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

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**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND
QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)**

**IN THE MATTER OF AN APPLICATION BY PATRICK STEWART FOR
JUDICIAL REVIEW**

Before Kerr LCJ, Campbell LJ and Higgins LJ

KERR LCJ

Introduction

[1] The applicant seeks judicial review of four linked decisions. The first of these is that of the Secretary of State, imposing a licence condition on the applicant's release under article 26 of the Criminal Justice (Northern Ireland) Order 1996 that he reside in accommodation approved by the Probation Board of Northern Ireland (PBNI). Secondly, the applicant challenges the decision of PBNI either to fail to make available accommodation to the applicant or to approve existing accommodation. The applicant also challenges PBNI's decision to prosecute the applicant for an offence under article 27 of the 1996 Order 1996 for allegedly failing to comply with the licence condition. Finally, he challenges the decision of a resident magistrate to convict him of that charge.

Background

[2] The applicant Patrick Stewart, who is now aged 40 was convicted on his plea of guilty at Londonderry Crown Court on 4 June 2001 by His Honour Judge Burgess, the Recorder of Londonderry on two counts of grievous bodily harm with intent contrary to Section 18 of the Offences Against the Person Act 1861, two counts of unlawful imprisonment, one count of indecent assault on a female and one count of burglary and theft.

[3] The offences had been committed by the applicant on 9 June 2000 when he forced entry to the home of an elderly couple, who were both aged 82 years, beat them with a poker, tied them up, masturbated in front of both of them, used the female elderly victim's sleeve to wipe himself and then forced her to touch his penis.

[4] He was sentenced initially to a custody probation order made under article 24 of the 1996 Order, comprising eleven years imprisonment followed by two years probation. Having served 50% of his sentence, the applicant was due to be released from custody on 15 December 2005. On an application by the prosecution on 16 December 2005, however, the Crown Court, revoked the custody probation order, re-sentenced the applicant to 13 years imprisonment and made an order under Article 26 of the 1996 Order, thereby ensuring that the applicant would be released from prison on licence and subject to the conditions imposed by the Secretary of State. Effectively the applicant was required to serve a further 12 months in custody. He became eligible for release on 15 December 2006.

[5] The Secretary of State had imposed a condition upon his release on licence that he reside in accommodation approved by his probation officer; no such accommodation was available for him. He was therefore arrested upon his release and convicted before Londonderry Magistrates' Court on 15 December 2006 for breach of licence conditions under article 27 of the Order. The court suspended his licence for 6 months and ordered that he remain in custody for an effective period of three months. He became entitled again to release under the normal remission rules on 15 March 2007.

[6] On 14 March 2007 the Secretary of State served the applicant with the licence under which he would be released. Once more this licence required the applicant to reside in accommodation approved by his probation officer. Despite extensive efforts by the Probation Board to find suitable accommodation for the applicant both in Northern Ireland and in England, no facility was willing to offer him a place because he had been diagnosed as suffering from a severe personality disorder and there was a high risk that he would sexually assault adults of both genders.

[7] On his release from prison on the 15 March he was collected by probation staff and brought to their office in Belfast. The Probation Board issued a complaint before Belfast Magistrates court; the court issued a warrant for his arrest on the 15th March and the applicant was arrested. On the 16 March a resident magistrate convicted the applicant of breach of licence conditions as he was not residing in probation approved accommodation. The resident magistrate suspended his release on licence for a period of a further six months (the

maximum permitted under the legislation) and he was recalled to prison. He is eligible for release on the 15 June 2007 but this release will again be subject to licence. Happily, a place has now been found in England and the applicant was [due to be] released on 11 June on condition that he resides there.

The relevant statutory conditions

[8] The relevant legislative provisions are articles 26 and 27 of the Criminal Justice (Northern Ireland) Order 1996. They provide: -

“Article 26 Release on licence of sexual offenders

(1) Where, in the case of an offender who has been sentenced to imprisonment or ordered to be detained in the Young Offenders’ Centre -

(a) The whole or any part of his sentence or order for detention is imposed for a sexual offence, and

(b) The court by which he was sentenced or ordered to be detained for that offence having regard to -

(i) the need to protect the public from serious harm from him,

(ii) the desirability of preventing the commission by him of further offences and of securing his rehabilitation ordered that this Article shall apply,

instead of being granted remission of his sentence for order for detention under Prison Rules the offender shall, on the day on which he might have been discharged if the remission had been granted, be released on licence under the provisions of this Article.

(2) An offender released on licence under this Article shall be under the supervision of a probation officer appointed for or assigned to the Petty Sessions District within which the offender resides until the date on which he would (but for his release) have

served the whole of his sentence or order for detention.

(3) An offender released on licence under this Article shall comply with such conditions determined by the Secretary of State as may be specified in the licence.

(4) An offender released on licence under this Article shall be given a notice form the Secretary of State before any alteration in then conditions specified in the licence comes into effect.

(5) The Secretary of State may make rules for regulation the supervision of sex offenders under this Article.

Article 27 Breach of Licence Conditions

(1) If at any time while an offender is released on licence under Article 26 it appears on complaint to a Justice of the Peace that the offender has failed to comply with any of the conditions specified in the licence, the justice may -

(a) Issue a summons requiring the offender to appear at the place and time specified in it; or

(b) If the complaint is in writing and on oath, issue a warrant for his arrest.

(2) Any summons or warrant issued under paragraph (1) shall direct the offender to appear or to be brought before a court of summary jurisdiction acting for the Petty Sessions District in which he resides.

(3) If it is proved to the satisfaction of the court of summary jurisdiction before which an offender released on licence under Article 26 appears or is brought under paragraph (2) that he failed without reasonable excuse to comply with any of the conditions specified in the licence, the court may

(a) Impose on him a fine not exceeding £1,000; or

(b) Suspend the licence for a period not exceeding six months and order him to be recalled to prison or as the case may be a Young Offenders Centre for the period of the suspension.

(4) On the suspension of the licence of an offender under paragraph 3(b) he shall be liable to be detained in pursuance of his sentence or order for detention and if at large shall be deemed to be unlawfully at large."

The purpose of article 26

[9] It is clear that the overriding purpose of article 26 is to control the conditions under which a sex offender is released into the community with two particular, related objectives in mind. The first of these is the protection of the public from serious harm and the second is to prevent the released prisoner from committing further offences. Although these are the objectives that the provision is designed to secure, the central theme of the article is the *release* of the prisoner under controlled conditions and it was accepted by Mr McGleenan (who appeared on behalf of the Probation Board and the Secretary of State) that this was its essential function.

[10] On behalf of the applicant Mr Larkin QC submitted that this was not the purpose to which article 26 had been put in this instance. On the contrary, he said, the Secretary of State and the Probation Board had used the provisions of articles 26 and 27 to secure the continued incarceration of the applicant by imposing a requirement that was incapable of fulfilment. The Probation Board devised the condition for the express purpose of founding a prosecution as a means of ensuring that the applicant was not released and the Secretary of State was complicit in that arrangement.

The conviction of the applicant under article 27

[11] Article 27 is contravened if a released prisoner fails *without reasonable excuse* to comply with a requirement imposed as a condition of his release under article 26. This appears to us to contemplate two things. Firstly, the prisoner must have the opportunity to comply with the condition. Secondly, there must be no reasonable explanation for failing to avail of that opportunity.

[12] For the resident magistrate Mr McAlister argued that absence of 'reasonable excuse' in this context could include the offending behaviour which

led to the need to impose a condition that, in the event, could not be fulfilled. He suggested that the applicant's personality disorder (which gave rise to the need for close monitoring of him on release) constituted an absence of reasonable excuse in this context. We do not accept that argument. In the first place, it has not been suggested that the applicant has any control over his disorder of mind. He cannot be faulted for something over which he has no power. If he cannot control it, he cannot be said to have acted without reasonable excuse in allowing it to precipitate the condition. Secondly, the lack of reasonable excuse must have a direct connection with the failure to comply with the condition, rather than the reason for its imposition.

Conclusions

[13] It is not difficult to accept that the Probation Board acted with the best of intentions in preventing the applicant's release from prison. They were confronted with a seemingly impossible dilemma. The applicant's personality disorder is acute and the risk that he will commit serious offences if released unconditionally is both obvious and substantial. We accept that the Board made appropriate and valiant efforts to obtain accommodation for the applicant where suitable monitoring of his behaviour could take place.

[14] We are of the opinion that the attachment of a condition on licensed release which cannot be fulfilled is not *per se* in contravention of article 26. Provided the Board and the Secretary of State are conscientiously convinced that such a condition is required to ensure that the public are protected from serious harm, the incidental consideration that it cannot be carried out will not invalidate its imposition. Although Mr Larkin argued strongly that the reason for imposing the condition in this instance was to ensure that the applicant's release from prison was prevented, we cannot be sufficiently confident that this was the sole purpose of the relevant authorities in making this a requirement of release. There is no question but that the applicant will require close supervision on his release and we cannot see how that can be achieved unless he is required to live in accommodation which will allow that to take place.

[15] It appears to us, however, that the decision to prosecute the applicant was taken for the exclusive reason of ensuring that he was not released from custody and this is unquestionably a purpose that is outwith articles 26 and 27. As we have said, the scheme of these articles is to secure the release of prisoners with suitably devised conditions to ensure that the public is not put at risk of serious harm and that further offending by the released prisoner is prevented. Here, the Board had the applicant prosecuted because this was the only way in which his release could be avoided. The statutory powers were used not to secure release but to prevent it. The decision to prosecute therefore contravenes the

fundamental principle that statutory powers should be used to promote the policy and objects of the legislation – see *Padfield v Minister of Agriculture* [1968] 2 WLR 924. We will therefore make a declaration that the decision to prosecute was unlawful. We do not consider that it is now necessary to make an order for certiorari since the applicant has now been released and, for reasons that we will now give, we intend to quash his conviction for breach of article 27.

[16] The applicant was not given an opportunity to comply with the article 26 condition. It was suggested that, even if the Probation Board could not find accommodation that it was prepared to approve, it was incumbent on him to make efforts to find such a place. This is, in our view, unrealistic and, in any event, does not reflect the way in which the affair was conducted by the Board. We are satisfied that, by the time that the applicant's release was imminent, the Probation Board had determined that it was not going to approve any accommodation that might be suggested for the applicant and that he should remain in custody. An attempt was made to secure a warrant for his arrest under article 27 even before he was released. When that was unsuccessful, an artificial release was contrived but he remained effectively within the control of the Probation Board throughout the time that he was discharged from prison until he was brought before the magistrates' court. He was at all times willing to reside at any address stipulated by the Board. He was never given the chance to do so.

[17] We are moreover satisfied that the magistrate was in error in concluding that the applicant had failed to comply with the condition without reasonable excuse. It is, in our judgment, incontrovertible that where someone is unable, by force of circumstances, to comply with a condition, he has a reasonable excuse for not doing so. He was at all times willing to comply with the condition. He did not comply because he simply could not. That constitutes a reasonable excuse. We will therefore make an order of certiorari quashing his conviction for breach of article 27.

Final observations

[18] We are satisfied that at all times the Probation Board and the magistrate were anxious to ensure that the applicant was not released because of the undoubted risk that he posed. Their objective was, to that extent, entirely laudable. The difficulty that this case has illustrated was that there was simply no satisfactory means of lawfully achieving that desirable objective. It seems to us that the government will want to give urgent consideration to the need to make suitable provision to correct the present position so that the need to protect the public by the imposition of suitable precautionary conditions where prisoners are released on licence can be fulfilled.