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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY CONOR EDGAR FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION OF THE PROBATION BOARD OF NORTHERN IRELAND, THE PAROLE COMMISSIONERS OF NORTHERN IRELAND AND THE DEPARTMENT OF JUSTICE

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KEEGAN J

[1] This is an application for judicial review brought by the applicant against three proposed respondents the Probation Board of Northern Ireland (hereinafter referred to as PBNI), the Parole Commissioners of Northern Ireland (hereinafter referred to as PCNI) and the Department of Justice (hereinafter referred to as DOJ). The impugned decision is dated 1 August 2017 and is a decision of the DOJ to revoke the applicant's licence.

[2] Ms Kelly Doherty BL appeared for the applicant, Mr Corkey BL for the first proposed respondent, Mr Sayers BL for the second proposed respondent and Ms Mc Mahon BL for the third proposed respondent. I am grateful to all counsel for their focussed submissions.

[3] The applicant is a 25 year old man. On the 23 of May 2016 he was sentenced at Downpatrick Crown Court to 36 months' imprisonment comprising 18 months' custody and 18 months' licence. This sentence was imposed for offences of burglary and possession of drugs. It is recorded that the index offences occurred in two domestic dwellings and a hostel in which the applicant was staying at the time. During one of the burglaries the applicant assaulted a woman who challenged him. The applicant was also found to be in possession of Class B controlled drugs which were discovered in a follow-up search of his hostel room. Pursuant to the terms of the sentence the applicant was released on licence on 8 April 2017. The licence is due

to expire on 7 October 2018. The applicant was recalled to custody by virtue of the decision of 1 August 2017.

[4] The applicant has a long and persistent offending history. His criminal record contains 53 offences since 2005 including 20 burglaries committed over an 11 year period. He has also been convicted of breaches of court order on 7 occasions and road traffic offences on 6 occasions. The applicant has been offending since 2004 when he committed his first offence as a juvenile. This is the first recall on this licence however the applicant was previously recalled for breaches of licence in 2013 and 2016.

[5] In the pre-sentence report the applicant was considered to present a high likelihood of reoffending however he was not considered to pose a significant risk of serious harm. The applicant's release on licence was explained to him on 10 April 2017. The risk factors in relation to the applicant are identified as follows:

(a) Substance misuse.
(b) Lack of consequential thinking.
(c) Impulsivity.
(d) Poor mental health.
(e) Limited victim awareness.
(f) Unstructured lifestyle.

[6] The conditions imposed upon the applicant as part of the licence are described in the papers as follows;

> The particular conditions of the licence included the standard conditions:
>
> - Keep in touch with the probation officers instructed by the probation officer
>
> - Receive visits from the probation officer as instructed by the probation officer
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> - Permanently reside at an address approved by the probation officer and obtain the prior permission of the probation officer for any change of address.
>
> - You must not behave in a way which undermines the purposes of the release on licence, which are the protection of the public, the prevention of reoffending and the rehabilitation of the offender, commit any offence.

Additional licence requirements:

- You must permanently reside at an approved address – Thompson House Hostel, 426-428 Antrim Road, Belfast BT15 5GA – and must not leave to reside elsewhere without obtaining the prior approval of your probation officer; and thereafter must reside as directed by your probation officer.

- You must attend all appointments with your GP and cooperate fully with any care or treatment they recommend.

- You must not contact your co-accused without prior approval.

- You must present yourself and participate actively in alcohol counselling/and/or treatment during the licence period.

- You must actively participate in any programmes of work designed to reduce your risk and to attend and co-operate in any assessments by PBNI as to your suitability for programmes and offence focussed work.

- You must submit to drug testing as agreed with your probation officer.

[7] In this hearing there was no dispute about the legal power to revoke a licence and recall to prison. The issue in this case is whether the power was exercised lawfully. This involves consideration of the decision making process to which I now turn. The sequencing begins with the PBNI filing a report in relation to recall. That report is then considered by a Single Commissioner who makes a recommendation which is then considered by the DOJ. The DOJ is the ultimate decision-maker and will be informed by the information contained in the reports from PBNI and the PCNI. In view of this process it is clear that the DOJ is the correct respondent in this type of case. In my view the PBNI and PCNI should be notice parties.

[8] The legislative framework is contained within the Criminal Justice (Northern Ireland) Order 2008 (hereinafter referred to as "the Order")

"Recall of prisoners while on licence

28-(1) In this article P means a prisoner who has been released on licence under Article 17, 18 or 20.

(2) The Department of Justice or the Secretary of State may revoke P's licence and recall P to prison –

(a) if recommended to do so by the Parole Commissioners; or

(b) without such recommendation if it appears to the Department of Justice or (as the case may be) the Secretary of State that it is expedient in the public interest to recall P before such a recommendation is practicable.

(3) P –

(a) shall, on returning to prison, be informed of the reasons for the recall and of the right conferred by sub-paragraph (b); and

(b) may make representations in writing with respect to the recall.

(4) The Department of Justice or (as the case may be) the Secretary of State shall refer P's recall under paragraph 2 to the Parole Commissioners.

(5) Where on a reference under paragraph 4 the Parole Commissioners direct P's immediate release on licence under this chapter the Department of Justice shall give effect to the direction.

(6) The Parole Commissioners shall not give a direction under paragraph 5 with respect to P unless they are satisfied that –

(a) where P is serving an indeterminate custodial sentence or an extended custodial sentence it is no longer necessary for the protection of the public from serious harm that P should be confined;

(b) in any other case it is no longer necessary for the protection of the public that P should be confined.

(7) On the revocation of P's licence, P shall be –

(a) liable to be detained in pursuance of P's sentence; and

(b) if at large, treat it as being unlawfully at large.

[9] The first information source in the decision making process is the probation report. In this case the probation report refers to the trigger for recall which was applicant's alleged involvement in an offence committed in July 2017. The report refers to some issues prior to that in more positive terms. This includes the fact that while the applicant admitted drug misuse on 2 May 2017 he presented as motivated to address this. Also, a referral to community addictions was completed and the applicant sought the support of his GP on the same date. The report refers to the applicant undergoing a transition to new housing in June 2017

[10] It is stated in the report that on 19 July 2017 the PBNI received information from the Police Service of Northern Ireland (hereinafter referred to as PSNI) that the applicant was sought in relation to an attempted burglary in the Bangor area. From the PSNI outline of case dated 28 July 2017 it appears that an attempted burglary was reported to police by owners of a house in Bangor where someone had attempted to gain access to their house around midnight the previous evening. The person was frightened off by the barking of the owner's dogs. The attending police officer reviewed CCTV footage and reported that he recognised the applicant as the individual seen on the footage

[11] The applicant was spoken to about this incident on 21 July 2017 . At that stage he denied the allegations. The probation report states that the applicant presented to the police on 27 July 2017, admitted the burglary, offering the excuse of substance misuse and was remanded into custody. Bail was refused by the District Judge on that date. The licence was then revoked on 1 August 2017. The applicant did not mount a High Court bail application given that his licence had been revoked.

[12] The probation report also refers to the applicant's current lack of progress to develop a more stable lifestyle and adhere to licence conditions. The opinion of PBNI is that he presented evidence of increased risk. The report opines that this is evidenced by patterns of previous nonadherence to conditions designed to reduce the risk of offending behaviours, the applicant's continued substance misuse and a return to offending for which he has been remanded into custody. The PBNI's assessment is expressed in clear terms that "that the escalated risk the applicant presents can no longer be safely managed in the community." A review of his ACE assessment led to an increase in his score from 59 to 68 given the risk factors and information outlined in the report.

[13] This report informed the Parole Commissioner's decision, in that the Commissioner repeats the probation report in relation to the applicant's alleged admittance of the offences to police. He also recites the history. Paragraph 11 reads as follows;

> "The evidence strongly suggests that the applicant returned to drug use after a short period in the community. When the constraints of hostel monitoring were lifted he then gravitated towards previous associates where the context was set for further acquisitive offending to which he later admitted. The Commissioner was satisfied on the basis of the evidence presented that the applicant on the balance of probability has engaged in further offending since his release on licence. This offending occurred a short time after he was moved into independent accommodation."

[14] The report states that additionally the applicant has not demonstrated any apparent learning from previous periods on licence (2013 and 2016) when he broke the conditions of his licence by not residing at his approved accommodation, he became involved with previous associates and he also failed to refrain from further offending on subsequent occasions. The Commissioner's opinion is framed as follows;

> "This establishes a clear increase in a risk of harm to the public since his release on licence and behaviour leads me to conclude that the risk he presents is no longer manageable in the community."

[15] The applicant's case is that he should be immediately released as the recall decision was based on incorrect material namely:

(i) He did not admit the offences.

(ii) He was at the address at all times approved by PBNI.

(iii) He was not with associates as alleged.

[16] This case was made in comprehensive pre-action correspondence which was sent to the three proposed respondents. The replies to the first pre-action letter are useful as they encapsulate the case on behalf of the three proposed respondents. In the first response which is dated 11 August 2017 on behalf of the PBNI reference is made to the assertion in the PBNI report that the applicant admitted the burglary and substance misuse. Reliance is also placed upon the mechanism for initiating a recall decision outlined in Article 28(2) of the Order. Essentially the point is made

that there is an appropriate alternative remedy and in any case the PBNI is not the decision-maker and should not be part of the proceedings.

[17] The first pre-action response from the PCNI of 11 August 2017 also refers to the fact that the PCNI dispute being a correct respondent and reference is made to the remedy open to the applicant under the Order. The first reply to the correspondence again dated 11 August 2017 from the DOJ contends that the decision was properly reached after consideration of the information and an assessment that the risk the applicant presented had increased significantly (i.e. more than minimally since his release from custody). This response states that the Department has clearly adhered to both the letter and spirit of the Order and states that the decision to revoke the licence is entirely rational and consistent with the evidence the Department considered.

[18] The DOJ response also refers to the regime under the Order which requires a mandatory referral of all offenders recalled to custody to the PCNI for consideration of release under article 28(4) of the Order. This pre-action correspondence states that the Department referred the applicant's case to the PCNI for consideration under this provision on 2 August 2017. It further states that the applicant's release is a matter for the PCNI to direct in exercise of their statutory responsibilities. The DOJ contend that it can only re-release an offender on licence into the community on the direction of the PCNI following their review of the individual's case. As such the DOJ assert that the applicant has an opportunity to argue the merits of his recall before the PCNI. This correspondence also stressed that the applicant is at liberty to request the PCNI to consider an expedited timetable for the review of his case.

[19] A second pre-action letter was sent on behalf of the applicant dated 16 August 2017. A response was received from the Crown Solicitor's Office dated 18 August 2017 on behalf of the PBNI and the Chief Constable for the Police Service of Northern Ireland. This letter is instructive in that it accepts that there was some misunderstanding about the applicant's position. In particular this letter includes instructions from the PSNI and states as follows:

> "I am instructed by PSNI they informed PBNI the proposed applicant was interviewed and remanded into custody after the refusal of court bail by DJ Hamill on 27 July 2017. I am instructed that the PSNI informed PBNI that the applicant accepted during interview that he was the individual captured on CCTV and that he was intoxicated. I am instructed PSNI confirmed to PBNI the proposed applicant stated in interview that he was `blocked and lost'. I am instructed the PSNI further confirmed the case would be proceeding in the Crown Court.

> I am instructed the PSNI did not inform PBNI that the applicant admitted the offence of burglary during his police interview. The applicant was interviewed and charged with the offence of attempted burglary. PBNI instructed there has been a misunderstanding regarding this aspect of the information provided by PSNI. In relation to the issue of substance misuse, the applicant accepted that he was intoxicated and this information was accurately passed to PBNI by PSNI."

[20] The letter also refers to some issues in relation to the applicant's address. It concludes by stating that the PBNI confirm their assessment that the escalated risk the applicant presents can no longer be safely managed in the community. This letter states that the recommendation to initiate recall has not been affected by the issues raised in the pre action correspondence. It states that the review of ACE scores from 59 to 68 remains and the conclusion is expressed as follows;

> "PBNI's decision to recommend recall stands regardless of the initial misunderstanding by PBNI of the attitude of Mr Edgar during his police interview. Taking into consideration the other issues contained in the recall report the discrepancy does not impact on the recommendation to recall. Further reference is also made to the remedy under the Criminal Justice Order."

[21] A further reply is dated 18 August 2017 from the PCNI. This states that the PCNI decision stands and secondly that there is the review procedure under the Order. Reference is made to the fact that the review process can be abridged but no application has been made by the applicant. The PCNI assert that there is no breach of Article 5(4) of the European Convention on Human Rights. The PCNI referred to its statutory obligation to deal with the information it had before it. It is reiterated that the DOJ act on the recommendations of PBNI and PCNI and therefore are not unable to take any alternative decision. Reference is made to the order. In the correspondence the PCNI do not accept that they had a duty to check the veracity of the information provided or amend the recommendation on that basis. This correspondence concludes:

> "In summary, and as was outlined in our initial correspondence in this matter, an alternative remedy to address your client's contentions remains available, but has thus far not been engaged with. In the circumstances, our client considers the proposed judicial review proceedings as premature, and any proposed involvement of our client in such proceedings as wholly misdirected."

[22] The DOJ response to the second letter is dated 17 August 2017. It deals with the claim of incorrect material forming the basis of the decision. The DOJ maintains the view that the original decision was justified and consistent with the evidence that the DOJ had available at the time.

[23] Counsel referred me to three authorities in this area namely R(Broadbent) v Parole Board [2005] EWHC 1207 Admin, In the Matter of an Application by CL for Leave to Apply for Judicial Review [2017] NIQB 2 and Gulliver v The Parole Board [2007] EWCA Civ 1386. Ms Doherty, on behalf of the applicant accepted the proposition in the Broadbent case that the circumstances of charge were relevant to any recall decision. She also argued that the CL case was different on the facts as the judicial review in that case was invoked after the review procedure. Ms Doherty accepted that the Gulliver case establishes that in some cases there may be no option other than to bring a judicial review or a habeas corpus application but this would be where the revocation decision is so subverted that the prisoner may have to seek a different or separate remedy.

[24] Ms Doherty frankly accepted that there was an admission on behalf of the applicant that he was at the premises where the alleged burglary is stated to have happened. She confirmed that the applicant accepts that he was the person on the CCTV and that he was intoxicated. However the case was centred on the fact that the applicant did not actually admit the crime. Ms Doherty explained that he was raising intent as a defence as he contends that he was looking for his girlfriend's friend's house on the night in question and so he says that he was innocently captured on CCTV. Ms Doherty also asserted that there was misinformation about the address and the applicant's associates however she focussed on the issue of admission of guilt as the core of her case.

[25] The legal challenge was helpfully streamlined by Ms Doherty into two points. Firstly she argued that the material provided by PBNI was so flawed in that it referred to the applicant admitting the offence that the decision is rendered unlawful and/or irrational. Secondly she argued that the review process does not provide an effective alternative remedy as it cannot actually review the lawfulness of the recall.

[26] Ms Doherty also accepted that relief was directed towards the DOJ given that the DOJ was the decision-maker and as per the Order 53 Statement she sought an Order of Certiorari to quash the decision to revoke the applicant's licence and an Order of Mandamus directing the Department of Justice to release the applicant.

[27] Counsel for the PBNI and PCNI both argued that these bodies were not proper respondents but it was accepted that they were notice parties. Mr Sayers also provided some important information to the Court. He stated that the review process was now in place and timetabled and that the review decision by the PBNI was due on 12 October. Mr Sayers pointed out that if that review were unsuccessful

the applicant could request a full hearing of the matter within approximately 2 weeks and that that would take place approximately 4 weeks thereafter. He made the case that this provided a remedy and that the decision-making process was not unlawful in this case as it followed the statutory scheme. Ms McMahon on behalf of the DOJ reiterated this proposition and referred to the test in relation to recall which she said was framed in terms of assessing risk to the public. Ms McMahon conceded that there were errors in the information provided but she submitted that they were not so fundamental as to render the decision unreasonable, irrational or unlawful.

[28] In conducting my consideration I particularly bear in mind the statutory scheme and the test for recall. It is common case that this involves an assessment of risk and whether or not the applicant can be managed in the community. That is a matter of judgment taking into account all relevant factors. In this case relevant factors are the background of the applicant, the licence conditions and current circumstances including the trigger for recall. All of these issues will feed into a reassessment of risk. Any breach of licence conditions will be formative however that is not the only consideration. In order to properly evaluate a case of this nature a decision maker has to look at the case in the round.

[29] The first ground of challenge relates to an accepted error of fact within the documentation that informed the decision making process. It is correct that the PBNI report contained inaccurate information. The most significant point is that the applicant did not admit the crime. There are factual disputes about the address issue and the applicant's associates which cannot be resolved within a judicial review. In any event, Ms Doherty argued that the material error is the reference to the applicant admitting the offence. This error is accepted by all parties. The core question is whether this error vitiates the entire decision making process such as to cause an unfairness to the applicant.

[30] In the reply to pre-action correspondence the error is described as a misunderstanding. I have some sympathy for that view given the particular circumstances and the fact that information was shared between agencies within a short timeframe given the public safety issues in play. I bear in mind the dicta from Re William Mullan's Application [2007] NICA where Kerr LCJ agreed with the contention that the decision whether to recommend a recall should not be regarded as one that requires the "deployment of the full adjudicative panoply."

[31] The mistake in this case was unfortunate but I consider that it is not so material as to render the decision making unlawful or irrational. In my view there was enough information to ground a recall decision notwithstanding the mistake. Quite apart from the issues raised by the probation report, which the applicant disputes, he admits other matters which are relevant to the consideration of whether he can be safely be managed in the community. The applicant accepted that he was heavily intoxicated in that he was 'blocked and lost' late at night. The applicant also accepted that he was the person on the CCTV at a stranger's house. As such there is

a valid argument that the risk posed by the applicant may have increased. There is also a valid argument that the general behaviour requirements in the licence have been breached. The applicant is entitled to the presumption of innocence however there is a prima facie case that the applicant may have been involved in a criminal offence. The applicant was ultimately charged with an offence and refused bail. As the Broadbent decision makes clear the circumstances surrounding an alleged offence suffice. Decisions such as this are not prefaced upon proof of another offence having being committed but rather upon an assessment of risk.

[32] I understand Ms Doherty's submission that previous breaches of licence appear to have been tolerated but to my mind that does not mean that the decision maker is prohibited from considering the entire history. The exercise involves assessing whether the risk has increased and that may be an escalating or evolving situation. In looking at the case in the round it appears to me there was enough to ground a recall. I do not consider that the error in relation to the issue of admittance of the offence is material enough to vitiate the lawfulness of the entire process.

[33] I now turn to the second point which is the alleged inadequacy of review. The review process under Article 28 of the Order is mandatory and it provides an opportunity for the applicant to argue that he should be released post recall on the basis that the legislative test is not met. This is not the same as determining the lawfulness of the original decision. However the two issues are clearly interlinked in that the review will look at the merits of the original decision. The ultimate remedy for the applicant is release and that can be ordered as part of the review. There is a high level of scrutiny applied to any recall decision. I also observe that the PCNI are a specialist body best placed to deal with these issues in particular where there are disputes of fact. The procedure in these cases involves active participation by the applicant. The role of the PCNI in the review process is clearly expressed in Gulliver;

> "It is to have regard to all the circumstances of the case, including, of course, the circumstances of the recall, but in the end to decide whether to recommend the release of the prisoner having made an assessment of risk to the public, on the basis of all the material available to it when it makes the decision."

[34] This is a procedure which is Article 5 compliant. The case of Weeks v UK [1987] 10 EHRR 293 confirmed that the English equivalent of the Commissioners can be a court for the purposes of Article 5(4) of the Convention. This is referenced in the decision of R (on the application of Morales) v Parole Board & Ors [2011] EWHC 28.

[35] It is only in certain limited circumstances that judicial review is an appropriate course. Counsel suggested that an example would be misidentification. Each case will of course turn on its own facts and I do not attempt to strictly define

categories. However the point is addressed by Sir Igor Judge in the Gulliver case at paragraph 45 as follows:

> "There may, of course, be exceptional cases where the revocation decision process is so subverted that the prisoner may seek a different or separate remedy, by way of judicial review or, indeed, habeas corpus. In such cases the court may be satisfied that the Parole Board may not be able to provide an adequate or sufficient remedy. If so, it will deal with the application accordingly."

[36] I do not consider that this is a case where the process is subverted. There was a mistake made about the applicant confessing to a crime rather than simply being suspected of a crime. The relevant parties accept that. However in my view there was enough information to ground a recall from the surrounding circumstances pertaining to the applicant. I do not consider that the mistake made was of such materiality to vitiate the entire decision-making process. I consider that the process was lawful and rational. I also note that the review process is under way and within a relatively short timeframe the applicant will have a decision from the Single Commissioner. There is nothing in this case to suggest that the applicant is prejudiced or that there has been a breach of Article 5.

[37] Accordingly I do not consider that an arguable case has been established for judicial review and so the application is dismissed.