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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

HA's (a minor) Application [2014] NIQB 115

IN THE MATTER OF AN APPLICATION BY HA (a minor) BY HIS MOTHER AND NEXT FRIEND FOR JUDICIAL REVIEW
AND IN THE MATTER OF A DECISION OF THE POLICE SERVICE OF NORTHERN IRELAND

Before: Morgan LCJ, Coghlin LJ and Gillen LJ

MORGAN LCJ (giving the judgment of the court)

[1] This is an application for judicial review in which the principal remedy sought is a declaration that the power to attach conditions to pre-charge bail under Article 48(3D) of the Police and Criminal Evidence (Northern Ireland) Order 1989 ("PACE") without automatic and prompt production before a judge is incompatible with Article 5(3) of the ECHR. Mr Scoffield QC appeared with Mr Toal for the applicant, Mr McGleenan QC and Mr Sands for the PSNI and Mr Coll for the Department of Justice. We are grateful to all counsel for their helpful oral and written submissions.

Background

[2] The applicant is a 16-year-old boy. He and his father were arrested on 2 January 2014 in respect of an allegation that each of them raped a 14-year-old girl in the family home and that the father had recorded the rape by his son with some kind of electronic recording device. The complainant alleged that the applicant's mother and grandmother were downstairs drinking when all of this occurred in about Halloween 2013. She also alleged that she had been raped by the applicant in December 2013 and that the applicant's father had sexually assaulted her on a number of other occasions when she visited the applicant's family home. Finally she alleged that the applicant's father had used the existence of the camera recording of

the rape to blackmail her to return to his address so that he could continue to inappropriately touch her.

[3] The applicant admitted in interview that he did have sex with the complainant on a number of occasions. He stated that on each occasion it had been with the consent of the complainant. Both parties were under the age of consent at the time. Both the applicant and his father denied any allegation of rape or of recording any sexual intercourse. At the end of the interviews the police concluded that there was insufficient evidence to charge either the applicant or his father. It was decided that further investigation of mobile phones, computers and other recording devices which had been seized from the applicant's home was required before deciding whether to bring any charges.

[4] The applicant and his father were released on police bail until 2 March 2014 subject to the following conditions:

a. No contact with the complainant or any witness in the case;
b. To reside at the applicant's family home;
c. No unsupervised contact with any person under 16 years of age unless approved by Social Services.

The investigating officer indicated that the third condition was regularly used in the case of allegations of sexual offending where the alleged injured party was a child and there was a risk of further offences. It did not constitute an absolute prohibition on contact with minors as there was a role for Social Services in making an assessment of risk. The police considered that the allegations were such that it was necessary to impose this condition to prevent the risk of further offences against minors.

[5] Social Services had been involved with the family. The applicant and his nine-year-old sister had been on the Child Protection Register for five years prior to the arrest. Because of concerns around suspected domestic violence, alcohol misuse and the lack of supervision of the applicant's sister a Supervision Order was made by Newtownards Family Proceedings Court in February 2013 in respect of both children for a period of 12 months.

[6] On 1 January 2014 police contacted local Social Services to advise them of the allegation made against the applicant and his father. A social worker attended at the police station on 2 January 2014 and informed the applicant's mother that because of the very serious allegations neither the applicant nor his father could remain in the family home with the applicant's sister. It was proposed that the applicant's sister should reside outside the family home on a voluntary basis but the parents did not consent.

[7] On 3 January 2014 Social Services applied for an Emergency Protection Order in the Family Proceedings Court and the daughter was taken into temporary foster care. On 15 January 2014 an Interim Care Order was made in respect of that child. On 27 January 2014 it was ordered that the daughter could return to the care of her mother at the family home on the basis that the applicant would be cared for by his father in alternative accommodation.

[8] The grounding affidavit alleged that the applicant was not allowed to have any contact with his sister as a result of the bail conditions. The social worker stated that arrangements were made for him to see her with his parents three times per week. He allegedly attended on an infrequent basis.

[9] In her grounding affidavit the applicant's mother stated that she was advised by Social Services that the bail conditions meant that the applicant was not allowed to attend school and that this lasted for six weeks. Thereafter he was allowed to attend between the hours of 9 and 12. The social worker said that she contacted the school principal on 6 January 2014 and he indicated that it would not be possible for the school to give a guarantee that the applicant would be supervised at all times during the school day. The principal agreed to consult his Board of Governors. He stated that the applicant would still be entitled to education through home tuition if the school was unable to facilitate him attending the school.

[10] According to the social worker the applicant had already missed a lot of school that year for other reasons and had not been a good attender in the past. A reduced timetable was put in place to begin on 21 January 2014 so as to allow him to attend certain classes but the applicant did not fully avail of them. The principal of the school indicated that at no time did the school prohibit the applicant from attending.

[11] At the time of his conditional release neither the applicant nor his solicitor objected to the conditions imposed. On 15 January 2014 his present solicitors took over conduct of this case and spoke to the investigating officer. It was pointed out that the applicant attended an all boys' school and suggested that he could return to education but the investigating officer replied, "How do we know he is gender specific". The applicant maintains that this demonstrated a mindset contrary to the presumption of innocence.

[12] On 27 January 2014 there was a further hearing before Newtownards Family Proceedings Court when it was indicated that it might be nine months before the forensic evidence connected to the criminal case would be complete. On 7 February 2014 a variation application was made in order to enable the applicant to attend his former school. Police indicated that they were content to accept that proposal on 11 February and that was confirmed by the Magistrates' Court on 13 February. On that occasion submissions were made to the District Judge that the bail conditions should be removed in their entirety because they constituted a violation of Article 8 ECHR.

Further submissions on this issue were made on 27 February 2014 and on 4 March 2014. The District Judge rejected the application concluding that there was no breach of Article 8. The applicant's solicitor then lodged an application with the High Court but received a phone call from the PSNI on 13 March, the day before the bail application was to be heard, to confirm that the applicant had been released pending report.

The statutory provisions

[13] Article 42 of PACE provides that a person arrested and detained at a police station must be released or brought before the court after 24 hours. In certain circumstances a Superintendent can extend the permissible period of detention to 36 hours. Article 38 (2) of PACE provides that, where a person is arrested and the custody officer concludes that there is insufficient evidence to charge, the custody officer may release that person either on bail or without bail. If the person is subsequently detained in connection with the same matter, the custody clock continues from where it was when the detained person was admitted to bail (see Connelly's Application [2011] NIQB 62). By virtue of Article 48 (1) of PACE a person released on bail is under a duty to appear either at a Magistrates' Court or report to the police station at a specified time. In the case of a person bailed to appear at a Magistrates' Court the period must be less than 28 days. There is no statutory limit on the bail period where the person is under a duty to report to the police station.

[14] The provisions dealing with bail conditions commence at Article 48 (3D):

> "(3D) He may be required to comply, before release on bail under Article 38(2)…., with such requirements as appear to the custody officer to be necessary to secure that-
>
> (a) he surrenders to custody;
>
> (b) he does not commit an offence while on bail; and
>
> (c) he does not interfere with witnesses or otherwise obstruct the course of justice, whether in relation to himself or any other person.
>
> (3E) Where a custody officer has granted bail he or another custody officer serving at the same police station may, at the request of the person to whom it is granted, vary the conditions of bail; and in doing so may impose conditions or more onerous conditions.

(3F) Where a custody officer grants bail to a person no conditions shall be imposed under paragraph …(3D) or (3E) unless it appears to the custody officer that it is necessary to do so for the purpose of preventing that person from-

(a) failing to surrender to custody;

(b) committing an offence while on bail; or

(c) interfering with witnesses or otherwise obstructing the course of justice, whether in relation to himself or any other person.

(3G) Paragraph (3F) also applies on any request to a custody officer under paragraph (3E) to vary the conditions of bail….

(4) A magistrates' court may, on an application by or on behalf of a person released on bail under Article 38(2)…, vary the conditions of bail."

The submissions of the parties

[15] The primary submission advanced by the applicant was that the failure to ensure automatic and prompt production to the judge after arrest and release on pre-charge bail was incompatible with Article 5 of the Convention. The relevant provisions of Article 5 are:

"Article 5

Right to liberty and security

1. 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…

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to

> prevent his committing an offence or fleeing after having done so…
>
> 3. Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial."

[16] Mr Scoffield submitted that the protection in Article 5 (3) ensures an obligation to secure automatic and prompt production before a judge in the case of an arrest or detention. He relied on the text of both Article 5 (1) (c) and 5 (3) and on the analysis of Article 5 by Cape and Edwards in "Police Bail without Charge: the Human Rights Implications" published in Volume 69 of the Cambridge Law Journal. A procedure for automatic and prompt production would provide an opportunity to test the legality of the arrest which otherwise in practical terms was only capable of challenge through action. Access to the Magistrates' Court under Article 48(4) of PACE only provided an opportunity to vary the bail conditions rather than an opportunity to release unconditionally.

[17] Secondly, Mr Scoffield submitted that there was an unlawful policy in that the condition that there should be no unsupervised contact with any person under 16 years of age unless approved by Social Services was routinely imposed where a person was suspected of having committed a sexual offence against a child. The evidence in relation to this was that the investigating officer said that the condition was regularly used in allegations of sexual offending where the alleged injured party was a child and there was a risk of further offences. The reply to the applicant's pre-action protocol letter stated that the condition had been used in other similar situations but had not impeded attendance at school.

[18] Thirdly, it was submitted that the use of the conditions was disproportionate in this case. Even if the removal of the applicant from the family home was a consequence of the Emergency Protection Order obtained by Social Services, bail conditions in relation to his contact with those under 16 affected his schooling and his social contact. The principal of the school had indicated that he had no difficulty with the boy attending school. The applicant submitted that the agreement to the variation to allow him to attend school unconditionally indicated that the police did not consider the condition necessary. Fourthly, it was submitted that the comment by the police officer about whether he was gender specific suggested a mindset which did not respect the presumption of innocence.

[19] Mr McGleenan submitted that the condition in relation to contact with minors was not an absolute prohibition but recognised that such contact would be managed

more effectively by Social Services. There was no evidence that such conditions were applied routinely and Detective Inspector Richard Graham specifically said that the condition was not applied unthinkingly. There was no blanket policy.

[20] The applicant had sought to take comfort from the remarks of the Court of Appeal in R v CK (a minor) [2009] NICA 17 which concerned the conviction on seven counts of serious sexual offences committed when the appellant was 12 years old. He was subject to a Sexual Offences Prevention Order which prevented him having or seeking to have any unsupervised contact with any child under the age of 18 years unless approved by Social Services. This court concluded that it would be extremely difficult to enforce the condition and might well prove to be an inhibition to progress given that the condition would remain in place for five years. The assessment that the condition in that case could be counter-productive did not undermine the imposition of the condition for a limited period in this case. The allegations in this case were serious and were made by the complainant who appeared to be credible. The condition was necessary.

[21] The applicant asserted that his sister had been removed from the family home as a result of the imposition of the bail condition. That was incorrect. Social Services would have become involved regardless of whatever bail conditions were set because of the nature and gravity of the allegation. The affidavit from the social worker indicated that such action would have been required in any event. The reason for the separation of the family was the making of the Emergency Protection Order by a competent court.

[22] The bail condition would not have prevented the applicant's attendance at school if it had been possible to provide supervision. It would have been open to the applicant at any stage to apply to the Magistrates' Court to vary the bail conditions but no such application was made until 6 February 2014, some 5 weeks after the imposition of the condition. Although it was accepted that the bail conditions engaged Article 8 ECHR, an appropriate balance was struck in this case given the competing rights of the applicant and his family. That balance was endorsed by both the Family Proceedings Court and the Youth Court.

[23] The remark by the investigating officer did not give rise to any violation of the presumption of innocence. DI Graham said in his affidavit that experience had demonstrated that the sexual behaviours of offenders are not always conservative. The observations of the investigating officer simply recognised the nature of the risk. PSNI supported the observations of the Department of Justice on the incompatibility issue.

[24] Mr Coll noted that the power to impose conditions on pre-charge bail was introduced in England and Wales by the Police and Justice Act 2006. In Northern Ireland the change was effected by amendment of Article 48 of PACE by the Criminal Justice (NI) Order 2008. The Northern Ireland Office, which had

responsibility for policing and justice matters at that time, considered that the power would increase public protection by providing for reasonably proportionate conditions, reduce court appearances caused by early charging and thereby improve the charging regime and reduce delay in the criminal justice system by ensuring better preparation of cases brought to the courts.

[25] Secondly, the release of the applicant on bail did not constitute a deprivation of liberty although it may have interfered with his freedom of movement. Article 5 of the Convention is concerned with deprivation of liberty. Conditions of bail which constitute a restriction of movement only do not engage the automatic and prompt review requirements of Article 5(3) ECHR.

[26] The distinction between detention and restriction of movement was also recognised in Connelly's Application [2011] NIQB 62 where it was held that release on police bail stopped the clock running in relation to the permissible detention period under PACE of a person who had been arrested and was being investigated in relation to an offence.

Consideration

[27] The distinction between deprivation of liberty and restrictions on liberty of movement was considered by the ECHR in Austin v United Kingdom [2012] ECHR 39692/09. That was a case in which a number of protesters were held for periods of up to 7 hours in order to enable police to prevent violence and widespread disorder associated with a demonstration. The distinction was recognized, *inter alia*, at paragraph 57.

> "Article 5 § 1 is not concerned with mere restrictions on liberty of movement, which are governed by Article 2 of Protocol No. 4. In order to determine whether someone has been "deprived of his liberty" within the meaning of Article 5 § 1, the starting-point must be his concrete situation and account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question. The difference between deprivation of and restriction upon liberty is one of degree or intensity, and not of nature or substance"

The Court went on, in agreement with the House of Lords, to conclude that the demonstrators had not been deprived of liberty within Article 5 (1).

[28] In this case it is accepted that the applicant was detained in a police station and interviewed consequent upon his arrest. It is also common case that upon his release on pre-charge bail he was no longer subject to deprivation of liberty although

he was subject to restriction of movement. The issue in this case is whether a person who is released without charge on conditions which restrict movement must be brought automatically and promptly before a court.

[29] In our view the answer to that question can be found by an examination of the case law of the ECHR. Brogan and others v United Kingdom [1988] ECHR 11209/84 was a case in which a number of people were detained under terrorism legislation for periods of between four and six days before being released without charge. The issue was whether they ought to have been brought before a court promptly. The court held that a period of 4 days and 6 hours, the shortest of the periods at issue, fell outside the "promptness" requirement of Article 5(3). The obligation arising from Article 5(3) was captured in paragraph 58.

> "The fact that a detained person is not charged or brought before a court does not in itself amount to a violation of the first part of Article 5 para. 3 (art. 5-3). No violation of Article 5 para. 3 (art. 5-3) can arise if the arrested person is released "promptly" before any judicial control of his detention would have been feasible"

[30] This passage plainly recognises that release prior to the incidence of the requirement for judicial control is consistent with the objective of the arrest provisions in Article 5(1)(c) taken together with the supervisory obligation in Article 5(3). The purpose of the Article 5(3) supervisory jurisdiction was addressed in Aquilana v Malta [1999] ECHR 25642/94. That was a case in which the detained person was brought before a court which did not have jurisdiction to release and which did not have a power to automatically review the circumstances of detention. The Court found a breach of Article 5. The purpose of Article 5(3) was considered at paragraph 47.

> "It is essentially the object of Article 5 § 3, which forms a whole with paragraph 1 (c), to require provisional release once detention ceases to be reasonable. The fact that an arrested person had access to a judicial authority is not sufficient to constitute compliance with the opening part of Article 5 § 3. This provision enjoins the judicial officer before whom the arrested person appears to review the circumstances militating for or against detention, to decide by reference to legal criteria whether there are reasons to justify detention, and to order release if there are no such reasons"

[31] Article 5(3) was again considered in McKay v UK (2007) 44 EHRR 41. That was a case in which the applicant was charged with a scheduled offence of robbery. He appeared before a Magistrates' Court the next day. It was accepted that the Magistrates' Court had jurisdiction to review the lawfulness of the detention and the existence of reasonable suspicion and was capable of releasing the detained person if not satisfied in respect of those matters. Because the offence was a scheduled offence, the issue of bail had to be dealt with by the High Court on the application of the detained person.

[32] The ECHR held that the jurisdiction of the Magistrate provided satisfactory guarantees about abuse of power by the authorities and ensured compliance with Article 5(3). That jurisdiction had to be exercised automatically and be prompt. Release pending trial was a distinct and separate matter. No element of possible abuse or arbitrariness arose from the fact that the application was dependent on the detained person's application (see paragraphs 48 and 49). Those paragraphs recognise the separate and distinct obligations that arise from the two sentences in Article 5(3).

[33] We do not consider that the use of the disjunctive is significant. We note that the French text uses both the conjunctive and the disjunctive in Article 5. In any event, Mr Scoffield accepted that where the detained person was released unconditionally at an early stage there was no requirement for automatic and prompt production. He submitted that the distinction in the case of a person released on conditions was the continuation of the effect of the arrest. We do not accept that submission. In both cases there is no continuing deprivation of liberty and that is why there is no requirement for automatic and prompt production to a court. In both cases the remedy for any complaint about the arrest is by action.

[34] We consider that the case law makes it clear that the first sentence in Article 5(3) imposes an obligation on the State to ensure an automatic and prompt review of the lawfulness of the continued detention of a person held in custody and the existence of reasonable suspicion. That obligation does not arise in the case of someone who is not detained. We further consider that there is no requirement for an automatic review of bail conditions imposed on a person who has been released although these should be dealt with promptly.

[35] We can deal with the remaining issues fairly briefly. We do not accept that the evidence indicates any policy of imposing the impugned condition on a routine basis. The height of the evidence is that the condition is imposed where it is considered appropriate. We accept that the applicant is entitled to pursue a complaint against the police for breach of Article 8 but we do not consider that we can resolve that complaint in these proceedings. There are clear factual disputes and the applicant invites us to draw inferences against the assertion by police that the condition was necessary which the relevant officers should have an opportunity to answer in the course of an action. Finally, we accept that the remark of the

investigating officer was directed to risk rather than a violation of the presumption of innocence.

Conclusion

[36] For the reasons given the application is dismissed.