

Departmental Circular in respect of offenders under the Children and Young Persons Act (NI) 1968 – whether merely guidance – legal effect – validity of scheme – whether ultra vires – whether decision to treat applicant as within the scheme procedurally flawed

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

Delivered: 18.05.04

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN’S BENCH DIVISION (JUDICIAL REVIEW)

**IN THE MATTER OF AN APPLICATION BY CHARLES CONLON
FOR JUDICIAL REVIEW**

and

**IN THE MATTER OF A DECISION OF THE NORTH AND WEST BELFAST
HEALTH AND SOCIAL SERVICES TRUST AND THE DEPARTMENT OF
HEALTH, SOCIAL SERVICES AND PUBLIC SAFETY**

GIRVAN J

[1] The applicant in this application challenges the decision of the North and West Belfast Health and Social Services Trust (“the Trust”) to reject his appeal or application under the Department of Health, Social Services and Public Safety’s Circular 3-96 (“the Circular”) against his so-called status as an offender falling within Schedule 1 of the Children and Young Persons Act (Northern Ireland) 1968 (“the 1968 Act”). He challenges the legality of the scheme set out in the Departmental Circular.

[2] The applicant was convicted (inter alia) of common assault on a child or young person at Belfast Crown Court on 29 April 1997. That offence occurred on 27 May 1996. He served his sentence in relation to that offence and was released sometime in 1997. Following his release from prison on that occasion he committed further offences, leading to further conviction and a period of imprisonment. In March 2001, leading up to his release from prison scheduled for 26 July 2001, he applied for home leave. At that stage it was brought to his attention that there was in place a scheme set out in the Circular obliging the Prison Service to consult with Social Services due to the fact that he had a previous conviction for common assault on a child or young person. The Prison Governor brought the Circular to the

applicant's attention in a letter of 30 March 2001. In his letter the Governor pointed out that the applicant could appeal against being classified as a Schedule 1 offender (that is an offender having committed an offence falling within Schedule 1 of the 1968 Act). As matters transpired, for a variety of reasons including the applicant's obstructiveness and the delay occasioned by the Prison Service's need to consult under the Circular scheme, the applicant was not able to take up home leave. He was eventually released on 26 July 2001, thereby ceasing to be a serving prisoner. The stance taken by the respondent Trust is that he continues to be somebody who should be treated as a Schedule 1 offender within the terms of the Circular. It is accordingly necessary to consider the terms of that Circular.

[3] The Circular is described as inter-agency guidance on the release of persons charged or held in connection with Schedule 1 offences against children and young persons under the age of 17. The introductory section of the Circular states that the procedures set out therein provide a framework to enable Health and Social Services Trusts, the Probation Board, the police and the Prison Service, to work together to protect children who may be at risk from a person who is charged with or convicted of a Schedule 1 offence, who is released from custody or who is discharged from hospital. According to the Circular child protection was not the preserve of any one agency and there was a need for a close working relationship between all agencies involved in children protection. For the purposes of the Circular, a Schedule 1 offenders means somebody convicted of one of the offences against children or young persons listed in Schedule 1 of the 1968 Act. This list includes common assault on a child. The guidance provides for Social Services to be notified and/or consulted at various times including when the prisoner starts a custodial sentence, before transfer or temporary release, approaching release or on early release. When an offender starts a custodial sentence the Prison Service will determine whether a prisoner is a Schedule 1 offender. The relevant Trust will determine whether or not there are children protection issues involved. If there are none they should advise the prison probation manager that the Schedule 1 procedures outlined in the Circular should not apply.

[4] Paragraph 27 appears under the heading "Prisoner's Right of Appeal". Thus paragraph 27 provides:

"27. At the same time as the HSS Trust is notified the prisoner will be informed that he has been classified as a Schedule 1 offender and the Social Services will be notified of and consulted about his release plans. If a prisoner argues that a mistake has been made concerning the facts of a previous or current conviction he will be advised to take up the matter with the police. If he argues that the nature of his offence is not sufficiently serious that these arrangements should apply (for instance, in cases of minor physical violence between young people of similar age or development), he will be advised that he has the right to pursue the matter with the relevant HSS Trust through its Chief Executive.

28. If the police or the Trust accepts the prisoner's representations or if the Trust decides that child protection issues are not involved, the Schedule 1 procedures will not be applied. To promote prison staff to cancel the arrangements, one of the following must be sent to the prison probation manager:

- a letter signed at not below the level of the Trust Chief Executive, either confirming that an error or fact has been made and that the prisoner is not a Schedule 1 offender; or explaining that child protection issues are not involved and that accordingly the Schedule 1 procedures need not apply; or
- a letter from the police confirming that an error of fact has been made in the prisoner's record and correcting the error so as to make it apparent that the prisoner is not a Schedule 1 offender."

[5] Various procedures are to be followed in the event of a prisoner being unsuccessful in challenging the application to him of the procedures set out in the circular. Paragraph 41 sets out what it describes as the implications of "Schedule 1 status". These include the right to know that a record of that status is held. The offender may be asked to co-operate with professional staff to assess the likelihood of future harm to children. Prisoners may be asked to work with the professional staff to reduce the risk of future harm to children. Information about the history of conviction may be disclosed to other agencies on a need-to-know basis. In some circumstances an individual's offence history will prevent them from gaining paid or voluntary work with children. Planning to live with or regularly visit a household with children may be grounds for information being given to another person who holds parental responsibility of the offence history. A court may be informed of the offence history as evidence of the likelihood of significant harm to a child. Under paragraph 45 as soon as the Social Services have been notified of the release of any Schedule 1 offender, Social Services in consultation with the police "will visit, as soon as possible, the known victims and/or their families who can be located, to tell them about the release and assess their vulnerability and need for services." Where there is a concern for children in general Social Services should convene a meeting of child protection and other relevant agencies to exchange information; assess risk; decide if services or treatment are appropriate that may reduce the risk of re-offending and who should provide it; appoint a case co-ordinator to act as a contact point for the exchange of information; alert relevant agencies to any changes in domicile or relationships and to reconvene the meeting when required and decide on any other action. A risk assessment will require the relevant professionals to formulate a view about the potential risks to an individual having contact with children, and from that make recommendations for action. The meeting should assess the potential risk to children and record the decision and recommendations, ensure that the offender is informed of the risk assessment and any implications of it, allocate responsibility for informing the offender of the

recommendations and consider whether the child protection officer of the relevant Education and Library Board, the Diocesan Administrator of the Council for Catholic Maintained Schools and the Principals of local schools should be told about the presence of a Schedule 1 offender in the area. Paragraph 52 states:

“Probation staff obtain (sic) details of any employment or training, paid or voluntary undertaken by a person known or suspected to have committed offences against children or young persons. In particular staff check (sic) the extent to which employment directly or indirectly facilitates access to children or young persons.”

(The wording in paragraph 52 seems to omit words. It is not clear whether it is mandatory or permissive).

Under paragraph 53 where probation staff have any cause for concern they will immediately alert the area manager and Regional Assistant Chief Probation Officer and the relevant Trust Programme Manager, so that appropriate contact can be made with the offender and the employer to make the situation safe. Under paragraph 54 the Probation Board in accordance with their own child protection policies and procedures will notify the Programme Manager or any new address to which a discharge of a Schedule 1 offenders intends to move. Social Services should investigate the new accommodation to ensure that any children there will not be at risk. Under paragraph 55 where a discharged Schedule 1 prisoner changes address without information to probation staff, the Probation Board may ask Social Services for held in tracing him.

[6] The applicant, through his solicitors, sought to challenge the categorisation of the applicant as a so-called Schedule 1 offender, contending that the circumstances of the actual assault case were not serious enough to justify his categorisation as a Schedule 1 offender within the terms of the circular. There was considerable delay by the Trust in informing the applicant of the details of convictions relied on as giving rise to a Schedule 1 status. On 1 July 2002 the Trust wrote to indicate that it had considered the request to have the Schedule 1 status removed and decided that having considered the circumstances of the assault, it could not accede to the request to have a categorisation of the status removed. It considered that the assault was neither of a minor nature nor accidental and the Trust could not confidently believe such an offence might not occur again.

[7] The applicant attacks the scheme set out in the circular as having no legal basis, that it was ultra vires the Department and was contrary to article 8 of the ECHR. He also challenges the decision to refuse his application to be “descheduled” on the ground that it was procedurally unfair to so categorise him in the circumstances. Under article 8 of the ECHR the applicant contends that the Scheme is not in accordance with law. In order to satisfy legal certainty the Scheme must have a legal basis, be adequately precise and easily reached and be formulated so that it is sufficiently foreseeable. The Circular was not published or sufficiently

made known. The scheme was not sufficiently precise, in that there are clearly no criteria or procedural safeguards governing descheduling.

[8] The Trust countered the applicant's case contending that the Circular is guidance, establishing a framework to enable Trusts and other agencies to work together to protect children who may be at risk when a person charged with a conviction of a Schedule 1 offence, is released from custody or discharged from hospital. The Circular suggests that the framework can be used in conjunction with Volume 6 of the Child Protection Policy established under the Children (Northern Ireland) Order 1995. What the Trust does in any case will depend on the actual circumstances and, in an appropriate case, it may consider that child protection measures require little more than observation or periodic monitoring. In any civilised society there should be some record of persons who have committed offences against or involving children.

[9] The Department contends that, on the proper analysis of the Circular, the fact that a person has committed an offence is an immutable question of fact. The fact of commission of a Schedule 1 offence is in itself a trigger for the potential for consideration of the matters set out in the Circular. In essence the Circular has adopted the view that offences as set out in the Schedule of the 1968 Act are offences that indicate that child-care protection issues may arise. The Trust is enjoined to consider, irrespective of the fact that a Schedule 1 offence has been committed, whether or not there are child protection issues involved. Once the Trust has concluded that there are child protection issues involved, the measures set out in the circular are appropriate, rational and proportionate. The guidance is not imperative since the Department has no authority over the police, prosecutors or prison service. It is perfectly proper for the Department to formulate guidance. While the Trust accepted that article 8 of the Convention was engaged, the Department did not accept that it was. If article 8 is engaged, then the Scheme and the Circular is justified being in accordance with law, necessary in a democratic society and for a legitimate purpose.

[10] Both the Trust and Department contend that the making and operation of the Scheme find a statutory basis in article 18 of the Children (Northern Ireland) Order and article 15 and article 4(b) of the Health and Personal Social Services (Northern Ireland) Order 1972. Under article 18 of the 1995 Order, it is provided that is the general duty of every authority, in addition to the other duties imposed by the 1995 Order, "to safeguard and promote the welfare of children within its area who are in need" and, insofar as is consistent with the duty, to promote the upbringing of such children by their families by providing a range and level of personal social services appropriate to those children's needs. For the purposes of facilitating its general duty under the article, every authority has the specific powers and duties set out in Schedule 2. Schedule 2 includes:

“1. Every authority shall take reasonable steps to identify the extent to which there are children in need within the authority’s area.

5(1) Every authority shall take reasonable steps through the provision of services under Part IV to prevent children within the authorities area suffering ill-treatment for neglect.”

Part VI of the 1995 Order deals with the protection of children and includes article 66 which provides under “Authority’s duty to investigate” that, where an authority has reasonable cause to suspect that a child who lives or is found in the authority’s area is suffering or is likely to suffer significant harm, the authority shall make, or cause to be made, such enquiries as it considers necessary to enable it to decide whether it should take any action to safeguard or promote the child’s welfare. Where, as the result of complying with the article, an authority concludes that it should take action to safeguard or promote the child’s welfare, the authority should take that action so far as it is both within the power of the authority and reasonably practical for it to do so.

[11] There is nothing in law to prevent the Department issuing guidance notes and its power to do so can be found in article 15 and 4(b) of the 1972 Order. Even apart from those statutory provisions it is open to the Department to issue guidance to Trusts and other public bodies to assist them in fulfilling their various statutory duties and functions. Nor is there anything unlawful in the Department, Trusts or other agencies establishing policies or practices to guide them in the carrying out of the statutory duties and functions.

[12] There is a developing body of case law on the powers and duties of Trusts and the police to pass information relating to convictions or allegations of sexual abuse affecting children. In Re James Morrison [2002] NIQB 67, Weatherup J considered the extent of the right of trusts to retain and disclose information relating to allegations of physical and sexual abuse against an applicant. In that case the applicant challenged, firstly, the decision of the Trust to retain records of the allegations of physical and sexual abuse against the applicant, secondly, challenged the decision to disclose the information and thirdly, challenged the refusal to undertake not to disclose information to third parties in the future. In that case it was not in dispute that the retention of the information affected the right to respect the private life of the applicant and that the disclosure of the information affected his right in respect of private and family life. The action of the Trust in retaining and disclosing the information required justification under Article 8(2) of the convention. The processing of the data, in the view of Weatherup J, fell within the section 29 exceptions set out in the Data Protection Act 1998 and satisfied the requirements of legality. He considered that the Trust’s objective in that case was the protection of specific children from abuse and that was a legitimate aim. In that case the particular measure was the retention and disclosure of information to specified persons as the primary carers of the specific children so that the carer

would be alert to the risk. The means adopted by the Trust were focused on that objective and were rational and not arbitrary. Weatherup J was satisfied in that case that there was no blanket policy of disclosure in operation, nor was there any absence or regard for the requirement to establish a pressing need in the particular case. In that case the respondent involved the applicant in the exercise by requesting his attendance with social service to explain the rules, action and to involve the applicant in the actual disclosure to the new partner. The Trust had a significant discretionary area of judgment. In the judgment Weatherup J referred to and analysed the reasoning of the courts in R v Local Authority and Police Authority in the Midlands ex parte LM [2000] 1FLR 612, Re S (Sexual Abuse Allegations - Local Authority Response [2001] 2FLR 776 and Re L (Disclosure to Third Party) [2002] NIFAM 24. A clear picture emerges from those authorities that Trusts, in furtherance of their statutory duties to protect the interests of children at risk, have on occasions the right and duty to disclosure information relating to misconduct or allegations of misconduct, if there is a pressing need to do so. Disclosure is exceptional and not the rule and requires a very careful analysis of the facts and a very sensitive balancing of the public interest in the need to safeguard the right of an individual to his private life.

[13] In this case the Circular is expressed in terms of creating a structured scheme to deal with individuals who have been sentenced in respect of Schedule 1 offences. It is framed or phrased in terms that do not make it absolutely clear that it is merely guidance, though it contains portions of which appear to be of an advisory nature. It proceeds on the basis that, if it is determined that child protection issues arise, then certain consequences are intended to follow. The framework of the scheme proceeds on the basis that the Prison Service will determine whether a prisoners is a Schedule 1 offender and the relevant Trust is to be informed within 2 weeks of the admission to the prison of a person with a current or previous conviction for a Schedule 1 offence. At that stage the Trust is to consider whether there are child protection questions involved. At the same time as the Trust is so satisfied, the prisoner will be given information that he has been classified as a Schedule 1 offender. If the prisoner argues that the nature of the offence is not sufficiently serious that the arrangements set out in the circular should apply to him, he will be advised that he has the right to pursue the matter through the Trust's Chief Executive (see paragraph 27 and 28 of the circular).

[14] The fact that different legal consequences or potential consequences may flow or are expressed to flow, depending on whether a person continues to be viewed as a Schedule 1 offender or a prisoner whose offence while within Schedule 1 does not in the Trust's view raised child protection issues, indicates that the decision whether or not to disapply the circular scheme is one of some consequence to the prisoner concerned. In a sense the Trust's decision does determine a form of "status" in relation to the prisoner and the Circular itself uses the term "status" (see paragraph 41). The Prison Governor in his correspondence with the prisoner recognised that a form of status arose under the circular which it might be important for the prisoner to challenge.

[15] Assuming for the moment that the scheme in the Circular itself is lawful, it is necessary to determine the question whether the decision by the Trust that his case raised child protection issues justifying his retention within the framework of the Circular can be challenged in law. The applicant claims that the Trust arrived at a view of the facts of the offence on a procedurally flawed basis by gathering information from the police and giving the applicant no opportunity to comment on that interpretation of events. The requirement of procedural fairness in this case was not, in my view, satisfied in that the applicant was entitled to an opportunity to present his version of events if it is in conflict with those stated by the police. The applicant was not given an opportunity to challenge the police version.

[16] The procedure set out in the circular itself were not followed in that the right of appeal under paragraph 27 was intended to be exercisable by the prisoner following his being informed that he was being classified as a Schedule 1 offender. That information should have been given to him within 2 weeks of admission to prison. It does not appear that he was so informed. Had this been a statutory scheme the question would arise as to whether the late provision of information invalidated the decision to treat him as a Schedule 1 offender. However, this Scheme is not statutory scheme.

[17] The Circular in my view goes beyond being a mere set of guidelines. It purports to create a form of non-statutory scheme which the various agencies concerned are expected to follow and apply. The scheme as a scheme only makes practical sense if the various agencies feel, in some way, bound to follow through its provisions. It is true that in some respects it leaves matter to the discretion of the various agencies. In other respects it purports to impose an obligation on the agency concerned to do certain things, for example, Social Services must be consulted whenever consideration is being given to considering a temporary release or home leave. Probation staff are to obtain details of employment undertaken by the prisoner and are to notify the Programme Manager of any new address to which the discharged prisoner has moved. Some invasive powers appear on the face of the Circular to be conferred on agencies (eg, the Probation Board may ask Social Services for help in tracing the prisoner and information may be circulated to appropriate agencies throughout the United Kingdom and Republic of Ireland). The Sex Offenders (Northern Ireland) Order 1997 made notification provisions in relation to certain sex offenders. Such a scheme was held by Kerr J to be compatible with the Convention in Re Kevin Gallagher [2003] NIQB 26. He pointed out that due recognition must be given to the fact that Parliament had determined what is required for the protection of the public for sex offenders. The scheme set out in the present circular has not been the subject of democratic debate. Inasmuch as portions of the scheme appear to go beyond mere guidance, the scheme as a whole is flawed. That is not to say that many aspects of what the Circular seeks to achieve, might not be achieved by the Trusts or other agencies acting in individual cases in a case-sensitive way to achieve the protection of the interests of vulnerable children. Following a careful review of the terms of the circular, it may be possible to

formulate a set of guidance that would assist the Trusts and other agencies in the fulfilment of their duties and functions in this field in accordance with law.

[18] I consider that the appropriate relief to grant in the present case is as follows:

1. A declaration that the provisions of HSS Circular 3-96 confer no powers or duties on the Trust which must exercise its statutory powers and duties in accordance with law.
2. A declaration that, insofar as the Circular purports to confer any powers or duties on Trusts beyond the Trusts existing statutory and legal powers and duties, the Circular was ultra vires.
3. The declaration, insofar as the Trust purported to designate the applicant as a Schedule 1 offender within the terms of the Circular, the decision was of no legal effect.