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

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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

BEFORE A DIVISIONAL COURT

AN APPLICATION BY ANDREW WILLIAMSON FOR JUDICIAL REVIEW

Before: Morgan LCJ, Weatherup LJ and McBride J

WEATHERUP LJ (delivering the judgment of the court)

[1] This is an application for Judicial Review of decisions of the Northern Ireland Prison Service (NIPS) and the Probation Board for Northern Ireland (PBNI) on 9 June 2016 refusing the applicant credit for a period served on remand in custody against the licence period imposed as part of a determinate sentence of imprisonment. At the conclusion of the hearing the Court declared that the applicant was to be treated as no longer on licence and the reasons for that conclusion are set out below. Ms Doherty QC and Ms Rooney appeared for the applicant and Ms Murnaghan QC and Ms McMahon appeared for the respondent.

[2] The applicant was arrested on reasonable suspicion of sexual activity with a child. On 11 June 2013 he was remanded into custody and remained in custody for 2 years and 9 months. On 26 January 2016 he was convicted of an offence under Article 16 of the Sexual Offences (Northern Ireland) Order 2008. On 23 March 2016 he was granted bail and released from custody. On 8 April 2016 His Honour Judge Fowler QC sentenced the applicant to a determinate custodial sentence of 3 years, of which 18 months was to be served in custody and 18 months on licence.

[3] On being sentenced the applicant had already served 2 years and 9 months in custody and therefore had no further period to serve in custody. There remained the matter of the 18 months licence period. The applicant contended that the period spent in custody should also be credited against the licence period so that the

applicant's licence would have expired in July 2016. The respondent contended that no credit for any period in custody applied to the licence period and accordingly the 18 months licence period commenced on the applicant's release from custody and he would remain on licence until October 2017.

[4] The licence was imposed under Article 17 of the Criminal Justice (Northern Ireland) Order 2008, with the applicant's supervision stated to have commenced on 7 April 2016 and expiring on 6 October 2017. The object of the supervision was stated to be (a) to protect the public, (b) to prevent re-offending and (c) to achieve successful rehabilitation. The applicant was required to comply with conditions determined by the Department of Justice under the 2008 Order and the Criminal Justice (Sentencing)(Licensing Conditions) Northern Ireland Rules 2009. The conditions required engagement with the probation officer, a designated address, work to be undertaken and restricted travel. Additional licence conditions required a specified address, attendance with the GP/psychologist, no communication with the victim, no unsupervised contact, directly or indirectly, with children under the age of 18 or vulnerable adults without prior approval, no work involving a person under 18 without prior approval, no possession of a mobile phone, participation in programmes of work, compliance with the conditions of a Sexual Offences Prevention Order, not to enter or remain in sight of any child centred area, notification to the Probation Officer of any developing personal relationships and not to develop such relationships without verifiable disclosure.

[5] The applicant's grounds for Judicial Review are:

(a) The decision is in breach of section 26 of The Treatment of Offenders (NI) Act 1968, read in conjunction with Article 8 of the Criminal Justice (NI) Order 2008.

(b) The licence period that the NIPS and PBNI seek to impose upon the applicant extends beyond the 3-year sentence imposed by His Hon Judge Fowler QC.

(c) NIPS and PBNI failed to take relevant factors into account, including Judge Fowler's sentence and sentencing remarks which explicitly refer to the applicant's licence period and acknowledge his time spent on remand.

(d) NIPS and PBNI's decision is illegal and irrational in light of His Hon Judge Fowler's sentencing remarks on 8 April 2016 sitting at Downpatrick.

(e) NIPS and PBNI, contrary to their obligations under section 6 of the Human Rights Act 1998, acted incompatibly with the applicant's rights under Article 8 of the European Convention on Human Rights by interfering with his right to respect for his home, private and family life, which was not in accordance with law, or proportionate.

(f) NIPS and PBNI failed to provide the applicant with adequate reasons for the decision to impose a period on licence which exceeds the 3-year sentence imposed by His Hon Judge Fowler on 8 April 2016.

(g) The decision is unreasonable, unlawful and *ultra vires*.

[6] The starting point is the Treatment of Offenders Act (NI) 1968. Section 26 provides (*italics added*) -

“(2) *The length of any sentence of imprisonment ... shall be treated as reduced by any relevant period, ...*

(2A) In subsection (2) ‘relevant period’ means –

(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;

(5) Any reference in this Act or any other enactment (whether passed before or after the commencement of this Act) to the length of any sentence of imprisonment or order for detention in a young offenders centre shall, unless the context otherwise requires, be construed as *a reference to the sentence or order pronounced by the court and not the sentence or order as reduced by this section.*”

[7] Thus Section 26 provides that the length of any “sentence of imprisonment” shall be treated as reduced by any “relevant period”, being any period during which he was in custody in connection with the offence for which he was sentenced. In the present case the sentence of imprisonment was one of 3 years and the relevant period in custody was 2 years 9 months. According to Section 26 the sentence of imprisonment of 3 years is to be treated as reduced by the period of 2 years and 9 months in custody.

[8] By virtue of section 26(5) of the 1968 Act, any reference in any other enactment to the length of any sentence of imprisonment shall be construed as a reference to the sentence pronounced by the court, unless the context otherwise requires.

[9] The relevant later legislation is the Criminal Justice (NI) Order 2008. Article 8 headed "Length of Custodial Period" provides that where the court imposes a sentence of imprisonment for a determinate term –

"(2) The court shall specify a period (in this Article referred to as 'the custodial period') at the end of which the offender is to be released on licence under Article 17.

(3) The custodial period shall not exceed one half of the term of the sentence.

(4) Subject to paragraph (3), the custodial period shall be the term of the sentence less the licence period."

[10] Article 8 of the 2008 Order is stated to deal with the length of the "custodial period". The Article applies where the Court passes "a sentence of imprisonment for a determinate term", thereby distinguishing the sentence of imprisonment and the custodial period. The effect of the Article is to require the Court to specify the custodial period of the sentence of imprisonment, which it is stated should not exceed one half of the term of the sentence. It is clear that a sentence of imprisonment comprises a custodial period and a licence period. Nothing in Article 8 of the 2008 Order alters the general position under section 26(5) of the 1968 Act that the length of any sentence of imprisonment shall be construed as a reference to the sentence pronounced by the Court.

[11] The respondents also rely on Article 17 of the 2008 Order which imposes a duty to release on licence a fixed-term prisoner who has served the requisite custodial period. The respondents submit that the licence period begins from the date of the expiry of the requisite custodial period and the Department of Justice has no power to back date the licence period or give credit for time spent on remand to reduce the licence period. However, Article 17 deals with the duty to release from custody and not with reduction of the sentence of imprisonment or the effect of the licence period.

[12] The respondents further rely on Article 21 of the 2008 Order which provides that where a fixed-term prisoner is released on licence, the licence shall remain in force for the remainder of the sentence, subject to revocation. However, that does not assist in determining "the sentence", for the remainder of which the licence shall remain in force. Indeed, it is consistent with the applicant's approach that the sentence is the period of 3 years and with credit being given for the period in custody that sentence will expire in a further 3 months after release from custody.

[13] The respondents contend that there is a distinction between the "sentence" and a "sentence of imprisonment" and that the latter must be read as referring to the period of time actually spent in prison. We are unable to accept that contention. The relevant reference is to "sentence" in the 2008 Order and is clearly a reference to the

sentence of imprisonment, which in the present case was the sentence of imprisonment for 3 years.

[14] The sentencing Judge was mindful of the period spent in custody. He acknowledged the need for a significant period of supervision. He also appears to have regarded the relevance of the period in custody on remand as being limited to any recall of the applicant in the event of a breach of licence. However, the sentencing Judge's intentions in imposing the sentence of imprisonment cannot affect the issue of statutory interpretation.

[15] Similar issues have arisen in England and Wales although the statutory scheme is different in that jurisdiction. In R (McMahon) v The Governor of HM Prison Haverigg (1997) EWHC Admin. 785, the prisoner assaulted a woman and, while on bail, committed a further assault and was remanded in custody for all offences. He was tried for the first offence and imprisoned for 120 days. With time spent on remand he had an additional 45 days credit. He was then dealt with for the second offence and sentenced to 15 months' imprisonment. He sought credit for the 45 days which had been unused in relation to the first conviction being a period when he was on remand in custody on both charges. In England and Wales section 67 of the Criminal Justice Act 1967 was in the same terms as section 26 of the 1968 Act in Northern Ireland. However, the relevant statutory provision was held to be section 41 of the Criminal Justice Act 1991 which provided that when considering the reduction of a sentence under section 67 of the 1967 Act and in determining whether a person had served half or two-thirds of his sentence, the period in custody was to be treated as having been served by him as part of that sentence. It is of note that the 1991 Act applied rather than the 1967 Act.

[16] Sedley LJ stated that the effect of section 41 was to focus the exercise upon the time actually served (*italics added*) -

"16. The effect of section 67(4) of the 1967 Act, which is undoubtedly ubiquitous within the criminal justice legislation, is certainly to require time spent in custody to be subtracted under sub-section (1) from the sentence as pronounced; in the present case 120 days reduced by 105. But the formulation of section 41 of the later statute suggests a different exercise in which the date of release prescribed by section 33 (viz the half way or two-thirds point of the sentence pronounced by the court) is accelerated by the period spent in custody in relation to the material offence or offences. There is no reference in this provision, at least in terms, to the length of the sentence of imprisonment and so nothing upon which section 67(4) of the 1967 Act may operate.

...

18. On any view there is an apparent mismatch between section 67(1) of the 1967 Act, which as Miss Gray suggests, does require the

time spent in custody to be subtracted from the entire period of the sentence pronounced by the court and section 41 of the 1991 Act which clearly contemplates setting off time served in remand against time served pursuant to the sentence in order, among other things to compute the release under section 33. Therefore for the reasons we have given, this asymmetry is not resolved by the construction provision of section 67(4). In such a situation it must be the later statute which prevails.”

[17] Hence the 45 days in custody which were unused in relation to the first sentence were set off against the second sentence.

[18] The issue was further considered in England and Wales in R (Galiazia) v The Governor of HM Prison Hewell [2016] 1 All ER 660 where the relevant legislation was the Criminal Justice Act 2003. The prisoner was sentenced to 12 months’ imprisonment, of which half would be in custody and half on licence. He had been on remand in custody for 411 days and therefore claimed that the whole sentence had been completed. The Secretary of State contended that a period in custody could not be set off against the licence period. It was held that section 240ZA(3) of the Criminal Justice Act 2003 allowed time on remand to be counted only against time spent in custody and not against time spent on licence.

[19] The operative provision, being section 240 ZA(3), provides that,

“The number of days for which the offender was remanded in custody in connection with the offence or a related offence, is to count as time served by the offender as part of the sentence.”

Elias LJ referred to “the critical phrase” in the statutory provision, namely that the period on remand is to count as “time served” by the offender as part of the sentence. It was decided that the more natural meaning of the phrase “time served” as part of the sentence was that it was concerned with time actually spent in custody. Other provisions in the legislative scheme were relied on to reinforce that conclusion.

[20] Reference was also made to McMahon and the statutory provisions then applicable and Elias LJ concluded (*italics added*)-

“[28] The current provision equivalent to s 67 is s 240ZA(3). However, whereas s 67 unambiguously made it plain that the effect of remand time was to reduce the sentence actually imposed by the court, s 240ZA(3) is drafted in a different and more obscure manner. The claimant’s argument, in effect, submits that the two provisions are in fact saying the same thing.

[29] *The court in McMahon accepted that reading s 67 alone would undoubtedly require time in custody to be subtracted from the sentence as pronounced by the judge, as the Secretary of State was claiming (and as the claimant submits is the position here with respect to s 240ZA(3)). The court rejected that analysis only because it did not accept that s 67 was the material provision in play. Section 41 was contained in the later statute and in the court's view that section governed the situation...."*

[21] At one time there was a common approach in England and Wales and in Northern Ireland. Section 67 of the Criminal Justice Act 1967 was in the same terms as section 26 of the Treatment of Offenders Act (NI) 1968 and provided for the reduction of the sentence of imprisonment by the relevant time spent in custody. In England and Wales section 41 of the Criminal Justice Act 1991 and section 240ZA of the Criminal Justice Act 2003 placed the emphasis on time served so that credit for time spent in custody did not apply to the licence period. However, we are satisfied that the effect of the Criminal Justice (NI) Order 2008 is not to place the emphasis on time served and that credit for a relevant period in custody applies to both the custody period and the licence period of the sentence of imprisonment.

[22] It is regrettable that this situation arose in the first place where the applicant spent such a period on remand in custody. It is also regrettable that he will not have the benefit of supervision for a period of 18 months.