Neutral Citation No. [2010] NIQB 121 | *Ref:* **COG7971**

Judgment: approved by the Court for handing down | *Delivered:* **10/11/10**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

Loughran's (Michael) Application [2010] NIQB 121

IN THE MATTER OF AN APPLICATION BY MICHAEL LOUGHRAN FOR JUDICIAL REVIEW AND IN THE MATTER OF A DECISION OF THE PRISON SERVICE OF NORTHERN IRELAND

Before Morgan LCJ, Higgins LJ and Coghlin LJ

COGHLIN LJ (delivering the judgment of the court)

[1] This is an application by Michael Loughran ("the applicant") for judicial review of a decision, dated 18 May 2010, by the Northern Ireland Prison Service ("the respondent"), as a consequence of which the applicant's earliest date of release ("EDR") was calculated as being 17 January 2010. Mr Donal Sayers appeared on behalf of the applicant while the respondent was represented by Mr Tony McGleenan. The court wishes to acknowledge its appreciation of the industry and professionalism of both counsel reflected in their helpful and carefully constructed oral submissions and skeleton arguments.

The factual background

[2] The applicant, who was born on 4 August 1988, was initially arrested for an offence contrary to section 18 of the Offences Against the Persons Act 1861 on 8 July 2008 and brought before Belfast Magistrates' Court on the following day. He was subsequently admitted to bail and, on 15 January 2010, he was sentenced to a custody probation order comprising 2 years imprisonment followed by 2 years probation.

[3] During the period that the applicant was remanded on bail he was arrested for breaches of his bail conditions on 8 December 2008, 14 January

2009, 31 January 2009, 7 August 2009 and 15 January 2010. Upon each of these occasions the applicant spent some time in police custody.

[4] On 5 May 2010 the applicant's solicitors wrote to the Northern Ireland Prison Service enquiring as to the applicant's EDR. By letter dated 18 May 2010 the respondent replied indicating that the applicant's EDR had been calculated as 17 June 2010. In the course of that letter the respondent explained that in calculating the applicant's EDR no account had been taken of periods of detention subsequent to arrests on 8 December 2008 and on 14 January 2009 since those arrests had been effected in relation to alleged breaches of bail and, therefore, were not considered relevant to the sentence that he ultimately received.

[5] After some further discussion between the applicant's solicitor and the respondent, the latter accepted that the applicant was entitled to the benefit of two further days credit in respect of the period that he had spent in custody between 7 and 8 December 2008. The effect of that acceptance was that the applicant's EDR was recalculated to be Tuesday 15 June 2010. The only further period of police detention that the applicant contends should be taken into account is the period lasting from 9.25 pm on 13 January 2009 to 9.23 am on 14 January 2009. It appears that the respondent accepts that a prisoner is entitled to credit against his sentence of one day in respect of any relevant day or part of a day in police detention. In such circumstances, it seems that, should his application prove successful, the applicant would be entitled to a further two days credit and, since the policy of the respondent is not to release prisoners on Saturday or Sunday, he argues that he should have been released on Friday 11 June 2010. In fact, the applicant was released from custody at HMP Magilligan on 14 June 2010.

The statutory framework

[6] *(i)* Section 26(2) of The Treatment of Offenders Act (Northern Ireland) 1968 (the "1968 Act") provides that:

> "The length of any sentence of imprisonment or term of detention in a young offenders centre imposed 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."

(ii) Section 26(2A) provides that "relevant period" in subsection (2) means:

> "(a) any period during which the offender was in police detention in connection with the offence for which the sentence was passed."

(iii) Section 26(6) provides that:

> "A person is in police detention for the purposes of this section –
>
> *(a)* at any time when he is in police detention for the purposes of the Police and Criminal Evidence (Northern Ireland) Order 1989; and
>
> *(b)* at any time when he is detained under section 41 of the Terrorism Act 2000."

[7] Article 2 (3) (as amended) of the Police and Criminal Evidence (Northern Ireland) Order 1989 ("the 1989 Order") provides that:

> "Subject to paragraph (4) and (4A), a person is in police detention for the purposes of this Order if –
>
> *(a)* he has been taken to a police station after being arrested for an offence or after being arrested under section 41 of the Terrorism Act 2000; or
>
> *(b)* he is arrested at a police station after attending voluntarily at the station or accompanying a constable to it, or
>
> *(c)* he is arrested at a police station after being taken to the station in pursuance of a direction under section 16 of the Prison Act (Northern Ireland) 1953,
>
> and is detained there or is detained elsewhere in the charge of a constable."

(ii) Article 2(4) provides that:

"A person –

(a) who is at a court after being charged; or

(b) who has been taken from a custodial establishment and held in police custody pending his appearance at a court,

is not in police detention for those purposes."

(iii) Article 2(4A) provides that:

"Where a person is in another's lawful custody by virtue of paragraph 8, 22(1) or 23(2) of Schedule 2 to the Police (Northern Ireland) Act 2003, he shall be treated as being in police detention for the purposes of this order."

[8] On 13 January 2009 the applicant was arrested and detained in accordance with Article 6(3)*(b)* of the Criminal Justice (Northern Ireland) Order 2003 which provides for arrest by a constable without a warrant of a person who the constable has reasonable grounds for suspecting has broken any conditions of his bail. Article 3(1) of the same Order provides that in Part II of the Order 'bail' means bail grantable in or in connection with proceedings for an offence to a person who has been accused of that offence. Breach of a condition of bail is not, in itself, an offence.

The questions to be determined by the court

[9] The parties are agreed that two matters arise for determination in this application:

(i) whether the applicant was detained *in connection with* the offence for which sentence was ultimately passed; and

(ii) whether the applicant was in *police detention* for the purposes of Article 26 of the 1968 Act.

The submissions of the parties

Was the detention in connection with the relevant offence?

[10] The applicant seeks to distinguish the decision of this court in Re Rea's application [2010] NIQB 63 by submitting that, in contrast to the circumstances in Rea, the applicant was ultimately sentenced in respect of the same offence in relation to which bail had been granted. By way of response the respondent

also sought to rely upon the principles developed by this court in Rea. He submitted that section 26(2A)*(a)* of the 1968 Act should be construed purposively with the court taking account of the circumstances in which the most historically recent arrest of the applicant had taken place. Thus, according to the argument of the respondent, the period spent in police custody was as a direct consequence of the applicant's failure to adhere to important administrative conditions imposed upon him by the court, namely, the bail conditions, and any connection with the offence for which he was eventually sentenced was "tenuous and tangential".

During the relevant time in custody was the applicant in *police detention*?

[11] In answer to this question Mr Sayers advanced two broad submissions:

(i) that the applicant was in police detention for the purposes of the PACE Order 1989; and

(ii) that, in the alternative, the applicant was nonetheless in police detention for the purposes of the 1968 Act.

[12] Mr Sayers conceded that, as breach of bail is not, *per se,* an offence, a person arrested on suspicion of breach of bail is not arrested *for an offence* in the commonly understood sense of Article 2(3) of the PACE Order. However, he argued that the key to the applicant's case was being taken to the police station, an action that was grounded upon his initial arrest and detention. In such circumstances the applicant was a person *taken to a police station after being arrested for an offence*. In the absence of such an interpretation and in the context of breach of bail not being itself an offence, Mr Sayers submitted that a person arrested for breach of bail at some location other than a police station and taken into police custody would not be regarded as falling within Article 2(3) whereas a person who attended a police station in compliance with one condition of his bail and was then arrested for failing to comply with another condition would come within the Article. Mr Sayers submitted that such a manifest absurdity was a result to be avoided.

[13] Mr Sayers drew the attention of the court to chapter 4, paragraph 4.9.6 of the Prison Services Standing Order applicable in England and Wales which provided that:

> "4.9.6 Under section 7 of the Bail Act, a person who has been granted bail may be arrested without warrant by a constable if the constable has reasonable grounds for believing that the person has broken or is likely to break any of his bail conditions or is not likely to surrender to custody. A person arrested under this section – where no warrant has been issued

> for his arrest is deemed to be in police detention in respect of the original offence after he or she arrives at the police station. This period is therefore credited against any subsequent sentence in respect of the original offence."

In July 2001 the Halliday report was published reviewing the sentencing framework for England and Wales. That report included a recommendation that time spent in police custody, as opposed to custody on remand, was a necessary incident of the process of criminal investigation and should not be credited against any subsequent sentence. That recommendation appears to have been adopted by Parliament and implemented in England and Wales by the passage of section 240 of the Criminal Justice Act 2003. As a consequence, it seems that in England and Wales any prisoner sentenced after 4 April 2005 does not receive credit for time spent in such police custody. Mr Sayers submitted that such a development in England and Wales did not assist the court's task of statutory construction in this jurisdiction. The court notes that, while a general distinction between police custody for investigation and remand in custody by a court might have its logical attractions, it would be prima facie inconsistent not only with the submission for which the respondent contends but also with Article 2(3) of the 1989 Order.

[14] In the alternative, Mr Sayers submitted that, in accordance with the taxonomy adopted in Bennion on Statutory Interpretation (5th Edition 2008 page 561 section 199) the definition of "police detention" in section 26(6) of the 1968 Act should be considered as constituting a clarifying definition that includes a referential definition. He further argued that section 26(6) should not be seen as a comprehensive definition to the detriment of the "potency" of the term and to the exclusion of matters plainly falling within the ordinary dictionary meaning of the phrase. Adopting such an approach would, in his submission, avoid the absurdity otherwise arising from the wording of Article 2(3)*(a)* of PACE.

[15] By way of response Mr McGleenan accepted that the definition of *police detention* was an issue of construction for the court but advanced the submission that the appropriate approach was to regard section 26(6) of the 1968 Act and Article 2 (3) and (4) of PACE as forming part of one coherent legislative scheme. Adopting such an approach he argued that the word "only" should be read into section 26(6)(a), as amended, which should then be regarded as exhaustive although he conceded that the examples in Article 2 were not exhaustive. However, he submitted that it would have been an easy matter to insert a provision covering the circumstances of the applicant's detention into Article 2(3) had such been the intention of Parliament. According to Mr McGleenan the "absurdity" identified by Mr Sayers could be avoided by reading the words "after being arrested for an offence" into Article 2(3)*(b)*. He rejected the contention that the applicant's case could be brought within Article

2(3)(a) by reliance upon the original arrest for the offence charged. Mr McGleenan sought to maintain a clear distinction between "investigative" detention pre-charge and "administrative" detention post-charge, arguing that detention subsequent to arrest for breach of bail conditions fell into the latter category. He submitted that only the former "investigative" periods of detention should be reckonable against ultimate sentence.

[16] In the event of the court holding that the relevant period of custody did constitute "police detention" Mr McGleenan argued that the connection between that detention and the offence in respect of which the applicant was ultimately sentenced was tenuous and tangential and not such as to amount to a "direct and substantial connection" as required by this court in Rea.

Discussion

[17] Logically, the initial question to be determined is whether the relevant period spent in custody by the applicant comes within the definition of "police detention" for the purposes of section 26(6) of the 1968 Act. It is to be noted that Article 49 of the 1989 Order which dealt with the amendment of section 26 of the 1968 Act was contained in a section of the former headed "*Police detention to count towards custodial sentence.*" Both Mr Sayers and Mr McGleenan accepted that Article 2 (3) of the 1989 Order did not provide an *exhaustive* list of examples of "police detention" and Mr McGleenan submitted that, in such circumstances, it was necessary to examine the specific examples provided in the statute in order to identify any applicable underlying principles. Such an approach commends itself to the court.

[18] Section 26(6) of the 1968 Act provides that a person is in police detention for the purposes of the section if he is in police detention for the purposes of the 1989 Order. The purpose of the 1989 Order was, inter alia, to regulate the powers and duties of the police in respect of those persons whose detention they had initiated and for whom they remained responsible and, in particular, to ensure that such detention was regularly reviewed. By contrast, the examples contained in Article 2(4) concern persons in police custody under the supervision of a court after charge and those who are simply in police custody in transit pending a court appearance. In neither of those cases is there any requirement for regulation or review of the custody in accordance with the provisions of the 1989 Order

[19] It seems clear that the 1989 Order contemplates that a person might continue in police detention subsequent to being charged. Article 39(1) provides that the custody officer shall release a person who has been charged from police detention unless he has reasonable grounds for believing that he will fail to answer his bail or interfere with the administration of justice or the investigation and sub-article (2) permits him to authorise that such a person

should be kept in police detention. Article 47 of the 1989 Order specifically deals with police detention *after charge* (italics supplied).

[20] After giving the matter careful consideration we are not persuaded that the examples set out in Article 2(3) and (4) of the 1989 Order easily fall into the dichotomy espoused by Mr McGleenan between pre charge "investigative" detention and post charge "administrative" detention. It is clear that, in appropriate cases, the police have a discretion to refuse bail after charge and it is difficult to see how such a period of detention could be easily brought within such a classification. In our view it would be more appropriate to have regard to the purpose for which the particular power of custody purports to have been exercised and the identity of the agency with overall responsibility. Article 2(3) appears to deal with detention subsequent to powers of arrest exercised by the police in circumstances in which the detainee remains "…in the charge of a constable" while the two exceptions defined in Article 2(4) are concerned with persons detained at a court after charge or in the course of transit from a custodial establishment pending an appearance at a court. Police officers responsible for the custody in the circumstances defined in Article 2(4) act not upon their own initiative but under supervision of the court ensuring that the directions of the court are properly and effectively discharged.

[21] How then should arrest and detention for the purposes of investigating suspected breaches of bail conditions fall to be considered? That course of action is implemented at the initiative of the police but breach of bail is not, per se, an offence. Article 40 of the 1989 Order, subject to specific exceptions, places a duty upon the custody officer at a police station to ensure that all persons in police detention at that station are treated in accordance with the Order and any code of practice issued under it relating to the treatment of persons in police detention. In this context we consider that it is of assistance to have regard to PACE Code C (2007 ed.) which concerns the "detention, treatment and questioning of persons by police officers". Code C, with one or two exceptions, applies generally to persons in police custody. However section 15 of that Code, entitled "Reviews and extensions of detention," applies solely to people in "police detention" as defined by Article 2 (Code C para 1.1). The notes for guidance to section 15 provide that the detention of persons in police custody not subject to statutory review requirements under Article 41 of PACE should be reviewed periodically as a matter of good practice. The notes for guidance provide as an example of a person to whom the statutory review requirements do not apply but whose detention should still be reviewed periodically as a matter of good practice a person who has been "arrested for breaching a condition of bail granted after charge" (paragraph 15B*(b)* – Code C). While recognising that such detention is not subject to the statutory duty of review contained in Article 41, the notes record that the purpose of review is to:

"…check the particular power under which the detainee is held continues to apply, any associated conditions are complied with and to make sure appropriate action is taken to deal with any changes."

The court notes that such purpose corresponds closely to the purpose of the 1989 Order. In such circumstances it seems clear that the PACE order of 1989 contemplated that the type of custody to which this application relates could come within the definition of "police detention".

[22] In the case of Rea this court gave consideration to the interpretation of the phrase "in connection with" as it is used in section 26(2A)*(a)* of the 1968 Act. After doing so, the court confirmed that it was necessary for an applicant to establish a direct or "clear and certain" (per Lord Clyde in R v Secretary of State for the Home Office ex parte A [2001] 2 WLR 293) connection between the order remanding him in custody and one of the offences in respect of which he was eventually sentenced. As noted above bail is defined in Article 3 of the Criminal Justice (Northern Ireland) Order 2003 as being grantable:

"(a) in or in connection with proceedings for an offence to a person who is accused or convicted of an offence, or
(b) in connection with an offence to a person who is under arrest for an offence….."

In this case, unlike that of Rea, we are satisfied that the applicant has established a direct and clear connection with the offence for which sentence was passed. The relevant period of custody was initiated solely for the purpose of investigating a suspected breach of the conditions of bail granted in relation to the offence with which he had been charged and for which he was ultimately sentenced. In the absence of that offence no question of bail or breach of bail conditions could have arisen.

[23] In the circumstances we propose to grant the application and make the declaration sought. The matter should now proceed as an action for damages in the Q.B.D. We take the opportunity to repeat the suggestion that we made in Rea, namely, that this is an area of law that requires rationalisation and perhaps consideration should be now given to legislation to bring this jurisdiction into line with that of England and Wales. At the same time we would wish to record once more the reservation that we noted upon that occasion.