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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION
(JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY KEVIN CONWAY FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION BY NORTHERN IRELAND PRISON SERVICE DATED 13 APRIL 2021

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Mr Ivor McAteer QC led Mr David McKeown for the Applicant instructed by Joe Mulholland & Co Solicitors
Ms Neasa Murnaghan QC led Ms Ashleigh Jones for the Respondent instructed by the Departmental Solicitors Office

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COLTON J

Introduction

[1] The applicant was the subject of four separate sentencing exercises between 5 November 2020 and 19 March 2021.

Sentence Exercise No. 1

[2] On 5 November 2020 he was sentenced at Craigavon Crown Court in respect of charges of being concerned in the supply of drugs. These offences were committed on 23 March 2019. At the time of sentencing he had been on bail but had been remanded to appear at court on 11 December 2019, 3 July 2020 and 16 July 2020. He received a determinate custodial sentence ("DCS") of one year and eight months, with eight months to be spent in custody and 12 months on licence. The effect of the sentences was that the applicant's custody expiry date was 2 July 2021 and his sentence licence expiry date was 2 July 2022.

Sentencing Exercise No. 2

[3] On 27 November 2020 he was sentenced at Craigavon Magistrates' Court for two different sets of offences. The first set of offences related to three counts of assault on police, two counts of criminal damage, one count of resisting police and one count of disorderly behaviour, all of which occurred on 15 July 2020. He was on bail for these offences but was in police custody on 15 July 2020 and was remanded on bail on 16 July 2020.

[4] For these offences he received seven concurrent sentences of four months' imprisonment. This resulted in an estimated date of release of 22 January 2021. The 22 days that he had spent in custody, as a sentenced prisoner in respect of sentence No. 1 were not included in calculating the release date.

Sentencing Exercise No. 3

[5] On 27 November 2020 he was also sentenced at Craigavon Magistrates' Court for possession of a Class A drug on 23 August 2019. For that offence he received a sentence of three months' imprisonment to be served concurrently with sentence No. two. This resulted in an estimated date of release of 8 January 2021. As was the case in relation to sentence No. two the 22 days the applicant had spent in custody as a result of sentencing exercise No. one were not included in calculating the release date for this sentence.

Sentencing Exercise No. 4

[6] On 19 March 2021 the applicant was sentenced at Craigavon Crown Court in respect of drugs related offences committed on 8 February 2019. For those offences he received a further DCS of one year nine months with seven months in custody and one year two months on licence together with a concurrent three month sentence of imprisonment.

[7] As a result of this sentence the respondent has calculated that the custody expiry date for the applicant is 15 October 2021 with the sentence licence expiry date being 15 December 2022.

The Issue

[8] The applicant challenges the calculation of the custody expiry date of 15 October 2021 and the sentence licence expiry date of 15 December 2022 in respect of sentence No. four. His case is that the respondent has failed to take into account the time he spent in custody between 5 November 2020 and 19 March 2021 in arriving at the expiry dates.

[9] This calculation was confirmed to him by correspondence from the respondent on 13 April 2021 setting out the basis for the calculation. It is this decision which is the subject matter of the judicial review challenge.

[10] By these proceedings he seeks the following relief -

(i) An Order of Certiorari to bring into this court and quash the decision of the respondent calculating the applicant's custody expiry date as 15 October 2021.

(ii) A declaration that this decision was of no force or effect.

(iii) An Order of Mandamus directing the proposed respondent to recalculate the applicant's release date.

[11] I am obliged to counsel for their written and oral submissions which were of great assistance to the court.

The Legislative Background

[12] This case turns on the interpretation of section 26 of the Treatment of Offenders Act (Northern Ireland) 1968 ("the 1968 Act"). Where relevant section 26 provides as follows:

> "***26. Duration of sentence***
>
> *(2)* The length of any sentence of imprisonment or term of detention in a young offenders centre [or sentence of detention under Article 14(5) **o**r 15A(5)] of the Criminal Justice (Northern Ireland) Order 2008] imposed on or ordered in relation to an offender by a court shall be treated as reduced by any **[**relevant period, but where he**]** was previously subject to a probation order **[**a community service order**]**, an order for conditional discharge or a suspended sentence or order for detention in respect of that offence, any such period falling before the order was made or the suspended sentence or order for detention was passed or made shall be disregarded for the purposes of this section.
>
> (2A) In subsection (2) 'relevant period' means –
>
> (a) any period during which the offender was in police detention in connection with the offence for which the sentence was passed; or

(b) any period during which he was in custody –

(i) by reason only of having been committed to custody by an order of a court made in connection with any proceedings relating to that sentence or the offence for which it was passed or any proceedings from which those proceedings arose; or

(ii) by reason of his having been so committed and having been concurrently detained otherwise than by order of a court."

[13] In the interpretation section of the Act section 33(2) provides:

> "*(2)* For the purposes of any reference in [the Prison Act and] this Act to a term of imprisonment or to a term of detention in a young offenders centre, consecutive terms or terms which are wholly or partly concurrent shall be treated as a single term [if –
>
> (a) the sentences were passed on the same occasion; or
>
> (b) where they were passed on different occasions, the person has not been released under Chapter 4 of Part 2 of the Criminal Justice (Northern Ireland) Order 2008 at any time during the period beginning with the first and ending with the last of those occasions.]"

[14] Finally in terms of legislative provisions Article 32 of the Criminal Justice (Northern Ireland) Order 2008 provides:

> **Concurrent or Consecutive Terms**
>
> **Concurrent Terms**
>
> "**32**-(1)This article applies where -
>
> (a) a person ("the offender") has been sentenced by any court to two or more custodial sentences the

terms of which are wholly or partly concurrent; and

(b) the sentences were passed on the same occasion or, where they were passed on different occasions, the person has not been released under this chapter at any time during the period beginning with the first and ending with the last of those occasions.

(2) Where this Article applies -

(a) Nothing in this Chapter requires the [Department of Justice] to release the offender in respect of any of the terms unless and until the [Department of Justice] is required to release the offender in respect of each of the others; …"

The Relevant Case Law

[15] In the course of submissions both parties referred to jurisprudence in which the courts considered the legislative provisions set out above or their equivalent in England and Wales.

[16] It should be noted that none of the cases to which the court was referred dealt with the same factual matrix as the one confronted by the court in this application. As a consequence their value as precedents is limited.

[17] The applicant places particular focus on the decision of the Divisional Court in **Re McConville's Application for Judicial Review [2020] NI 502**. There the court was dealing with concurrent sentences which it was held should be treated as a single term but the focus was in respect of the allocation of "*remand time*" as opposed to time served in custody in respect of a subsequently imposed sentence.

[18] The court considered the issue of the application of remand time where concurrent sentences are passed at paragraphs [32] to [36] of the judgment. In those passages the court refers to the judgment of the Divisional Court in the case of **R v Governor of Brockhill Prison ex parte Evans [1997] QB 443**. In paragraph [33] of the judgment Morgan LCJ quotes a passages from the Evans judgment at [461] –

> "Time spent in custody in relation to any of the offences for which sentence is passed should serve to reduce the term to be served, subject always to the condition that time can never be counted more than once."

[19] At paragraph [34] the court goes on to say –

> "The operative provision for the calculation of the `relevant period' in **Evans** was S67(1)(b)(i) of the Criminal Justice Act 1967 (`the 1967 Act'). That provision corresponds exactly to S26(2A)(b)(i) of the 1968 Act. For the conclusion that concurrent terms should be treated as a single term the Divisional Court in **Evans** relied on S104(2) of the 1967 Act which provided that for any reference to the term of imprisonment to which a person has been sentenced or which, or part of which, he has served, consecutive terms or terms which are wholly or partly concurrent shall be treated as a single term. The corresponding provision in this jurisdiction is section 32(3)(ii) of the 1968 Act …"

[20] At paragraph [35] the court went on to say –

> "That enabled the court to interpret `that sentence' in S26(2A)(b)(i) as the single term. The court then relied on the provision in the Interpretation Act 1978 that words in the singular include the plural unless a contrary intention appears. The same interpretative provision in this jurisdiction is S37(2)(a) of the Interpretation Act (Northern Ireland) 1954. The word 'offence' in the sub-section determines the relevant period to be taken into account could, therefore, properly be interpreted to include the remand time for all of the offences for which the concurrent sentences were passed. The court concluded that the particular approach followed prior to this had produced anomalies which gave rise to injustice and the aggregate approach protected against this."

[21] The court went on to explore the consequences of the **Evans** decision in a series of examples.

[22] At paragraph [38] the court concluded –

> "We accept that the approach in **Evans** was taken in circumstances where the concurrent sentences were passed at the same time. The 1968 Act, however, expressly contemplates the circumstances where the concurrent sentences are passed on different occasions and the same principles apply as long as there is no period of release between the imposition of the sentences. The respondent may be required to recalculate the offender's custody release date in those circumstances. It remains the position that a different approach to double

> counting is taken where the sentences are passed separately and we wish to make it clear that the decision in **Re McAfee's Application [2009] NIQB 142**, **[2009] NI 216** applies in such cases."

[23] In **Evans**, as should be clear from the judgment in **McConville**, the court was dealing exclusively with the effect that remand time had on calculations of concurrent sentences imposed on the same date.

[24] The case of **McAfee** to which the court referred in **McConville** was another decision of the Divisional Court in this jurisdiction.

[25] There the court was dealing with time in police custody and remand time. In that case the applicant was arrested and remanded in custody for two unrelated offences. The Magistrates' Court reduced the sentence for the first offence in respect of the time spent in custody. However, the Crown Court refused to take account of the time spent in custody when it subsequently imposed a custodial sentence for the second offence. The applicant maintained that the period to be credited to him against a sentence imposed by the Crown Court was the entire period spent in police custody or remand time in respect of the first offence.

[26] The court held that while a literal interpretation of the provision could have produced the result contended for by the applicant, on further reflection, that had not been the intention of the legislature. The purpose of the legislation had been to ensure that offenders would not spend longer in prison than was warranted by the pronounced sentence. It had not been designed to allow a prisoner convicted of multiple offences to be the undeserving beneficiary of a reduction in a series of sentences because of a single period of detention on remand.

[27] The court considered the **Evans** case and also referred to the case of **R v Secretary of State for the Home Department ex p Kitaya [1998] Times, 30 January**. The court observed at paragraphs [19] and [20] –

> "[19] The Divisional Court concluded that the applicant should not receive credit twice. Simon Brown LJ observed that the dictum of Lord Bingham to the effect that there should not be double counting applied 'consistently across the board, even to a case such as the present, where the sentences were distinct and imposed neither concurrently nor consecutively'. Mance J stated that a result in which the overlapping period could be used more than once amounted to 'unacceptable double counting'. He considered the use of the word, 'only' in section 67(1A)(b)(i) (**which is in similar terms to section 26(2A)(b)(i) of the 1968 Act**) [my insertion] and said:

> 'On the face of it … read literally, section 67 would exclude the present 38-day period spent in custody awaiting trial as well as any periods spent in custody whilst serving another sentence; but, by beneficial interpretation of its words in **R v Secretary of State for the Home Department, ex parte Naughton [1997] 1 WLR 118** at 126, the court will disregard another reason for custody in cases where a person is held on two concurrent charges. However, this beneficial interpretation cannot itself be carried to absurd lengths. Thus, firstly, another reason for custody cannot sensibly be disregarded if the period of such custody has already been taken into account in reduction of another sentence not passed concurrently or consecutively, and, secondly, that double counting of the same period, which would result from the contrary view, cannot have been contemplated by the section.'
>
> ***Conclusions***
>
> [20] … The rule against double counting (which is soundly based in common sense and logic) should inform the interpretation of section 26. While a literal interpretation of the provision could produce the result contended for by the applicant, on further reflection, all the members of this court (which happily include those who constituted the court in Montgomery) have reached the view that this was not the intention of the legislature. The purpose of the legislation is to ensure that offenders do not spend longer in prison than is warranted by the pronounced sentence. It is not designed to allow a prisoner convicted of multiple offences to be the undeserving beneficiary of a reduction in a series of sentences because of a single period of detention on remand."

[28] The Divisional Court in this jurisdiction considered these provisions recently in the case of **An Application by Kielan Allen for Leave to Apply for Judicial Review v Northern Ireland Prison Service [2020] NICA 40**. That case involved an applicant seeking credit for remand time in respect of a charge which was ultimately withdrawn. The challenge turned on whether or not the prisoner could establish a connection between the withdrawn charge and his sentence. The factual matrix is obviously different but the court finds that the analysis of the scope of section 26 set

out in the judgment of McCloskey LJ at paragraphs [13] to [16] is invaluable. The relevant passages are as follows:

> "[13] The scheme of section 26 of the 1968 Act is to credit sentenced prisoners with certain periods of detention accumulated prior to the date of their sentencing. Section 26 distinguishes carefully between a "sentence of imprisonment" on the one hand and, on the other, pre-sentencing "police detention" or "committal to custody" by order of a court. Section 26, in this way, reflects the dichotomy in the criminal justice system of Northern Ireland of police custody and so-called remand custody (on the one hand) and sentenced custody (on the other). In short, section 26 prescribes the circumstances in which the latter form of custody is to be reduced by the former.
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> [14] As already noted, these proceedings are not concerned with the "police detention" element of the statutory regime, i.e. section 26(2A)(a). This case is concerned exclusively with court ordered remand custody, i.e. section 26(2A)(b) – and, in the present case (b)(i) only.
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> [15] As observed during the hearing, the court considers that section 26(2A)(b)(i) encompasses the following three disjunctive scenarios regarding sentenced prisoners:
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> (i) The custody of an offender solely by reason of a committal order of a court made in connection with any proceedings giving rise to the sentence of imprisonment under consideration.
>
> (ii) The custody of an offender solely by reason of a committal order of a court made in connection with the offence giving rise to the relevant sentence.
>
> (iii) The custody of an offender solely by reason of a committal order of a court made in connection with any proceedings from which the proceedings concerning either (i) or (ii) arose.

> Where any of the aforementioned three scenarios applies, the period of custody constitutes a 'relevant period' within the meaning of section 26(2). The effect of this is that any such period 'shall be treated as reduced' (i.e. shall be credited to the sentenced prisoner) in calculating the length of any sentence of imprisonment or other form of detention specified in section 26(2).
>
> [16] It will be evident that in formulating the three scenarios set forth above, the court has adhered strictly to the language of section 26(2A)(b)(i). We consider that scrupulous and consistent adherence to the statutory language is indispensable in every case. This discipline applies to the whole of section 26. It should, furthermore, reduce the possibility of error arising out of what may subjectively appear to be fair or unfair, just or unjust, in any given case."

The Court's Analysis

[29] Ultimately, the determination of this case depends on the proper interpretation of the construction of section 26 of the Treatment of Offenders Act (Northern Ireland) 1968. The applicant contends that the proper interpretation of the section is such that the time spent by him in custody between 5 November 2020 and 19 March 2021 is a "relevant period" as defined in section 26. (It will be noted that the applicant also contends that the period spent in custody between 5 November 2020 and 27 November 2020 should have been treated as a relevant period for the purposes of sentences two and three, but this would have no practical impact on his release date and so has not been considered by the court).

[30] In the court's view the language of the statute is clear. As McCloskey LJ said "**scrupulous and consistent adherence to the statutory language is indispensable in every case. This discipline applies to the whole of section 26.**" It is clear on any reading of section 26(2A)(b)(i) that there are three distinct scenarios in which a prisoner can establish a *"relevant period"* for the purposes of calculating a release date. None of these apply to the applicant's case. The time he spent in custody between 5 November 2020 and 21 March 2019 cannot be said to be <u>solely</u> by reason of any of the three disjunctive scenarios set out so clearly in McCloskey LJ's judgment. This answers a concern the court raised in the course of the hearing as to whether the applicant's situation was different after he was remanded in respect of the offences for which he was sentenced in March 2019 and 21 December 2020. From 21 December 2020 onwards he was not in custody <u>solely</u> as a result of any committal order of a court made in connection with the proceeding relating to the sentence which was passed on 19 March 2021.

[31] In response Mr McAteer rests his case on section 33(2) of the Act which has the effect that the sentences imposed on 27 November 2020 and 19 March 2021 *"shall be treated as a single term."* He argues forcefully that what this means is that in effect the sentence imposed on 19 March 2021 would be deemed to commence on 27 November 2020.

[32] The answer to this point is that on a proper analysis this amounts to a conflation of the term *"sentence of imprisonment"* with the expression *"term of imprisonment."* This matter was expressly considered by Simon Brown LJ in the case of **R v Secretary of State for the Home Department ex parte Naughton [1997] 1 All ER**. That case dealt with identical provisions in England and Wales. Again the factual matrix was different. There the court was dealing with consecutive sentences. The court held that where an offender was sentenced to consecutive sentences after being on remand in custody, the time spent on remand was deductible from the total sentence and not from each consecutive sentence when calculating the offender's release date. The reasoning of the court is however helpful on this point. At page 431 para (c) onwards the court says –

> "In **Ex P Mooney** the applicant for the first time sought to rely on provisions outside S61 to illuminate its meaning, notably S51(2) of the 1991 Act which is in substantially the same terms as S104(2) of the 1997 Act. In giving the first judgment of the Divisional Court on that occasion I said ([1996] 1 Cr App R (S) 74 at 77):
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> > 'Mr Owen Davies [counsel for the applicant], in these proceedings seeks to argue a point not apparently taken in either **Ex Parte Gaffney** or **Ex Parte Read**, although, as it seems to me, if a good point was one which was available to the applicants in each. The point is this; that the phrase `sentence of imprisonment' in the opening line of Section 67 should be interpreted to mean the same as the expression `term of imprisonment' as that expression is defined in Section 51(2) of the 1991 Act, formerly Section 104(2) of the 1997 Act. If that be right then every element of an eventual concurrent sentence is the sentence that carries with it the right to credit for pre-sentence periods spent in custody, irrespective of the offences in connection with which they were spent. In my judgment, however it is plainly wrong. Section 51(2) simply does not address the question of deduction of time spent on remand. That is left to be dealt with in the

> specific provision in the 1967 Act, namely section 67 as amended. Section 67 expressly adopts a particular approach, rather than the global or aggregate approach adopted for quite different purposes by Section 51 (ie calculation of remission). It is true, as Mr Davies points out, that Part II of the 1991 Act to which Section 51 applies, includes within it Section 41, but Section 41 by its opening words, begs rather than answers the question as to how Section 67 applies. Section 41 necessarily leaves its proper construction untouched. As to the proper construction of Section 67, the language seems to me unambiguous; it clearly requires the same result here as in both the earlier cases. There is no material distinction on the facts, nor are the statutory provisions presently in play materially different.'
>
> It seems clear from that passage that we regarded the crucial words at 67 to be the words 'sentence of imprisonment' in the first line, and that we understood those to refer to each individual sentence imposed rather than the total produced by the various different concurrent sentences. It might also appear that had we thought 'sentence of imprisonment' there referred to the total sentence imposed a different result would have followed."

[33] Later in the judgment at page 432 paragraph (g) the court recites with approval a passage from the judgment of Scott-Baker J in the case of **R v Secretary of State for the Home Department Ex p Woodward & Wilson (24 June 1996 Unreported)** as follows:

> "In my judgment, the key to the construction of S67(1) lies in the expression 'sentence of imprisonment' as opposed to the expression 'term of imprisonment' and SS104(2) and 51(2). It cannot, in my judgment, be doubted that by S104(2), which clearly is applicable, these applicants each have a single term of imprisonment, but the question is what are the consequences of that single term, and that is a matter which was resolved not by S104(2) but by S67(1). S51(2) and S104(2) are both general provisions, neither is concerned with how remand time and police detention time is to be deducted, that question was dealt with by S67 of the 1967 Act in conjunction with

> S41 of the 1991 Act. For my part, I have no doubt bearing in mind the reasoning of Simon Brown LJ with which Curtis J agreed that had the court been aware that S104(2) of the 1967 Act was still in force, they would have reached precisely the same conclusion … In my judgment S67(1) clearly envisages the particular approach. It has been so interpreted by a number of authorities over the last 14 years. There is, so far as I am aware, no decision to the contrary in the period of almost 20 years since the 1967 Act was envisaged. If Parliament had intended to change the law to the aggregate approach it could easily have done so in one of the numerous criminal justice acts that have been passed in recent years. The reason of Simon Brown LJ in **Ex p Mooney** prevails, and in my respectful view is correct. S67 was intended to link periods in custody to particular sentences for particular offences."

[34] The effect of section 33(2) of the 1968 Act is that the sentence imposed on 19 March 2021 is not to be treated as a consecutive sentence to the one imposed on 5 November 2021. From 19 March 2021 onwards he will be serving a concurrent sentence alongside the sentence imposed on 5 November 2020. It does not commence on the completion of the custodial term imposed on 5 November 2020. In this sense it is a "single term." He is thus serving the sentence pronounced by the court on 19 March 2021. It does not address the question of deduction of time spent on remand. That is left to be dealt with in the specific provision of section 26 of the 1968 Act.

[35] Returning to the question of the use of the word "only" in Section 26(2A)(b)(i) of the 1968 Act it is noted that when dealing with a similar provision in England and Wales Simon Brown LJ in **Ex p Naughton** says at page 33 paragraph (j) on this issue:

> "It seems to me that Mr Weatherby is clearly correct in submitting that the word 'only' is introduced simply so as to exclude periods spent in custody while serving another sentence – precisely as this very applicant did for 25 days of his initial 106 day period in custody. That is why no equivalent words were necessary with regard to police detention provided for under S67(1A)(a)." (**The equivalent of our Section 26**).

[36] In the course of submissions the applicant put forward scenarios which he says would result in absurdity if the respondent is correct in its approach to the interpretation of Section 26 of the 1968 Act. In particular he points to scenarios where a prisoner might be deterred from pleading at an early stage. The respondent counters by pointing to the overarching absurdity of affording greater benefit to a

prolific recidivist prisoner by reducing time to be spent in prison as being more compelling than any absurdity envisaged by the applicant.

[37] At the end of the day the court returns to the inescapable logic of McCloskey LJ's exhortation in **Allen** to the effect that the court in assessing these matters should adhere strictly to the language of section 26 of the 1968 Act. In his words such a discipline should "reduce the possibility of error arising out of what may subjectively appear to be fair or unfair, just or unjust, in any given case."

[38] In the court's view the language of the statute and the analysis of the case law leads inevitably to the conclusion that the respondent is correct in its interpretation of what is meant by a "relevant period" under section 26(2) of the 1968 Act.

Conclusion

[39] The court concludes that a proper interpretation of section 26(2A)(b)(i) of the 1968 Act results in the conclusion that the period of time the applicant has spent in custody arising from the sentence imposed by the court on 5 November 2020, that is between 5 November 2020 and 19 March 2021 is not a "relevant period" for the purposes of section 26 of the 1968 Act in respect of the sentence imposed on the applicant on 19 March 2021. The custodial element of the applicant's sentence imposed on 19 March 2021 should be calculated on this basis.

[40] The application for judicial review is therefore dismissed.