

*Judgment: approved by the Court for handing down
(subject to editorial corrections)**

Delivered: 26/1/2017

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND
QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)**

**IN THE MATTER OF AN APPLICATION BY GERARD McMANUS
FOR JUDICIAL REVIEW**

**AND IN THE MATTER OF DECISIONS OF THE PROBATION BOARD
FOR NORTHERN IRELAND AND THE DEPARTMENT OF JUSTICE**

**AND IN THE MATTER OF AN APPLICATION BY KEITH McCONNAN
FOR JUDICIAL REVIEW**

**AND IN THE MATTER OF DECISIONS OF THE PROBATION BOARD
FOR NORTHERN IRELAND AND THE DEPARTMENT OF JUSTICE**

COLTON J

[1] Both of the applicants in this case received determinate custodial sentences ("DCS") and have been released on licence pursuant to Article 17 of the Criminal Justice (Northern Ireland) Order 2008 ("the 2008 Order").

[2] Each of the applicants are subject to licence conditions under the provisions of Article 24 of the 2008 Order. These conditions include standard conditions prescribed by rules and an additional condition in relation to not engaging in paramilitary activities or participation in any organisation that supports, directs, authorises or controls such activities.

[3] The respondents have interpreted these conditions in such a way as to require the applicants to reside in United Kingdom during the period of their licence. Both applicants through these proceedings challenge the respondent's refusal to permit them to reside in the Republic of Ireland while they are subject to licence conditions. The respondents say that under the relevant legislation they have no discretion to permit the applicants to reside in the Republic of Ireland.

[4] I have been provided with very helpful detail in respect of both applicants which sets out the background to their personal circumstances. They say that those

circumstances make a compelling case that they should be permitted to reside in the Republic of Ireland during the period of their licence. However the initial issue to be determined in this application is whether or not in fact the respondents have discretion to permit such residence. I do not therefore propose to go into any detail as to the potential merits of the applicants' request, but confine myself solely to determine the issue of whether or not any discretion rests with the respondents.

[5] The issue for the court is one of construction and concerns the interpretation of the relevant legislation governing licence conditions in this jurisdiction.

The Statutory Framework

[6] The starting point is the Criminal Justice (Northern Ireland) Order 2008 ("the 2008 Order").

[7] Article 17 imposes a duty on the Department of Justice to release certain fixed-term prisoners. It states:

"17-(1)As soon as a fixed-term prisoner, ..., has served the requisite custodial period, the Department of Justice shall release the prisoner on licence under this Article."

[8] Article 27 imposes a duty on such a person to comply with licence conditions. It states:

"27. A person subject to a licence under this Chapter shall comply with such conditions as may for the time being be included in the licence."

[9] Each of the applicants has been released under Article 17 and has an obligation to comply with the conditions of their licence under Article 27.

[10] Licence conditions are dealt with in Article 24.

[11] The relevant part for the purposes of this application is as follows:

"24-(1) In this Article -

- (a) 'the standard conditions' means such conditions as may be prescribed for the purpose of this Article as standard conditions; and
- (b) 'prescribed' means prescribed by the Department of Justice by rules.

(2) Any licence under Article 17 or 19 in respect of any prisoner serving one or more determinate custodial sentences of less than 12 months and no determinate custodial sentence of 12 months or more shall include -

- (a) such conditions as may be required by the court in passing sentence; and
- (b) so far as not inconsistent with them, the standard conditions.

...

(8) In exercising the powers to prescribe standard conditions or other conditions referred to paragraph (3), the Department of Justice shall have regard to the following purposes of the supervision of offenders while on licence under this chapter -

- (a) the protection of the public;
- (b) the prevention of re-offending;
- (c) the rehabilitation of the offender."

[12] Under this enabling legislation the standard conditions of licence are contained in the Criminal Justice (Sentencing)(Licence Conditions)(Northern Ireland) Rules 2009.

[13] The rules are made under the powers conferred by Article 24(1) and (3) of the 2008 Order "having regard to the purposes of the supervision of offenders while on licence set out in Article 24(8) of that Order."

[14] The standard conditions of licence are set out in Rule 2 as follows:-

"2-(1) The conditions set out in paragraphs (2) and (3) are the standards conditions prescribed for the purposes of Article 24(1) of the Order.

- (2) The prisoner must -
 - (a) keep in touch with the probation officer as instructed by the probation officer;
 - (b) receive visits from the probation officer as instructed by the probation officer;

- (c) permanently reside at an address approved by the probation officer and obtain the prior permission of the probation officer for any change of address;
 - (d) undertake such work, including voluntary work, as approved by the probation officer and obtain the prior permission of the probation officer for any proposed change; and
 - (e) not travel outside the United Kingdom, the Channel Islands or the Isle of Man without the prior permission of the probation officer, except where the prisoner is deported or removed from the United Kingdom in accordance with the Immigration Act 1971 or the Immigration and Asylum Act 1993.
- (3) The prisoner must not -
- (a) behave in a way which undermines the purpose of the release on licence, which are the protection of the public, the prevention of reoffending and the rehabilitation of the offender;
 - (b) commit any offence."

[15] Rule 3 refers to other conditions of licence as follows:

"3-(1) Conditions of a kind set out in paragraph (2) are prescribed for the purposes of Article 24(3)(b) of the Order.

(2) The conditions are those which impose on a prisoner:

- (a) a requirement that the prisoner resides at a certain place;
- (b) a requirement as to the prisoner making or maintaining contact with a person, more than one person or identified group;

- (c) a restriction relating to the prisoner making or maintaining contact with a person, more than one person or identified group;
- (d) a restriction on the prisoner's participation in any activity;
- (e) a requirement that the prisoner participates in or co-operates with a programme or set of activities, which may include testing, designed to further one or more of the purposes referred to in Article 24(8) of the Order;
- (f) a requirement that the prisoner complies with the curfew arrangements;
- (g) a requirement that the prisoner complies with an electronic monitoring arrangement;
- (h) a restriction on the prisoner's freedom of movement which is not a requirement referred to in sub-paragraph (f);
- (i) any other requirement would be the prisoner's supervision in the community by a probation officer."

The Issues/Submissions of the Parties

[16] I am obliged for the assistance of counsel in this matter for their able, written and oral submissions. Mr Barry Macdonald QC, SC appeared with Ms Kelly Doherty for the applicant McConnan; Mr Ronan Lavery QC appeared with Mr Malachy McGowan for the applicant McManus. Dr Tony McGleenan QC appeared for both respondents leading Mr Matthew Corkey for the first named respondent and Ms Laura McMahan for the second named respondent.

[17] The respondents say that Rule 2 permits for no discretion regarding permanent residency. They say that an offender on licence must reside at approved accommodation within Northern Ireland, save for a successful application for residency elsewhere within the UK while on licence or where the prisoner is deported.

[18] In his submissions Dr McGleenan took me through the background to the 2008 Order which provided for a new sentencing framework for those convicted of crimes with a focus on measures to enhance protection of the public. Thus when

offenders are released on licence they are subject to certain conditions and restrictions for the purposes set out in Article 24(8) namely: the protection of the public, the prevention of reoffending and the rehabilitation of the offender.

[19] On release prisoners such as the applicants are subject to supervision as managed by the Probation Board for Northern Ireland. Any breaches of the licence conditions or failure to comply with supervision under the conditions renders a prisoner liable to recall during the licence period. Recall is provided for under Article 28 of the 2008 Order and requires involvement of the Probation Board of Northern Ireland, the Parole Commissioners of Northern Ireland and the Department of Justice. He argues that none of the relevant authorities have jurisdictional reach to supervise, risk manage or recall a prisoner permanently residing outside Northern Ireland.

[20] The licence conditions of both applicants require them to be supervised post release and should they place themselves beyond the legislative reach of the 2008 Order they will be considered “unlawfully at large” pursuant to Article 28(7) of the Order until their return to custody.

[21] In summary the respondents’ arguments are that as a matter of fundamental construction of the scheme it cannot be applied in the manner intended by Parliament if prisoners on licence are permitted to reside outside the United Kingdom.

[22] It is acknowledged that for applicants who have familial links in the Republic of Ireland this requirement involves an interference with Article 8 rights but it is argued that such interference is in accordance with law, in pursuance of a legitimate aim and proportionate. It is also argued that the rules are sufficiently flexible to permit family relationships to be maintained. By way of example in this case under the conditions of his licence the applicant McConnan is permitted to visit his family in the Republic of Ireland on two nights per week. Thus there is clearly mitigation in relation to any Article 8 interference.

[23] The applicants’ case in relation to the construction issue is that clearly Rule 2 does not expressly require a prisoner to reside at an address within the UK. Rule 2(2)(c) simply states that he must reside at an address “approved by the Probation Officer.”

[24] Rule 2(2)(e) imposes a requirement that a prisoner must “not travel outside the UK .. without the prior permission of the Probation Officer.”

[25] This may well give rise to the implication that the Rules contemplate that a prisoner would normally be expected to reside in the UK and that he would only be present outside the UK when he is there for the purposes of “travel” rather than as a resident.

[26] The applicants argue that the rules, as secondary legislation, should be construed so as to ensure that (i) they are *intra vires* the enabling legislation and (ii) compatible with Convention rights.

Conclusion

[27] The purposes of the enabling legislation have already been set out namely, the protection of the public, the prevention of reoffending and the rehabilitation of the offender. The 2008 Order specifically requires the Department of Justice to have regard to these matters in exercising its powers to impose licence conditions.

[28] In the majority of cases this will require that a prisoner on licence should reside in the UK. However this may not always be the case. The personal circumstances of the prisoner may mean that resettlement outside the jurisdiction can sometimes further the aims of the enabling statute in a way which might not be possible if compelled to reside in the UK. This may be particularly true in respect of the rehabilitation of the offender. If the rule is construed so as to permit discretion then this could facilitate rather than frustrate the aims of the enabling statute. Arguably both of these cases provide examples where this is so. I note that in both cases the applicants have continued to meet the relevant probation officer as required under the licence conditions. (Both applicants were granted interim relief so that they currently reside in the Republic of Ireland). Both applicants seek to reside in a jurisdiction subject to the rule of law. There is close co-operation between the security forces and probation services in each jurisdiction. There are appropriate extradition arrangements between the jurisdictions. The jurisdictions have a common travel agreement. Both have settled family homes in the Republic of Ireland and there are issues about suitable accommodation in this jurisdiction. However, this is to stray into the merits of the applicants' requests. The point is that one can foresee circumstances when the aims and objectives of the enabling legislation can best be met in circumstances where the prisoner on licence is permitted to reside outside the jurisdiction.

[29] In this regard it is interesting to note that in England and Wales the equivalent provisions which are virtually identical to the ones under consideration in this case are interpreted so as to permit residence at an address outside that jurisdiction. The relevant enabling legislation can be found in Section 250(1) and (4) of the Criminal Justice Act 2003 ("the 2003 Act") with the equivalent rule being contained in paragraph 3(2) of the Criminal Justice (Sentencing) (Licence Conditions) Order 2015.

[30] In the course of the proceedings I was referred to a policy document of the National Offender Management Service which explains the circumstances in which prisoners released on licence under the legislation in England and Wales are permitted to reside at an address outside that jurisdiction. In the course of the hearing I was taken through the terms of that policy which I do not intend to rehearse here. The point is that clearly the authorities take the view that there is

discretion under identical rules and that this is entirely consistent with the strategic aims of those rules. Dr McGleenan argues that the applicants could not avail of that policy if it applied to them in any event but it is not necessary for me to deal with this issue. The significant point is that the respondents have adopted a blanket policy by refusing to consider the issue at all on the grounds that the rules do not permit discretion in relation to residence outside the jurisdiction.

[31] In addition to the “*intra vires*” argument the applicants further argue that under Section 3(1) of the Human Rights Act 1998 the court should read primary and subordinate legislation and give it effect in a way that is compatible with Convention rights so far as it is possible to do so.

[32] Clearly Article 8 is engaged in relation to the licence conditions of those serving the non-custodial part of their sentence of imprisonment.

[33] It is also clear that in the particular circumstances of this case each of the applicants’ Article 8 right to his private and family life has been interfered with.

[34] I accept that the respondents could readily justify interference in the Article 8 rights of a DCS prisoner in terms of a requirement to reside in the jurisdiction. It would clearly be open to the respondents in such a scenario to justify such interference as being in accordance with law and necessary in a democratic society in pursuance of a legitimate aim. The courts would be extremely slow to come to a conclusion that any such restriction was disproportionate. However the issue in this case is whether the respondents’ interpretation of the rule which amounts to a blanket refusal to approve an address outside the UK infringes Article 8.

[35] In my view if, in a particular case, having carried out the relevant balancing exercise, the Article 8 rights of a particular prisoner should in the view of the decision-maker be met by residence outside the jurisdiction then the rules should be construed so as to permit this to happen.

[36] I therefore come to the conclusion that the respondents have misdirected themselves in law in so far as they have concluded that they have no discretion to permit the applicants to reside outside the UK under the standard licence conditions.

[37] The Rules should be construed so as to permit discretion in relation to the approval of residence outside the United Kingdom. This construction is in accordance with the aims of the governing statute and is compatible with the Article 8 rights of the applicants.

[38] I therefore propose to make the following orders.

- In relation to the case of Keith McConnan I grant the following relief:

- (a) A declaration that the policy of the respondents to refuse to permit any individual serving a period of supervision under licence to reside at an address outside the United Kingdom for the duration of that licence period is unlawful;
 - (b) A declaration that Rule 2 of the Criminal Justice (Sentencing)(Licence Conditions)(NI) Rules 2009 does not require a prisoner on licence to reside in the UK.
 - (c) An Order of Certiori to bring up into this Honourable Court and quash the decision of the respondents made on 14 June 2016 to refuse to permit the applicant to reside with his parents at Dungooley, Kilcurry, Dundalk, Co Louth during the licence period of his sentence.
 - (d) An order requiring the Probation Board for Northern Ireland to make a fresh decision in relation to the approval of the applicant's request to reside with his parents at Dungooley, Kilcurry, Dundalk, Co Louth during the licence period of his sentence on the basis that it has discretion to approve this request.
- In relation to Gerard McManus I grant the following relief:
 - (a) A declaration that the policy of the respondents to refuse to permit any individual serving a period of supervision under licence to reside at an address outside the United Kingdom for the duration of that licence period is unlawful;
 - (b) A declaration that Rule 2 of the Criminal Justice (Sentencing) (Licence Conditions) (NI) Rules 2009 does not require a prisoner on licence to reside in the UK.
 - (c) To quash the decision of the Probation Board of Northern Ireland to refuse to permit the applicant to reside with his parents at Hillview, 1B Fernhill, Letterkenny, Co Donegal during the licence period of his sentence.
 - (d) An order requiring the Probation Board for Northern Ireland to make a fresh decision in relation to the approval of the applicant's request to reside with his parents at Hillview, 1B Fernhill, Letterkenny, Co Donegal during the licence period of his sentence on the basis that it has discretion to approve this request.