

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

O'Neill's (Gerard) Application [2010] NIQB 8

AN APPLICATION FOR JUDICIAL REVIEW BY

GERARD O'NEILL

WEATHERUP J

[1] This is an application for Judicial Review of decisions of the Governor at HMP Maghaberry and of the Police Service of Northern Ireland in relation to the transfer on 4 November 2008 of the applicant from HMP Maghaberry, where he was on remand, to Musgrave Street police station, Belfast, for interview. Mr Lavery QC and Mr Ronan Lavery appeared for the applicant and Mr McGleenan for the respondent.

[2] The applicant was remanded in custody to HMP Maghaberry by Belfast Magistrates' Court on 23 October 2008 and by Craigavon Magistrates' Court on 24 October 2008. On 4 November 2008 the applicant was transferred from HMP Maghaberry to Musgrave Street police station for interview about another matter, namely a burglary that he was suspected of in Belfast.

[3] The applicant's solicitor attended at the police station when the applicant was transferred and questioned the basis on which the applicant had been transferred. The Custody Sergeant stated that the power to transfer had been exercised under section 16 of the Prison (Northern Ireland) Act 1953. The applicant's solicitor stated that any power to transfer should have been exercised under Article 47 of the Magistrates Court (Northern Ireland) Order 1981.

[4] Section 16 of the 1953 Act provides that the Secretary of State may transfer a prisoner from prison to another place 'in the interests of justice' (*italics added*) -

“(1) The Secretary of State may, *if he is satisfied that the attendance at any place of a person detained in a prison is desirable in the interests of justice* or for the purposes of any public inquiry, direct him to be taken to that place.

(3) Where any person is directed under this section to be taken to any place he shall, unless the Secretary of State otherwise directs, be deemed to be in custody while being so taken, while at that place, and while being taken back to the prison in which he is required in accordance with law to be detained.”

[5] Article 47(4A) of the 1981 Order provides that a Magistrates’ Court may, on an application by a police Inspector, commit a remand prisoner to detention in a police station for up to three days, if ‘there is a need for him to be detained for the purposes of inquiries into other offences’ (*italics added*)-

(4A) In the exercise of its power under paragraph (1)(a) to remand in custody an accused to whom this paragraph applies, a magistrates’ court may, on an application made under this paragraph by a member of the Police Service not below the rank of inspector, commit the accused to detention at a police station.

(4C) The period for which an accused is remanded under paragraph (4A) or (4B) shall not exceed 3 days commencing on (and including) the day following that on which he is remanded.

(4D) Paragraphs (4A) and (4B) apply to an accused who-

(a) is not under the age of 21 years; and

(b) is not already detained under a custodial sentence.

(4E) *An accused shall not be committed to detention at a police station under paragraph (4A) unless there is a need for him to be so detained for the purposes of inquiries into other offences; and, if a person is committed to such detention-*

(a) he shall, as soon as that need ceases, be brought back before the magistrates’ court which committed him or any other magistrates’ court for the county

court division for which that court was acting or before any other magistrates' court having jurisdiction to conduct the proceedings;

(b) he shall be treated as a person in police detention to whom the duties under Article 40 of the Police and Criminal Evidence (Northern Ireland) Order 1989 (responsibilities in relation to persons detained) relate; and

(c) his detention shall be subject to periodic review at the times set out in Article 41 of that Order (review of police detention).

(5) The court may order the accused to be brought before it at any time before the expiration of the period for which he has been remanded.

[6] The circumstances in which this applicant came to be transferred are recited by Detective Constable Rachel Wallace. She states that on 14 October 2008 she requested that the applicant be produced at the police station from prison for the purposes of an interview about a burglary that had occurred in the Greater Belfast area. She was advised that the applicant had been remanded in custody on charges that were being dealt with at Craigavon Magistrates' Court and she required to interview him in relation to matters that would be dealt with at the Belfast Magistrates' Court. She states her belief that this scenario could pose difficulties as illustrated by a previous experience. On 3 October 2009 she had sought to interview a person who had been remanded in custody from Newtownards Magistrates' Court and the interview was in respect of a matter that had occurred in Belfast. On that occasion she had applied to the Magistrates' Court for the production of that person under Article 47 and that order had been granted. She completed the interview and charged the person in respect of the Belfast offences and he was returned to Belfast Magistrates' Court the next day, 4 October 2008. DC Wallace attended at Belfast Magistrates' Court where the defendant was remanded in custody. She then liaised with the custody staff at Laganside and was advised that the defendant would have to be returned to HMP Maghaberry on foot of the warrant of committal that had just been issued by Belfast Magistrates' Court. The difficulty that this presented for DC Wallace was stated to be that Newtownards Magistrates' Court had required the defendant to be returned to that Court as required by Article 47. However the custody staff at Laganside would not release the defendant back into police custody.

[7] As a result of that experience, DC Wallace, when she came to consider the interview of the applicant, sought advice from a senior officer and was advised that she should request the production of the prisoner under section 16 of the 1953 Act. Accordingly she made an application for the production of

the prisoner to the Criminal Justice Administration Unit on 14 October 2008 and this was countersigned by Detective Inspector Mullan. That application form requires a statement of the reason why an application under Article 47 of the 1981 Order is not applicable. In response DC Wallace wrote –

“The prisoner is currently on remand by Craigavon court. The offence he is to be interviewed about occurred in South Belfast. Strong possibility that O’Neill may be charged overnight by BMC. Due to jurisdictional of orders an Order 16 production is requested.”

[8] On 28 October 2008 Detective Chief Inspector Hall authorised the production of the applicant under section 16. He completed the requisite form indicating an application for prisoner production directed to Prisoner Escort and Court and Custody Services requesting that arrangements be made for the production of the prisoner at Musgrave Street on Tuesday 4 November. The form stated that the application was made in accordance with section 16 of the 1953 Act.

[9] Brian Heazley of Prison Service Headquarters is the head of the Prison Escorting and Court Custody Service. He states that when the Police Service require the production of a prisoner for the purposes of interview a formal request is issued to the Prison Service and the request is then placed before a Governor or a Principal Officer for a decision. In considering such a request the Governor or the Principal Officer is acting on behalf of the Secretary of State. When the Governor or Principal Officer is satisfied that the production should take place under section 16 he completes an authorisation. In the present case Principal Officer Logue formally authorised the applicant’s production pursuant to section 16 on 13 October 2008.

[10] The applicant’s grounds for judicial review are fourfold. First, that no application was made to amend the Orders made by the Magistrates’ Courts under Article 47 remanding the applicant into the custody of the prison. Secondly, that detention by the police was in breach of the terms of the Orders made by the Magistrates’ Courts. Thirdly, that the detention was in breach of the applicant’s right to liberty under Article 5 of the European Convention. Fourthly, that the decisions made in respect of the transfer were ultra vires, unlawful and irrational.

[11] Clearly there is an overlap between the powers of the Secretary of State under section 16 and the powers of the Magistrates’ Court under Article 47. However section 16 is wider than Article 47 in that the former applies to any prisoner, whether on remand or sentenced, and extends to purposes beyond transfer to the police station for interview. For example section 16 may be used when a prisoner is to be transferred to Court to act as a witness in civil or

criminal proceedings. Article 47 is limited to the transfer of remand prisoners for the purpose of police interviews in respect of other offences, being the essence of the present transfer. The applicant's contention is that the Article 47 provisions, which impose additional safeguards in respect of the detention of persons by the police, should apply to a transfer such as occurred in the present case. The applicant further contends that section 16 should be limited to sentenced prisoners and that it should only be used when it is not practicable to resort to Article 47.

[12] The origins of the Article 47 provisions in Northern Ireland are in the 1990 Report of Viscount Colville on his review into the Emergency Provisions legislation. At paragraph 7.3.1 he states -

"I am concerned about another matter. When a person is charged by the police and remanded in custody and comes into the care of the prison authorities and will normally be housed in the Crumlin Road prison. Thereafter, any further interrogation by the police concerning different suspected offences cannot take place at the holding centre, or at least if it exceptionally does a prison officer must remain in attendance, as he would be in the interview rooms at Crumlin Road itself. In England and Wales, PACE provides for a remand into custody for up to three days. I recommend that consideration be given to a similar provision (for all offences) in Northern Ireland. As well as assisting the police because of the difficulty of interviewing suspects in prison, such a provision would I hope encourage greater reliance on the PACE Order as against the PTA. This would allow such further interviewing following charge to be covered by CCTV and I hope recording of the signal. It may be that, for adult prisoners on remand, the existing powers in Section 16 of the Prison Act (NI) 1953 would be adequate for this purpose; but that will not do for young offenders, nor will a Direction under Section 4 of the EPA, I am informed. If the point has merit at all it appears desirable to look at the various powers as a whole in order directly to address it."

[13] This recommendation was accepted and the result was the Criminal Justice (Northern Ireland) Order 1991, which amended the Magistrates Court (NI) Order 1981. To Article 47 of the 1981 Order were added the provisions set out above whereby the Magistrates' Court may, on the application of a police Inspector, commit the remand prisoner to detention at a police station

for up to 3 days. The Police Service issued a General Order 77/91 dated 12 September 1991 dealing with the operation of transfers under Article 47.

[14] It is interesting to look at the equivalent provisions in England and Wales because the same structure applies there. Production Orders made by the Secretary of State were provided for under section 22(2)(a) of the Prison Act 1952, the equivalent of section 16 of our 1953 Act. In England and Wales the provision was repealed and replaced by section 29 of the Criminal Justice Act 1961 and that in turn was repealed and replaced by paragraph 3(1) of part 1 of schedule 1 of the Crime Sentences Act 1997. In England and Wales a Prison Service Order 1801 dated 29 September 2000 provided guidance in relation to the exercise of such Production Orders. It is noted that the text of the Prison Service Order contemplates that the power to issue such an order includes production at a police station for interview about a serious arrestable offence.

[15] Also in England and Wales, section 128 of the Magistrates' Courts Act 1980 was amended by section 48 of PACE 1984 to provide for the three day transfer to a police station, being the provisions to which Viscount Colville referred in his 1990 Report and which were the forerunner and are in similar terms to the provisions that have applied in Northern Ireland since 1991.

[16] There are parallel powers and section 16 is not rendered ineffective or redundant by the subsequent introduction of Article 47. That the two provisions may continue to operate is apparent from a consideration of Article 2(3) of PACE (NI) 1989 which was amended by Article 3(1) of the Police Amendment (NI) Order 1995 to provide that a person is in police detention for the purposes of PACE when he is arrested at a police station after being taken there further to a direction under section 16 of the 1953 Act.

[17] Article 47 provides greater safeguards for the person detained. When the reason for the transfer concerns the interview of the prisoner by the police in respect of other offences Article 47 ought to be primary source of the power to order a transfer. That it is regarded by the Police Service as the primary source of power is apparent from the application form for a Production Order under section 16 where the police officer making the application is asked to explain the reason that Article 47 is not applicable.

[18] There appear to be certain difficulties in the operation of Article 47, as identified by DC Wallace, when the case involves different Magistrates Courts. The nature of any such difficulties was not examined on this application and there was not any direct challenge to the existence of the problems that have been outlined. The requirement in Article 47 is that after the police interviews the person be brought back to the Magistrates' Court making the transfer order or another Magistrates' Court in the same division or a Magistrates' Court having jurisdiction to deal with the original proceedings. It is apparent that the issue of how this might be achieved when the person has been further

remanded on new charges requires to be addressed by the Court Service and the Police Service and the Prison Service.

[19] However, does the fact that DC Wallace chose section 16 rather than Article 47 undermine the use of the section 16 power. I am satisfied that there was not any abuse of the process and that what was done was not for any reason other than that outlined by DC Wallace and that there are difficulties about the alternative use of Article 47 that have not been resolved. It is clear that a review of the operation of Article 47 is required so as to enable the provision to be used in circumstances such as the present. I have not been satisfied that there are any judicial review grounds on which to set aside the decisions that were made in the present case. The application for Judicial Review is dismissed.