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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

KING'S BENCH DIVISION
(JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY SHANE FRANE FOR JUDICIAL REVIEW

Karen Quinlivan KC and Séamas MacGiollaCheara (instructed by Emmet J. Kelly & Co) for the Applicant
Philip Henry (instructed by the Crown Solicitor's Office) for the first Respondent
Tony McGleenan KC and Laura McMahon (instructed by the Departmental Solicitor's Office) for the second Respondent

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HUMPHREYS J

Introduction

[1] On 4 February 2014 the applicant was sentenced to an indeterminate custodial sentence for the offence of manslaughter with a minimum tariff of 6 years, having been assessed as dangerous within the meaning of the Criminal Justice (Northern Ireland) Order 2008 ('the 2008 Order'). At the time of the commission of the offence, the applicant was on supervised licence. The tariff expired on 25 July 2019.

[2] On 10 March 2021 the Parole Commissioners refused to direct the release of the applicant. They were not satisfied that it was no longer necessary for the protection of the public from serious harm that the applicant be confined, being the test prescribed by Article 18 of the 2008 Order. The Commissioners cited a need for prolonged and sustained testing in order to be satisfied that the risk which he posed could be managed in the community.

[3] There is no challenge to that decision, but the applicant does impugn the alleged failures by the respondents, the Probation Board for Northern Ireland ('PBNI') and the Northern Ireland Prison Service ('NIPS'), to provide him with opportunities to demonstrate his suitability for release.

[4] In these proceedings, the applicant seeks, inter alia, mandatory orders compelling the respondents to:

(i) Permit him to participate in purposeful periods of temporary release;

(ii) Provide some bespoke programme of testing which would allow him to show evidence of risk reduction; and

(iii) Put in place a system for the assessment of eligibility for pre-release testing ('PRT') which recognises the fact that a prisoner is post-tariff.

The Evidence

[5] The Parole Commissioners reviewed the applicant's case in July 2019 at the time of expiry of the tariff and recommended that he avail of a full suite of temporary release opportunities. This commenced in August 2019 when he was afforded periods of Accompanied Temporary Release ('ATR'), followed in November 2019 by a period of Unaccompanied Temporary Release ('UTR'). However, on his return from UTR the applicant was placed in the Care and Supervision Unit ('CSU'), segregated from other prisoners, on suspicion of bringing drugs into prison. During this period, on 29 November 2019, he failed a drugs test which resulted in his suspension from any further PRT for a period of 3 months.

[6] By the time he was again eligible, all such testing had been suspended due to the impact of the Covid-19 pandemic. It was only recommenced in April 2021.

[7] On 26 August 2020 a panel of Parole Commissioners reviewed the applicant's case and stated that a sustained period of testing was necessary prior to release and a plan should be drawn up with a timeframe for such testing to take place. A Case Conference took place on 22 September 2020 which noted that little could be achieved as a result of the Covid restrictions.

[8] Following an oral hearing on 3 March 2021 the Commissioners recommended, on 10 March, inter alia, as follows:

(i) A Case Conference/Case Discussion be held within 28 days of the decision and that the applicant have the opportunity to have input into the matters discussed;

(ii) That the Case Discussion consider, subject to necessary risk assessments, permitting the applicant to participate in purposeful periods of UTR as soon as practicable and provide a timescale for this;

(iii) That the Case Discussion consider a pathway to progress the applicant to phased testing at Burren House or some other alternative bespoke programme

of testing which will permit him to demonstrate evidence of risk reduction and ability to comply with external controls in a community setting.

[9] A Case Discussion was held on 23 March 2021 at which the prison governor advised that:

> "Mr Frane could go back out on UTRs but that Mr Frane would need to pass drugs tests, remain adjudication free, stay out of the CSU and remain Rule 32 & Rule 35 free. The responsibility to achieve this remains with Mr Frane."

[10] A meeting took place between the applicant and his probation officer on 2 April 2021 at which the outcome of this Case Discussion was conveyed.

[11] The applicant failed a drugs test on 6 May 2021 and was suspended from PRT for a further period of 3 months.

[12] These proceedings were issued in June 2021 at which time the applicant complained that the recommendations of the Parole Commissioners had been ignored and no opportunities provided to him to demonstrate his suitability for release.

[13] At a Case Conference on 7 October 2021 the applicant was advised that he would immediately move to Braid House for around 6 to 8 weeks, before moving to Wilson House for a period of 8 weeks. From there he could be moved to Burren House and commence PRT. However, he remained a security Category C prisoner which effectively rendered him ineligible for transfer to Burren House. This categorisation indicates a prisoner who cannot be trusted in open conditions.

[14] The applicant failed a further drugs test on 18 October 2021 and was again suspended from PRT. The applicant is challenging the outcome of this test. Since this test result, the applicant complains that he has been moved between different wings with no discussion about resuming his pathway towards testing.

[15] A further Case Conference on 8 February 2022 resulted in the applicant being moved back to Braid House and he passed a drugs test on 1 March 2022.

[16] The applicant's case was further considered by a panel of Parole Commissioners on 11 March 2022 who directed that the applicant not be released. The panel did, however, describe the lack of progress as "an unsatisfactory state of affairs." They made recommendations including:

> "(i) A review of the applicant's security status;
>
> (ii) The prioritisation of the applicant for PRT;

(iii) A multi-disciplinary case conference be held within 28 days."

[17] The Commissioners expressed their concern that a Case Conference had not been held within 28 days of the previous determination of 10 March 2021. It may be, however, that evidence was not adduced to them of the Case Discussion which did take place within this time frame.

[18] The applicant successfully completed periods of ATR on 26 April and 30 May 2022. At a Case Conference on 18 May 2022 it was stressed to the applicant that he had been one of the first prisoners to be afforded PRT since the lifting of restrictions and that his security status was due to be reviewed. He moved to Wilson House on 9 June and completed a period of UTR on 22 June 2022.

[19] The applicant has had his security categorisation reviewed in June 2022 but his status as Category C was maintained, meaning that he could not progress to Burren House.

Pre Release Testing

[20] The evidence furnished by PBNI explains the system of PRT:

(i) The first stage is ATR which is open to all regardless of security category, when a prisoner is accompanied by a member of NIPS staff;

(ii) If successful, this leads to periods of UTR, starting with short day time release and building up to overnight in approved accommodation;

(iii) A prisoner can then progress to Wilson House, which operates a more relaxed regime and serves as a stepping stone;

(iv) The next stage is transfer to Burren House in Belfast, subject to the satisfaction of a number of criteria, including a 'D' security categorisation;

(v) Once in Burren House, a period of settling in is followed by a longer phase of 6 to 9 months involving periods of UTR;

(vi) A third phase at Burren is focussed on re-integration into the community and a move to approved accommodation, which may also last several months.

[21] It is emphasised that whilst PBNI are involved at each stage of the process, decisions in respect of the transfer and admission of prisoners into each phase falls within the jurisdiction of NIPS.

The Grounds for Judicial Review

[22] The applicant's claim rests on two principal arguments:

(i) The respondents have breached the duty which they owe to him pursuant to article 5 ECHR; and

(ii) In a connected but discrete challenge, it is alleged that the respondents have failed to adhere to the recommendations of the Parole Commissioners of 10 March 2021.

Article 5

[23] Article 5(1) of the ECHR states:

> "Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> (a) the lawful detention of a person after conviction by a competent court …"

[24] In *Brown v Parole Board for Scotland* [2017] UKSC 69, the Supreme Court considered the case of a prisoner who had received an extended custodial sentence and had been recalled to prison during the period of his licence to serve the remainder of his term. He complained that he was not provided with adequate rehabilitation programmes during the time of his recall, and that this was contrary to the duty imposed by article 5.

[25] The context for this appeal was the decision of the ECtHR in *James v United Kingdom* [2013] 56 EHRR 12, where it was held that, in order for detention to be justified under article 5(1)(a), it was necessary that real opportunities for rehabilitation be provided during the period after the tariff element of a prison sentence has been served. The basis for this requirement was to be found in the principle that rehabilitation was one of the purposes of detention. The Strasbourg Court recognised that the duty imposed was not absolute nor did a prisoner have to be afforded immediate access to the requisite courses. However, it was held that:

> "Any restrictions or delays encountered as a result of resource considerations must be reasonable in all the circumstances of the case." [para 218]

[26] In *Brown* Lord Reed emphasised that establishing a violation of article 5 requires a high threshold to be surmounted but the court found that the failure to provide any offending behaviour programmes to prisoners whose tariffs had expired

would render their detention arbitrary and unlawful pursuant to article 5(1)(a). Once access to the relevant courses was afforded the detention would become lawful once more.

[27] In *Re Larkin's Application* [2021] NIQB 66, Scoffield J considered the *Brown* and *James* principles in light of the restrictions imposed by the Covid-19 pandemic. Noting that the article 5 duty to provide PRT is not absolute, and that the pandemic represented an exceptional and unforeseen circumstance, he was not persuaded that any breach of duty could be established on the facts of that case. Each case is, however, fact-sensitive and the particular circumstances pertaining to any given applicant must be carefully assessed.

[28] One of the relevant features will be the applicant's own conduct. In *Brown* Lord Reed commented:

> "The problem which resulted in the appellant's serving the whole of his sentence was not the failure of the prison authorities to provide appropriate courses, but his own misconduct. There is simply no question of his detention during the extension period, or at any other point during his sentence, having been arbitrary." [para 85]

[29] The analysis of whether there has been any breach of the article 5 duty in this case requires a careful consideration of the relevant chronology. During 2018 and 2019 the applicant had benefited from periods of ATR and UTR. He then failed a drugs test on 29 November 2019, a matter for which he bears entire responsibility. This rendered him ineligible for any further PRT for a period of three months, which expired just at the time of the outbreak of the pandemic.

[30] In March 2020 access to and egress from the prison estate was tightly restricted in order to prevent the spread of the virus. Any entry to the prison was followed by a period of isolation for 14 days. There is no challenge to this course of action adopted by NIPS in these judicial review proceedings.

[31] In late July 2020 NIPS announced its intention to resume the phased reintroduction of PRT but this was paused in light of the resurgence of the virus and the second period of lockdown was then imposed in October 2020. As a result, no further steps could be taken to facilitate testing until April 2021. NIPS says that at all times it was following the advice from the Northern Ireland Executive.

[32] The applicant then failed a further drugs test on 6 May 2021, again rendering himself ineligible for PRT for a period of three months.

[33] At the 7 October 2021 Case Conference a pathway plan was agreed which entailed an immediate move to Braid House, as a stepping stone to Wilson House. However, he failed another drugs test on 18 October 2021.

[34] The 8 February 2022 Case Conference resulted in a move back to Braid, and then successful periods of PRT in May and June 2022.

[35] The applicant's security categorisation has been reviewed on two occasions in 2021 and 2022 and on each occasion Category C has been maintained.

[36] It is evident therefore that the applicant has been provided with PRT opportunities, albeit that these were suspended for some 13 months as a result of the pandemic. His own misconduct, in the form of failed drugs tests, is the reason why his progress in this area was derailed. Both in May and October 2021 the applicant failed tests, resulting in an effective suspension on each occasion for a period of three months.

[37] Since February 2022, further opportunities have been provided to the applicant and he has availed of those. Ultimately it will be a matter for the Parole Commissioners to be satisfied that the statutory test for release has been met.

[38] The circumstances of this case do not reveal any breach of the article 5 duty. On the contrary, aside from the extraordinary consequences of Covid-19, the applicant has been provided with relevant PRT opportunities but has chosen, through his own actions, not to avail of those. The obligation imposed by law is to afford a reasonable opportunity for the applicant to avail of PRT. There are some periods of delay in the provision of such services to the applicant which are unexplained. However, in the context of the pandemic and the inevitable disruption caused thereby, I have concluded that the applicant was afforded a reasonable, albeit imperfect, opportunity. His own misconduct prevented him from properly availing of the PRT which would have enabled him to establish to the satisfaction of the Parole Commissioners that he was a suitable candidate for release.

The Parole Commission Recommendations

[39] Central to the applicant's complaint is a claim that the respondents failed to adhere to the recommendations issued by the Parole Commissioners on 10 March 2021.

[40] Firstly, it is contended that there was a failure to comply with the recommendation in relation to the holding of a Case Conference within 28 days of the date of the decision. It is noteworthy that there is a distinction between a Case Conference, which is attended by the prisoner, and a Case Discussion, which is not. In the instant case, a discussion took place on 23 March 2021 but not a conference. However, the actual recommendation of the Parole Commissioners was as follows:

> "A Case Conference/Discussion be held within 28 days of this decision and that Mr Frane have the opportunity to have input to the matters discussed (the panel understands

> that a case discussion has been scheduled for 23rd March and it is imperative that this should go ahead)."

[41] A number of points arise:

(i) The recommendations of Parole Commissioners, whilst important, do not have the status of mandatory directions, whereby non-compliance would render the acts of the respondents unlawful;

(ii) The recommendation was that either a conference or a discussion take place into which the applicant should have input;

(iii) The panel was fully aware that a discussion was scheduled for 23 March 2021 and this did proceed accordingly;

(iv) There was subsequent engagement between the applicant and his Probation Officer on 2 April 2021.

[42] The second recommendation which is relied upon by the applicant was as follows:

> "That the case discussion consider a pathway to progress Mr Frane to phased testing at Burren House…or some alternative bespoke programme of testing which will permit him to demonstrate evidence of risk reduction and ability to comply with external controls in a community setting."

[43] Both the respondents are criticised for failing to instigate a bespoke programme as alluded to by the Commissioners. However, it must be recognised that this was only referenced as an alternative to the tried and tested approach. It is a misinterpretation to assert that the 'bespoke alternative' was a requirement of the Commissioners' decision. By the time the applicant was eligible again for PRT, the traditional approach was once again available. It was therefore wholly unnecessary, not to say risky and time consuming, to attempt to create a new and untested programme. By April 2021, there was simply no need to reinvent the wheel. Properly analysed, there was no failure to respond to the Commissioners' recommendations.

[44] In his skeleton argument, the applicant advanced an unpleaded claim that the PBNI has failed in its statutory duty, pursuant to Article 14A of the Probation Board (Northern Ireland) Order 1982. This provides:

> "It shall be the duty of probation officers-

(a) To supervise the persons placed under their supervision and to advise, assist and befriend those persons."

[45] In particular, it is asserted that since his probation officer was assigned to him in January 2020, he had only met either in person or virtually seven times in a two year period. It is claimed that this level of engagement has adversely affected the applicant's prospects for release since he has not been properly assessed.

[46] There is also an evidential dispute in relation to the extent of contact between the applicant and PBNI between September 2021 and February 2022. It is axiomatic that the judicial review court is ill-suited to the resolution of factual disputes and it is unclear what turns on this issue in any event. The core of the applicant's case rests on the alleged breach of article 5 and the failure to follow Parole Commissioners' recommendations. I therefore make no findings in respect of this evidential dispute.

[47] I could not be satisfied on the evidence that PBNI was in breach of any duty owed by it to the applicant, whether arising from the 1982 Order or otherwise, still less that this has had any adverse impact upon the applicant's ability to meet the threshold required for his release.

[48] The applicant also advanced a claim of irrationality, both in the sense of *Wednesbury* unreasonableness and in the failure to take into account material considerations. In truth, these merely recast the same alleged failings in respect of the duty to afford reasonable opportunity to rehabilitate and the Parole Commissioners' recommendations, and they do not succeed for the same reasons.

[49] A case based on substantive legitimate expectation was pleaded but not advanced at hearing. It could not be said that the Commissioners' recommendations constitute the genre of unambiguous promise or representation necessary to ground such a claim.

Conclusion

[50] For the reasons outlined, none of the grounds for judicial review have been made out and the application is dismissed. I will hear counsel on the question of costs.