

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

Delivered:	17/02/09
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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

Haire's Application [2009] NIQB 12

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW BY
PAUL HAIRE
AND IN THE MATTER OF A PRISON ADJUDICATION CONDUCTED
BY THE GOVERNOR AT HMP MAGHABERRY ON 16 JULY 2008
AND IN THE MATTER OF DECISIONS OF THE NORTHERN IRELAND
PRISON SERVICE TAKEN ON 16 JULY 2008 AND 15 SEPTEMBER 2008
IN RESPECT OF THE STATUS OF PAUL HAIRE ON THE PRE-RELEASE
SCHEME**

MORGAN J

Background

[1] The applicant is a life sentence prisoner who received an automatic life sentence in England on 8 February 2001 when convicted on three counts of rape. His tariff period was three years which expired on 8 February 2003. He was transferred to HMP Maghaberry on 4 May 2001. In 2004 he was transferred to the Pre-Release Scheme (PRS) but removed in November 2004 because of differences with a staff member. On 6 June 2005 he was again transferred to the PRS and obtained employment which he held until July 2008. On 26 September 2006 his case was considered at a Parole Board hearing and it was decided that it should be reviewed approximately 1 year later. That review did not take place apparently because of delays in the completion of the Community Sex Offender Treatment Programme. On 2 January 2007 he was admitted to Phase 3 of the PRS which meant that he was living and working full-time in the community, reporting fortnightly to the Prisoner Assessment Unit (PAU).

[2] Prisoners admitted to the PRS enter into a contract which is designed to regulate their behaviour during the period of temporary release. A substantial part of that contract is set out in the "Terms and Conditions of

Temporary Release from Prison on the Pre-Release Scheme - under Rule 27 of the Prisons and Young Offenders Centre Rules (NI) 1995". There are 8 general grounds dealing with reporting, sickness and staying within the jurisdiction. In the applicant's case there were 10 temporary release conditions dealing with residence, probation, reporting, alcohol, the need to retain enhanced status, additional work, testing, contact with victims and their families, the making of a daily diary and the need to remain in Northern Ireland. There were then separate requirements in relation to public conduct, banking and correspondence. The contract contained a warning in bold type.

"WARNING

You are reminded that any contravention of any of the conditions contained in this undertaking will result in your immediate recall to custody and will render you liable to the referral of a disciplinary charge under Ruled 35 (11) of the Prison and Young Offenders Centre Rules (Northern Ireland) 1995"

[3] By letter dated 26 March 2007 the applicant advised the Lifer Management Unit (LMU) that he had bought a car for his sister who was responsible for transporting his sick mother for medical treatment and he also sought permission to drive. On 25 April 2007 he was advised by the Governor that he was only permitted to drive his motorbike. On 27 April 2007 the applicant contacted the PAU in an agitated state because he was unhappy that he had been denied permission to drive the car. On 14 May 2007 he informed PAU staff that he had sold the car. On 16 November 2007 his solicitors wrote to the LMU contending that a vehicle played no part in his offending and that no such prohibition was directed in the Parole Board hearing of 26 September 2006. In a reply of 19 November 2007 the LMU asked the applicant's solicitors to set out the precise case being made by them. On 27 November 2007 the applicant's solicitors wrote to say that the clinical psychologist and probation officer had confirmed that they had no problem with the applicant having access to a car.

[4] On 4 December 2007 a multidisciplinary case conference attended by the clinical psychologist and probation officer agreed that the applicant would not be permitted to use a car at this stage but that the issue would be considered at the next MASRAM meeting. The case conference concluded that if permission were granted the following stipulations would be required:

- o Car to be used to and from work
- o Car to be used to take his mother to and from hospital
- o Car must be taxed/insured and not to be purchased on hire purchase
- o Car for his exclusive use to allow mileage to be monitored

[5] The MASRAM meeting took place on 4 March 2008. The minutes do not record any consideration of the applicant's request to drive a car. The

probation officer was designated as the person who should inform the applicant of his category of risk and the reasons for it. The applicant maintains that some days later the probation officer advised him that MASRAM had approved him being permitted to drive a car on conditions. It appears that this advice was changed approximately 1 week later and on 31 March 2008 the applicant's solicitors wrote to the LMU setting out the position and seeking clarification.

“We have been contacted by our client who instructs that MASRAM met on Tuesday 4 March 2008 and he was advised by his probation officer on 7 March 2008 that at the meeting on Tuesday it was decided and determined by MASRAM that the applicant was indeed allowed to drive a car provided that he stuck to stringent conditions such as recording mileage, recording where he went in the car and why and that he was the only one allowed to drive the car. He instructs he received a further visit from his probation officer on 13 March accompanied by the chief inspector of police relating to MASRAM and that he was advised on this occasion that a senior figure in the probation board of Northern Ireland advised that it was not within MASRAM’s jurisdiction or terms of reference to make the decision about the car but that it was up to the Northern Ireland Prison Service by way of the LMU.”

The LMU responded on 8 April 2008 stating that MASRAM had not recommended that the applicant could have a car and that if the applicant had been so informed he was unintentionally misled. The LMU indicated that it was content that the applicant should not be allowed to drive a car and

“as such it will remain a condition which may be reviewed periodically. Your client must be made aware that should he buy a car he will not be aligned under current circumstances to drive it.”

The applicant did in fact purchase a second-hand car in late March or early April 2008.

[6] The applicant attended a case conference on 28 May 2008 which considered the issue of his driving/owning a car. The applicant stated that he would like use of a car to take his mother out to shop and to visit family members. The applicant then withdrew from the meeting and the issue discussed. It was noted that the applicant still had to complete the last module of the Community Sex Offenders Treatment Programme and there

was concern as to how the applicant was meeting his sexual needs. The conference concluded that these issues should be addressed prior to a determination of his permission to drive. He was so advised that the end of the meeting.

[7] On 10 July 2008 it came to the attention of the prison authorities that the applicant had driven to work in a car. When interviewed the applicant initially denied that he had been driving but then admitted that he had been doing so in a car belonging to his sister which he had insured for himself approximately 2 months beforehand. He said that he needed it to transport his mother and to get heavier household items of shopping on his way home from work. In an interview the following day he said that he was fully aware that he was not allowed to drive a car. He agreed that he had done so. He said that the car belonged to his sister but was only insured in his name. At the end of this interview the Senior Officer in PAU advised the applicant that he had breached his Terms and Conditions and would be returning to prison. The applicant was advised that the breach had destroyed the trust that the authorities had in him. By letter of 16 July 2008 the LMU wrote to the applicant suspending him from the PAU because he had driven a motor vehicle when he knew that he was not allowed to do so.

[8] On his return to prison a charge was laid against the applicant at 1820 on 11 July 2008 that he had failed to comply with a condition of his temporary release contrary to Rule 38 (11) of the Prison and Young Offenders Centre (Northern Ireland) Rules 1995. The charge relied on the admission made by the applicant earlier that day. In 2008 12 July fell on a Saturday, 14 July was a public holiday and 15 July a privilege day. The adjudication took place on 16 July. The applicant stated that he fully understood the charge, had been given time to prepare an answer and did not want to consult legal representative. He stated that he intended to plead guilty and accepted that the evidence of the Senior Officer was correct. A penalty of 14 days loss of evening association and privileges and three-day cellular confinement was imposed.

[9] On 11 August 2008 the applicant's solicitors wrote to the LMU contending that the refusal of permission to drive was not a term or condition on which the applicant was released, that in any event it was unjustifiable and that permission to drive did not involve any risk. On 15 September 2008 a case conference considered the issue of risk presented by purchasing a car and the consequences flowing from that. The probation officer agreed that he had told the applicant after the MASRAM meeting on 4 March 2008 that he would be permitted to drive subject to conditions. However subsequently on 13 March 2008 he corrected his error and advised the applicant that he had not been given permission to drive or buy a car. The conference felt that there was a degree of planning in purchasing and insuring the car and blatant lying in covering up the purchase which had in fact been made by the applicant. The psychologist considered that this was offence parallel behaviour. The

conference noted that the applicant's risk of general offending had increased from moderate to high but his risk of violent/sexual re-offending remained the same. The applicant still had to complete the final module of the Community Sex Offenders Treatment Programme and the "Men Overcoming Domestic Violence Programme" neither of which were available in prison. It was agreed that the applicant should move to the PAU on 22 September 2008 under Phase 2, which meant that he should work in the community but reside in the prison, subject to specific conditions.

"PAU staff to liaise with the applicant's employer and explain circumstances of his return to Maghaberry and current position.

Permitted to attend work 5/6/7 days a week, permitted five hours out of the unit on a Sunday to travel to visit family.

He will have to provide proof of cancellation of car insurance.

Use bank account, keep all ATM receipts and show PAU staff receipts for anything over five pounds.

Not allowed to drive any vehicle except motor bike and digger.

Continue with Community Sex Offenders Treatment Programme.

Continue to work with Dr Pollock"

The Application

[10] The applicant complains about 4 decisions.

- o The adjudication decision of the governor of HMP Maghaberry dated 16 July 2008;
- o The decision of the Northern Ireland Prison Service dated 16 July 2008 removing the applicant from stage three of the PRS;
- o The decision dated 15 September 2008 preventing him from returning to stage three of the PRS; and
- o The decision of the same date preventing the applicant from driving a motor car and requiring him to cancel his motor insurance.

[11] Dealing with the adjudication decision Mr Hutton for the applicant makes two points. First he says that Rule 36(2) of the 1995 Rules requires that, save in exceptional circumstances, the governor shall first inquire into any charge not later than the next day after the laying of the charge unless that day is a Saturday, Sunday or public holiday. The applicant says that 14 July was a public holiday but 15 July was not. Secondly he says that the charge under Rule 38 (11) was misconceived as the prohibition on driving a motor vehicle was never a condition of release under Rule 27.

[12] In relation to the decision to remove the applicant from stage three of the PRS the applicant contends that the decision maker erroneously relied on the fact that there had been a breach of the Terms and Conditions of release. The applicant invites the court to conclude that the MASRAM meeting of 4 March 2008 approved of the applicant driving a motor vehicle. The removal from Phase 3 may affect the applicant's position before the Parole Board at his hearing later this month. The applicant also relies on the submission in relation to the decision of the case conference on 15 September 2008 not to return him to Phase 3 and not to permit him to drive.

[13] For the respondent Mr McGleenan asserts that the adjudication was within jurisdiction in the circumstances. He contends that Rule 38 (11) applied because either the condition became express on 8 April 2008 or should be implied in any event. He also points out that the applicant admitted the charge and indicated his intention to plead to it. The decision to remove him from Phase 3 was within the broad discretion available to the Northern Ireland Prison Service under Rule 27 and reflected the increased level of risk, the conduct of the applicant and the view that this was offence parallel behaviour. The decision to prohibit the use of the car does not inhibit the applicant engaging in employment or having a mode of transport. The applicant still represents a risk in the community which remains untested and it is submitted that he had used a car in previous offending.

Conclusion

[14] I begin with the adjudication on 16 July 2008. Rule 36(2) of the 1995 Rules place a duty on the governor to begin the enquiry timeously.

“36. -

(2) The governor shall first inquire into any charge not later, save in exceptional circumstances, than the next day after the laying of the charge unless that day is a Saturday, Sunday or public holiday.”

It is common case that 12 and 13 July fell on Saturday and Sunday in 2008, that 14 July was a public holiday and I accept that 15 July was a privilege day. Rule 4 (1) of the 1995 Rules defines “public holiday” as including privilege days. In those circumstances the commencement of the adjudication on 16 July 2008 was in accordance with Rule 36(2).

[15] The charge laid against the applicant was that he failed to comply with a condition of his temporary release contrary to Rule 38 (11). There is no real dispute in this application that the applicant drove a motor car when he knew that he was not permitted to do so but the applicant submits that this prohibition was not a condition of his temporary release and that the charge

should have been laid under Rule 38 (22) which makes it an offence against prison discipline to disobey a lawful order. There is no prescribed form for the making of conditions for temporary release under Rule 27 which provides:

“27.- (1) A prisoner to whom this rule applies may be temporarily released for any period or periods and subject to any conditions.

(2) A prisoner may be temporarily released under this rule for any special purpose or to enable him to have medical treatment. to engage in employment, to receive instruction or training or to assist him in his transition from prison to outside life.

(3) A prisoner released under this rule may be recalled to prison at any time whether the conditions of his release have been broken or not.”

The Northern Ireland Prison Service had, however, established a document entitled "Life Sentenced Pre-Release Scheme Contract" which introduced the prisoner to the work of the PAU and set out the commitment that the PAU made to the prisoner and the commitment that the prisoner was expected to make to the PAU. That included a commitment that the prisoner would be honest in all of his dealings with PAU staff. At the end of that section of the "contract" there was a declaration in bold type

Declaration

Please reflect on these commitments before accepting this contract. The Prisoner Assessment Unit has only one purpose, and that is to provide you with a challenging situation in which you can best prepare for your eventual release and returned to society.

The next page was entitled "Terms and Conditions of Temporary Release from Prison on the Pre-Release Scheme -- under Rule 27 of the Prisons and Young Offender Centre Rules (Northern Ireland) 1995". It set out 8 Terms and 10 Special Temporary Release Conditions, 6 Prohibitions and 3 matters in relation to paid employment. It is common case that none of the eight terms or 10 special temporary release conditions included any prohibition on driving a motor vehicle.

[16] The fact that the condition is not within this document does not, of course, determine the issue. The respondent relies on the history of the request of permission and its refusal to make it clear that as a matter of fact that prohibition was a condition on which the applicant was released under Rule 27. In particular the respondent relies on the letter of 8 April 2008 which specifically advised the applicant "that he should not be allowed to drive a car and as such it will remain a condition which may be reviewed periodically".

It is clear that Rule 27 gives Northern Ireland Prison Service the power to impose conditions at any time if appropriate and the effect of this letter in my view was to achieve the imposition of that condition from that date. That does not end the matter, however. On 12 May 2008 the applicant and the Northern Ireland Prison Service entered into a further contract which was duly signed in the old form by both the prisoner and the PAU. It set out the general and special terms and conditions of release and again did not include any prohibition on driving. I consider that these contracts were important documents for both the applicant and the Prison Service providing clarity in relation to the commitment and obligations expected of each. For the applicant the consequence of breach was clearly set out and exposed the applicant to a charge under a particular rule of prison discipline. If the Northern Ireland Prison Service intended to make the prohibition on driving a condition of the applicant's temporary release it could have done so in the May contract. The fact that it may have omitted to do this by way of oversight does not in my view provide any basis for concluding that it should be introduced as a condition by way of implication, earlier correspondence or otherwise. This contract was the operative contract at the date of the detection. I accept the applicant's submission that the prohibition on driving was not a condition of his temporary release and that the particular charge that he faced was without foundation. I also accept, however, that the applicant knew that he was not permitted to drive and had been so told on many occasions and that his acceptance of responsibility at the adjudication reflected the fact that he knew that he had failed to obey a lawful order.

[17] The next challenge is to the decision made by the Lifer Management Unit to suspend the applicant from the PAU. The decision is contained in a letter given to the applicant on 16 July 2008.

"I am writing to advise you that I am suspending you from the PAU. This follows you driving a motor vehicle when you knew you were not allowed to do so.

A meeting will be arranged of the MD team to consider in the arising circumstances how your case might best be progressed. Please provide any written representations which you would like considered at the meeting to the LMU by 11 August 2008."

The decision was challenged first on the basis that the decision maker took into account an erroneous factor, namely that the applicant had breached his terms and conditions of release. Secondly it is contended that the decision maker did not take into account the fact that the applicant's driving of a motor car cause no appreciable risk to the public. I do not consider that the applicant can succeed on either ground. It is clear from the terms of the letter

that communicated the decision to the applicant that the reason for the suspension flowed from the fact that he had driven a motor vehicle when he knew that he was not allowed to do so. Having regard to the detailed background in which the applicant had applied for permission to drive and been refused a number of occasions the deliberate decision by the applicant to insure himself for a motor vehicle and drive it constituted a breach of trust on his part which the LMU was entitled to treat as a serious matter. Indeed the applicant himself in a written representation filed on or about 8 August 2008 recognised that this was a serious matter. Any serious breach of trust was bound to impact on the decision as to whether or not it was safe to permit the applicant to continue to work and reside in the community and in the circumstances there may have been little other choice available to the LMU.

[18] The applicant also challenges 2 aspects of the case conference decision made on 15 September 2008. That conference was called to review the applicant's return to HMP Maghberry. The conference noted that there was a degree of planning in purchasing and insuring the car and blatant lying in covering up the purchase. It is also noteworthy that the deception involved an attempt by his mother to lie on his behalf. His initial admission in relation to the car was that it was purchased by his sister although insured for him only. At a later stage he admitted that he in fact had purchased the car although he said that his sister intended to give him the money for it. It is clear from the papers that the nature of this applicant's offending was to exercise control and dominion over his victims by deception and lying. That appears to be reflected in the comment of the psychologist that this incident would be seen as offence parallel behaviour in that it is similar to that of the index offences.

[19] The conference also noted that the applicant was working on the sixth and final module of the Community Sector Offenders Treatment Programme and had to complete the Men Overcoming Domestic Violence Programme. His general re-offending score had increased from moderate to high although his violent/sexual re-offending score remained the same. The papers also indicate that there remained a continuing concern as to how the issue of sexual arousal and meeting sexual needs had been addressed and in particular there was a concern as to whether the applicant was being open and honest. In concluding that the applicant should be returned to Phase 2 of the PAU the conference recognised the need for the applicant to be given an opportunity within the community in relation to the outstanding programmes while balancing the continuing risk in relation to sexual/violent offending and the heightened risk in relation to general re-offending. I do not consider that any criticism can be made of the approach or the outcome.

[20] The final issue concerns the decision to impose a condition at the meeting on 15 September 2008 that the applicant was not allowed to drive a vehicle except a motor bike or digger and to require him to provide proof of

cancellation of his car insurance. It is important to understand the context. Access to a motor vehicle would provide the applicant with increased social mobility. When access to a motor vehicle was considered in December 2007 the conditions suggested were clearly designed to ensure that that was close monitoring of the use to which the vehicle was put. That reflected a concern about the way in which the vehicle might be used within a social context. The case conference of May 2008 demonstrated that there was a concern about openness and honesty in relation to sexual needs and arousal and the discovery of this serious breach of trust was a further issue impinging directly on the same issues of openness and honesty. The note of the meeting of 15 September 2008 does not suggest any reliance by the conference on the suggestion that the use of the vehicle was a reflection of past criminal activity. That argument was advanced by the respondent in the course of the submissions. I am far from satisfied that the incident described in the victim's statement was the basis for any of the convictions of the applicant having regard to the location at which the incidents were charged but in any event it does not seem to me that this played any part in the decision-making. Access to a motor vehicle was an entirely proper matter for the case conference to consider having regard to its responsibility to assess the extent to which the applicant should have extended social mobility. There is no basis for the suggestion that because there was no evidence of offence related behaviour in a motor vehicle the conference was in any sense misguided in considering the question of access to it. The decision on the car reflected entirely appropriate concerns about unsupervised social mobility and I reject this challenge.

[21] Having regard to the fact that the applicant brought the adjudication upon himself by his conduct, that he pleaded guilty to it and accepted that he had been guilty of serious misconduct I have considered whether as a matter of discretion I should refuse him relief in relation to the adjudication ground which I have found made out. In light of the fact that he has an imminent hearing before the Parole Board I consider that I should quash the finding on adjudication lest the fact that he has an adjudication against him on such a specific charge should adversely affect the outcome. Accordingly the finding on adjudication should be expunged from his record.