Neutral Citation Number: [2020] EWHC 827 (QB)

Case No: QB-2019-000558

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/04/2020

Before :

MR JUSTICE CHAMBERLAIN

- -

Between :

Chelsea Football Club Ltd

Claimant

- and –

(1) Gary Nichols
(2) Adrian Price

Defendant

- -
- -

Edward Rowntree (instructed by **Kerman & Co.)** for the **Claimant**
Adam Tear (instructed by **Scott Moncrieff & Associated Ltd**) for the **Defendant**

Hearing dates: 30 March & 06 April 2020

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE CHAMBERLAIN

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 06.04.2020 at 16:00pm.

Mr Justice Chamberlain :

Introduction

1 This application is made on behalf of Mr Gary Nichols. He applies pursuant to CPR r. 81.31 for discharge from a sentence of imprisonment imposed for contempt of court. The application first came before me on Monday 30 March 2020. On that occasion I indicated that the application was insufficiently evidenced and adjourned it by a week to allow Mr Nichols to file evidence in support. Further evidence was filed on 2 April 2020. At a resumed hearing on 6 April 2020, I discharged Mr Nichols, indicating that I would give my reasons in writing. These are my reasons.

Background

2 Mr Nichols has a history of acting as a ticket tout. On 26 September 2011, Lindblom J made an order prohibiting Mr Nichols from selling Wimbledon tickets. In July 2018 he sold 4 Wimbledon tickets in breach that order. On 7 September 2018, he was sentenced by Lane J to 6 months imprisonment, suspended for 2 years. On 19 February 2019, Dove J made an order prohibiting Mr Nichols from dealing in Chelsea Football Club tickets. On 4 December 2019 he was filmed selling a ticket to an agent at the club near Stamford Bridge Stadium on a match day. He admitted the breach. On 14 January 2020, Ms Margaret Obi, sitting as a deputy High Court judge, found him to be in contempt of court and adjourned the case for sentencing. On 25 February 2020, Ms Rowena Collins rice committed him to prison for 21 weeks.

3 Mr Nichols was represented on that occasion, as today, by Mr Adam Tear. Chelsea Football Club Ltd was represented, then and now, by Mr Edward Rowntree. He has properly taken a neutral stance on this application, though he helpfully pointed out some of the relevant factual background.

4 In her judgement, Ms Collins-Rice said this:

> "5. I am required to pass the minimum sentence which I consider to be effective to punish the behaviour which has occurred, deter others from doing likewise and secure future respect for court orders from the person having been found to be in contempt. I am directed by the guidelines and the authorities to look at the culpability of the breach, that is how seriously blameworthy it is, and at the harm done.
>
> 6. As to culpability, in this case I note that the fact of the breach is undisputed. Mr Nichols says in the statement I have before me that the act of trafficking constituting the contempt was impulsive and made under a degree of personal stress. But however planned or unplanned the act of trafficking may have been, Mr Nichols had a choice. He chose to breach the order. He did so deliberately and for personal gain (albeit modest). I have no evidence that the order itself or the suspended sentence to which he was subject acted as a material restraint on his behaviour. He acted in disregard or defiance of the decision of the court, in a way which inevitably defeated the objectives of the court, contrary to the interests of justice. The apology briefly noted in Mr Nichols' statement before me today does not persuade

> me that the gravity of this conduct is fully understood, or that an unambiguous attempt has been made to purge the contempt adjudged by Ms Obi in January and give confidence of restored respect for court decisions. All of this points to a high degree of culpability.
>
> 7. As to harm, I have noted what decided cases emphasise about the perniciousness of ticket touting: the harm it does to the business model of sports organisations, the exposure of purchasers to having the tickets rejected or, conversely, the risks posed to public order and public safety by unauthorised and uncontrolled access to sports grounds. Mr Nichols was party to an inherently harmful activity. On the other hand, I also remind myself that there is a single incident before me today with no evidence as to any particular consequences, and that the harm in this case is therefore of a general rather than a specific nature. I consider the degree of harm on the facts before me to be no more than moderate."

5 Ms Collins-Rice considered the personal mitigations advanced by Mr Tear on Mr Nichols' behalf. About these, she said this:

> "12. Firstly, his health. This is not the first time Mr Nichols has put his health in front of the High Court as a mitigating factor. I have an account from Mr Nichols of the state of his health, with a list of his medicines. I do not have a medical report. I have a doctor's letter from last October which confirms that he is diabetic and advises on the management of his condition. None of this helps me very much in trying to understand the relevance of his medical conditions either to his behaviour in committing contempt of court or to the potential impact of a sentence of imprisonment. But I have noted what is said.
>
> 13. Other personal mitigations put before me go to his financial situation and to the impact of imprisonment on his family. Mr Nichols has had his share of personal adversity and misfortune. His wife has a disability which affects the care she can give her family. He has three teenage children only the eldest of whom is in employment. He says social services have been involved in the past and that his family members all to some degree rely on the care and support he provides. He has provided no specific evidence as to his finances, or indeed as to the potential impact of a period of imprisonment on his family. But I give what he and his son say as much mitigating weight as I am able to. I have particular regard to what is said about the impact on his family. His family are the innocent victims of his conduct and I am sorry for the consequences which they are set to face as a result of it."

6 Having considered all of this, Ms Collins-Rice said that 21 weeks' imprisonment was the minimum sentence she could impose commensurate the with seriousness of Mr Nichols' contempt.

7 Immediately after sentence had been passed, Mr Tear made a further application on Mr Nichols' behalf to purge his contempt. Ms Collins-Rice rejected that application.

8 The sentence was suspended for 72 hours to allow an application to the Court of Appeal for a stay. That was refused by Coulson LJ on 28 February 2020. Mr Nichols surrendered to custody on 2 March 2020. Next, there was an appeal to the Court of Appeal, which was heard by Lords Justices McCombe and Peter Jackson on Friday 27 March 2020: [2020] EWCA Civ 470. They dismissed the appeal. Peter Jackson LJ said this at [19]:

> "On an appeal against sentence in a contempt case [the court] will look at the matter in the round. It will ask, was this sentence a proper one for this contempt by this contemnor? By that standard, the appellants sentence was entirely proper. He has shown what the judge rightly described as a sustained and apparently undeterred lack of respect for orders of the court and for the administration of justice. She considered the matter with care and imposed a sentence that was well within the appropriate range for this breach by this contemnor. Had permission to appeal being required, it would surely not have been granted."

9 The Court of Appeal made plain that the appeal was concerned with the question whether the sentence was a proper one on the material available to the sentencing judge. Any application to purge the contempt on the basis of developments since the sentence was passed was a matter for the High Court. That is the application now before me.

The principles applicable to discharge applications

10 The principles applicable to applications by contemnors for discharge from custody before the expiry of sentence were summarised in *Lakatamia Shipping Co. Ltd v Su* [2020] EWHC 806 (Comm), in which an application to purge a contempt made on grounds arising from the effect of the Covid-19 pandemic was refused last Friday by Foxton J. The principles were derived from the decision of Court of Appeal in *Swindon Borough Council v Webb (trading as Protective Coatings)* [2016] EWCA Civ 152, [2016] 1 WLR 3301. In that case, Tomlinson LJ, with whom Lewison LJ agreed, derived particular assistance from the judgments of Wilson LJ in *CJ v Flintshire Borough Council* [2010] 2 FLR 1224 at [21], where he posed eight questions, as follows:

> "(i) Can the court conclude, in all the circumstances as they now are, that the contemnor has suffered punishment proportionate to his contempt? (ii) Would the interest of the state in upholding the rule of law be significantly prejudiced by early discharge? (iii) How genuine is the contemnor's expression of contrition? (iv) Has he done all that he reasonably can to demonstrate to resolve and inability not to commit a further breach if discharged early? (v) In particular has he done all that he reasonably can (bearing in mind the difficulties of his doing so while in prison) in order to construct for himself proposed living and other practical arrangements in the event of early discharge in such a way as to minimise the risk of his committing a further breach? (vi) Does he make any specific proposal to augment the protection against any further breach of those who the order which he breached was designed to protect? (vii) What is the length of time which he has served in prison, including its relation to the full term imposed

> upon him and the term which he will otherwise be required to serve prior to release pursuant to section 258(2) of the Criminal Justice Act 2003? (viii) Are there any special factors which impinge upon the exercise of the discretion in one way or the other?"

11 At [22] Wilson LJ made clear that the success of an application for an order for early discharge did not depend upon favourable answers to all these questions. Rather, the answers should go into the melting pot and out of it, once they have melted together, comes the conclusion. At [37] of his concurring judgement in the same case, Sedley LJ said this:

> "When a judge comes to consider discharge from a sentence which has already been found both necessary and proportionate, he or she is looking at new factors, if there are any, albeit these may modify what is now necessary and what is now proportionate."

12 Also of relevance is the decision of Andrews J's decision in *Her Majesty's Solicitor-General v Dodd* [2014] EWHC 1285 (QB) in which the judge discharged the defendant from a sentence of imprisonment imposed for contempt about 1 month early on the basis of evidence as to the effect imprisonment had had on the applicant, the fact that Mr Dodd had been imprisoned a long way from his family and that imprisonment had had a severe impact on Mr Dodd's health.

Submissions on behalf of Mr Nichols

13 Mr Tear's application before me is based squarely on new factors which he says have arisen between 25 February 2020, when the sentence was imposed, and today. The application is based upon the impact of the Covid-19 epidemic on prisoners in general and on Mr Nichols in particular. There are a number of strands to this submission, which overlap.

14 First, Mr Tear relies on Mr Nichols' medical conditions. These were considered by Ms Collins-Rice when she imposed the sentence from which discharge is now sought, but they did not then have the significance they now have. Mr Nichols is a 53-year old man, who is diabetic and also has a cardiac condition. Although there is no medical report before me, it is well known that both these conditions mean that the health risks to him if he were to contract Covid-19 are elevated. This is reflected in current NHS guidance and in Schedule 1 to the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 (SI 2020/350), which includes those with chronic heart disease or diabetes in the category of "vulnerable persons".

15 Second, there is the effect of Covid-19 on prison visiting in general and in HMP Wormwood Scrubs in particular, where Mr Nichols is currently being held. It was announced on 24 March 2020 that prison visits were temporarily cancelled to reduce the spread of the virus. As I indicated on 30 March 2020, the extent of any effect on an individual prisoner of the cancellation of visits is a matter for evidence. There is now evidence before me from Ms Nicole Mileham, Mr Nichols' wife. In a statement dated 2 April 2020, she indicates that she went with her son Jack and Mr Nichols' daughter Natasha went to see Mr Nichols at HMP Wanstead, where they had been told he was being held. It turned out that he was not there. By the time he had been located, they

were able to see him only once (on 17 March 2020). Because of the rule that only 3 visitors are allowed, his teenage daughters were unable to see him. Ms Mileham says that they are devastated by this. Mr Nichols is able to speak to Ms Mileham and the rest of the family on the telephone every couple of days, for about 10 minutes at a time.

16 The third matter relied upon relates to the conditions in which Mr Nichols is being held in HMP Wormwood Scrubs. When he arrived, he shared a cell with one remand prisoner. However, from around the week commencing 9 March 2020, he was moved to a dormitory with five others who she describes as "mainly elderly individuals". Ms Mileham says that because of Covid-19 all association in the prison has now been stopped and the prison went into what she describes as "lockdown", which means that prisoners may only leave their cells for medication or to work.

17 Fourth, Mr Tear relies on the effect that Mr Nichols' imprisonment is having on the rest of the family. Financial information has been submitted which shows that the finances are in a parlous state, a matter which is causing stress to Mr Nichols.

18 Fifth, since Mr Tear submitted his skeleton argument on Friday 3 April 2020, the Ministry of Justice has announced that, in order to relieve pressure on the NHS which is likely to be caused by any outbreaks of Covid-19 in prisons, the intention is to implement a phased release early of "low risk" prisoners who have served at least half their custodial term and are within 2 months of the end of their sentences. Mr Nichols has served nearly half of the custodial term he would be required to serve and on any view poses a "low risk".

Discussion

19 I have asked myself the eight questions identified by Wilson LJ in *CJ v Flintshire Borough Council*.

(i) Can the court conclude, in all the circumstances as they now are, that the contemnor has suffered punishment proportionate to his contempt?

20 Were it not for the effects of the Covid-19 pandemic on prisoners in general and on Mr Nichols in particular, it would be impossible to say that Mr Nichols had suffered punishment proportionate to his contempt. On 25 February 2020, Ms Collins-Rice decided that the punishment proportionate to the contempt was 21 weeks' imprisonment. The Court of Appeal dismissed Mr Nichols' appeal. Mr Nichols' expression of remorse was before the deputy judge when she passed sentence and immediately afterwards. Insofar as it has been repeated before me, the repetition carries very little weight. However, it is also right to note that one of the most serious effects of imprisonment on a family man such as Mr Nichols is the dislocation from his wife and children. In ordinary circumstances this is ameliorated to some extent by the ability of family members to visit. The fact that there has been only one family visit since he was imprisoned, and the practical certainty that there will be no more, do in my judgment make the conditions in which Mr Nichols has been and is now detained significantly more onerous than Ms Collins-Rice could have anticipated when she imposed the sentence on 25 February 2020. The same is true of the fact that prisons are now in "lockdown". These factors would not on their own justify Mr Nichols' discharge at this stage in his sentence, but they nonetheless go into the "melting pot".

(ii) Would the interest of the state in upholding the rule of law be significantly prejudiced by early discharge?

21 Any early discharge is capable in principle of prejudicing the state's interest in upholding the rule of law. However, the announcement of the conditional release of convicted prisoners who have served at least half of their sentence and have less than 2 months to serve reflects a balancing of the state's interest in upholding the rule of law, on the one hand, against other vital interests, on the other. These other vital state interests include in particular the public interest in protecting the NHS from the strain likely to be caused if there are outbreaks of Covid-19 in prisons. The MOJ's announcement reflects the impact that unnecessary strains on the already challenged NHS are likely to have on the wider community. Mr Nichols has already served some 5 weeks of his sentence when in the ordinary course he would serve 10½ weeks. In essence, he has served half of the custodial term he would otherwise have served. He has less than 2 months to serve, so would fall within the criteria announced by the MOJ for early release if he were a convicted prisoner at low risk of reoffending.

22 It will not always be possible to assess the risk posed by a contemnor in the same way as the risk posed by a convicted offender. However, given the circumstances of this case, I cannot think that it would be right to treat Mr Nichols any differently from the prisoners now being considered for early release.

23 Nothing I say here should be taken as suggesting that it will be appropriate to release all contemnors simply because they have served half their sentences and have less than 2 months to serve. Much will depend on the facts of their individual cases. In particular, different considerations may apply to those whose sentences had a coercive as well as a punitive element. Mr Nichols's sentence was, however, entirely punitive in purpose. The breach which it punished was of a prohibitory injunction. In those circumstances, it would not be fair for him to be treated more harshly than a convicted prisoner serving a custodial sentence of similar duration.

(iii) How genuine is the contemnor's expression of contrition? (iv) Has he done all that he reasonably can to demonstrate to resolve and ability not to commit a further breach if discharged early? (v) In particular has he done all that we reasonably can (bearing in mind the difficulties of his doing so well in prison) in order to construct for himself proposed living and other practical arrangements in the event of early discharge in such a way as to minimise the risk of his committing a further breach? (vi) Does he make any specific proposal to augment the protection against any further breach of those who the order which he breached was designed to protect?

24 As I have said, I would have given very little weight to Mr Nichols's repeated expressions of contrition. Mr Nichols made no arrangements of which I am aware to minimise the risk of his committing further offences. It is relevant, however, that – because of the current emergency – there are currently no sporting fixtures and therefore no opportunity for Mr Nichols to continue to breach the orders that apply to him. This means that if Mr Nichols were to remain in prison until 11 May 2020 (as he would if not discharged), neither the Claimant nor the public would thereby gain any element of protection by the mere fact of his continued incarceration. Again, this would not be determinative on its own, but it is a relevant factor.

(vii) What is the length of time which he has served in prison, including its relation to the full term imposed upon him and the term which he will otherwise be required to serve prior to release pursuant to section 258(2) of the Criminal Justice Act 2003?

25 Mr Nichols has served just over 5 weeks' imprisonment, which is almost exactly half of the custodial term he will otherwise be required to serve prior to release pursuant to section 258(2) of the Criminal Justice Act 2003 in conditions more onerous than normal. He has, therefore, had at least endured at least some of the punitive effect of the sentence imposed.

(viii) Are there any special factors which impinge upon the exercise of the discretion in one way or the other?

26 I would give very little weight to the financial effect that Mr Nichols's imprisonment is having on his family. I do not doubt that the effect is serious for Ms Mileham and Mr Nichols's children, but that effect is part and parcel of any sentence of imprisonment and was taken into account by Ms Collins-Rice.

27 The two factors of greatest weight in this application are the fact that Mr Nichols has two health conditions which increase the risk to his health if he were to contract Covid-19 and the MOJ's announcement in relation to convicted prisoners. Taken together, these factors mean that, given that Mr Nichols has already served 5 weeks' imprisonment in circumstances more onerous than anticipated, the state's interest in upholding the rule of law is outweighed by another important interest – that of removing a prisoner at increased risk of suffering serious health complications should he contract Covid-19 from the prison estate. The latter is both a private interest of Mr Nichols's and also, more significantly for present purposes, a public interest, because it serves to avoid increased strain on the NHS at a time when it is already under great strain. It also serves to lessen pressure on those responsible for running the prisons when they too are under considerable strain caused by manpower shortages connected with Covid-19.

28 Convicted prisoners who are to be released following the MOJ's announcement are to be released upon conditions, including electronic tagging. Similar conditions could be imposed on contemnors, by accepting undertakings as conditions of discharge. I do not, however, consider it necessary or appropriate to accept such undertakings in this case for two reasons. First, any such condition would entail supervision by already stretched public authorities. Secondly, such supervision is not required in Mr Nichols's case, given that his pre-existing health conditions provide a powerful incentive to remain at home until at least the date on which he would otherwise have been released, so as to avoid contracting Covid-19.

Conclusion

29 For these reasons, I directed earlier today, pursuant to CPR r. 81.31, that Mr Nichols be discharged from his sentence of imprisonment with immediate effect.