

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

JR 70's Application [2014] NIQB 5

IN THE MATTER OF AN APPLICATION BY JR 70 FOR JUDICIAL REVIEW

STEPHENS J

**Introduction**

[1] In these proceedings the applicant challenges the decisions of the Northern Ireland Prison Service ("the Prison Service") declining to place the applicant, a prisoner and a convicted sex offender, on a Sex Offenders' Treatment Programme ("SOTP") whilst in custody. There are only two types of SOTP available for prisoners in custody and they are a rolling SOTP or a core SOTP. The grounds on which the applicant relies are set out in his Order 53 statement and fall under two headings:-

- (a) The Northern Ireland Prison Service by failing to provide the necessary access to SOTP has failed to act in accordance with Rule 65 of the Prison and Young Offenders' Centre Rules (Northern Ireland) 1995.
- (b) The Northern Ireland Prison Service has acted incompatibly with the applicant's rights under Article 8 ECHR.

[2] I anonymise this judgment to protect the identity of the applicant's victim who was the complainant in the criminal proceedings and also to protect any children involved. Nothing should be published which would identify the applicant, the complainant, the children or any member of their extended family.

[3] Ms Quinlivan QC and Mr Sean Mullan appeared on behalf of the applicant and Dr McGleenan QC and Mr Mark Robinson appeared on behalf of the respondent. I am grateful for the assistance of counsel.

## **Rule 65, Article 8 and the United Nations Convention on the Rights of the Child**

[4] Rule 65 of the Prison and Young Offenders' Centre Rules (Northern Ireland) 1995 is as follows:-

*"Family relationships, welfare and after-care*

65. (1) Special attention shall be paid to the maintenance of relationships between a prisoner and his family.

(2) Prisoners shall be encouraged and assisted to establish and maintain such relations with persons and agencies outside prison as may, in the opinion of the governor, best promote the interests of his family and his own social rehabilitation.

(3) ..."

[5] That rule is to be construed in a way consistent with the United Kingdom's treaty obligations. Article 3(1) of the United Nations Convention on the Rights of the Child ("UNCRC") states that:-

*"In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."*

"A primary consideration" is not the same as "the primary consideration", still less as "the paramount consideration". Article 12 UNCRC is a participation right placing an obligation on the State in respect of judicial and administrative proceedings. Article 12 states that:-

*"(1) States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.*

*(2) For this purpose, the child shall in particular be provided with the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or*

an appropriate body, in a manner consistent with the procedural rules of national law.”

The term “administrative proceedings” is wide in its ambit. The term covers a very broad range of formal decision-making processes and would include administrative decisions as to whether an offender who is the father of a child is placed on a SOTP. There are many ways in which the voice of the child can be heard but in relation to administrative decisions of this nature there is a treaty obligation for the voice of the child to be heard. At its most elemental overlooking or ignoring the interests of a child does not comply with Rule 65 as construed in accordance with the treaty obligation. The voice of the child will not have been heard and no consideration will have been given to the child’s interests as opposed to giving those interests primacy.

[6] Article 8 provides:-

“1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

### **The SOTPs**

[7] SOTPs are run not only by the Prison Service but also by the Probation Service for Northern Ireland (“the Probation Service”). The applicant’s sentence comprises both a custodial period and a period on licence. During the custodial period the SOTPs are provided by the Prison Service but the type of programme differs depending on the prison in which the offender is detained. At HMP Magilligan the rolling SOTP is available. At HMP Maghaberry the core SOTP is available. During the licence period the SOTPs are provided by the Probation Service. I will summarise the programmes run by the Prison Service and by the Probation Service.

[8] The SOTP run by the Prison Service at HMP Magilligan is the rolling SOTP. The programme involves a group of offenders. Each offender works through a number of assignments which form his own personal curriculum. As group members enter and leave the group on a rolling basis the group therefore comprises at any one time a number of members all of whom are working on different tasks. However, the new members can observe and be helped by group members more advanced in treatment. The rolling programme is suitable for

low risk offenders and it cannot accommodate those who deny *all* responsibility for their offences and maintain their innocence. The applicant was assessed as a medium risk offender. Exceptions can be made to the principle that the rolling programme is not suitable for offenders other than low risk offenders. The Ministry of Justice National Offender Management Service (“NOMS”) publication entitled “Suitability for Accredited Interventions” states that “some clinical override is possible ....” The applicant states that whilst he was in HMP Magilligan another prisoner with a higher risk score than his was placed on the rolling programme. The Prison Service did not challenge that statement so accordingly, both as a matter of principle and as a matter of what has actually occurred, the rolling programme can be accessed by offenders who are assessed as posing a greater than low risk.

[9] The core SOTP is run by the Prison Service at HMP Maghaberry. It consists of 20 topics. There are 85 sessions with each session lasting two hours. It is delivered over a period of approximately 9 months. This programme is not suitable for a sex offender who denies all responsibility and maintains his innocence. To be suitable for the programme there has to be some degree of acceptance while understanding that minimisation can be expected. It is suitable for use with medium and high risk adult male offenders. The NOMS publication states that the optimum is 8 persons per group and that the programme requires 3 facilitators.

[10] The purpose of both the rolling and the core SOTPs is to reduce risk so that when the offender is released into the community the likelihood of him reoffending and of causing physical and emotional harm to others has been reduced. In short, a major benefit is to afford protection to members of the public. The SOTPs also benefit the offender in that they reduce the risk of him reoffending and returning to prison. Significantly also in the context of this case the SOTPs benefit the family members of the offender. On occasions family members are themselves victims of the offending behaviour. They will in any event have had their family lives disrupted by the offences and by the prospect of the offender re-offending. The reduction in risk enhances the chances of salvaging some part of their family life.

[11] Successful completion of a sex offender’s treatment programme in custody with a low risk – low deviancy conclusion may result in an offender not being required to undertake an induction programme in the community. Accordingly, from the perspective of family members if a SOTP is completed in custody, that facilitates greater expedition in relation to the programme in the community potentially advancing the date upon which the risks posed by the applicant to the members of his family can be reduced.

[12] The last core SOTP run by the Prison Service commenced in 2007 and was completed in 2008. There has been no core SOTPs between 2008 and 2014, a period of some 6 years. This means that there has been no programme

conducted by the Prison Service in respect of medium or high risk sex offenders over a 6 year period.

[13] The Prison Service does not have any SOTP for those offenders who completely maintain their innocence. There are courses which can be aimed at those who deny offences but they are not run by the Prison Service.

[14] The Probation Board of Northern Ireland runs a Community Sex Offender Group Programme. This programme can accept two offenders in each group who deny their offences. The community group programme involves a 50 hour induction programme followed by a written test. At this stage the offenders are divided into either the core programme for high risk - high deviancy offenders or the Better Lives Programme for low risk - low deviancy offenders. Offenders can be offered booster programmes or revision modules if their treatment needs suggest this is appropriate.

[15] It can be seen that in contrast to the Prison Service the Probation Service by the Community Sex Offender Group programmes cater for amongst others high risk - high deviancy offenders who maintain their innocence denying the commission of any offences.

[16] The challenge in this case is not to the absence of any programme in custody aimed at those who completely deny their offences. It is accepted by the Prison Service that by 24 March 2011 the applicant had accepted sufficient responsibility for some aspects of the offending to warrant him participating in a core SOTP. The applicant's challenge is to the decisions of the Prison Service which resulted in him not being placed on the core SOTP. In the alternative the applicant's challenge is to the decision which did not take into account placing him on the rolling SOTP despite the fact that he was assessed as a medium risk offender.

### **The general factual background**

[17] In approximately 2002/early 2003 the applicant commenced a relationship with a woman who became his partner. The relationship lasted until May 2009. They had a daughter and the applicant's partner had an older daughter by a previous relationship. The older daughter was the victim of the offences committed by the applicant over the period 31 July 2007 - 31 May 2009. The applicant and his partner spent most of their time together and were practically living together in the same house with both their daughter and the partner's elder daughter. In effect the applicant and his daughter lived together for some six years. His daughter lives with the applicant's partner along with the partner's daughter who is the principal victim of the offences.

[18] The elder daughter made disclosures to the applicant's partner in May or June 2009. She challenged the applicant who initially admitted the abuse and

stated that he wanted help. The police were contacted and he was arrested. During the police interviews he initially denied any abusive behaviour but then made an admission.

[19] In May 2009 the applicant was charged with six offences of indecent assault and one offence of sexual touching of a person under 16 years old.

[20] In June 2009 all contact between the applicant and his daughter came to an end.

[21] On 30 March 2010 the applicant pleaded guilty to the offences. The Probation Board for Northern Ireland prepared a pre-sentence report dated 16 April 2010. A number of matters are apparent from that report:-

- (a) The applicant stated that he pleaded guilty as he was under pressure to do so. He contended that at no point had he ever sexually assaulted or sexually touched the victim. This denial of guilt for the offences to which he had already pleaded guilty and of which he had been convicted was stated by the probation officer to be "not uncommon at this stage with individuals who have committed sexual offences and these issues relating to denial can be worked through with specialised professional services".
- (b) The applicant described his relationship with his daughter as being very close and loving and that he was struggling to come to terms with the separation from her.
- (c) The applicant was alcohol dependent.
- (d) The risk of committing further offences was considered to be medium. The applicant did not present imminent risk of serious harm to others. His behaviour did indicate that he had the capacity to cause harm. However this behaviour could be appropriately managed within the community through the Public Protection Arrangements Northern Ireland.

[22] The offences committed by the applicant were despicable. He has inflicted harm on the daughter of his partner and totally disrupted his own family life and the family life of his daughter. There is ample evidence on the papers that he is a manipulative individual.

[23] In May 2010 a six year determinate custodial sentence was imposed on the applicant consisting of three years custody and three years on licence. A Sexual Offences Prevention Order was made which, amongst other matters, prevented the applicant from having any contact with children or young people under the age of 18 years without prior agreement or arrangement with Social Services.

Despite the terms of the SOPO the ultimate arbiter as to whether the applicant can have contact with his daughter is the family court.

[24] On 28 May 2010 the applicant was committed to HMP Maghaberry.

[25] On 16 June 2010 the applicant was transferred to HMP Magilligan at which the only treatment programme for sex offenders was the rolling programme.

[26] From March 2011 the applicant was suitable to be placed on a core SOTP and for this he required to be transferred to HMP Maghaberry. He was transferred on 17 January 2013 but this was not to facilitate a core SOTP but rather individual offence focussed work.

[27] On 25 January 2013 in view of the lack of a Core SOTP the applicant was provided with individual offence focussed work with a Prison Service Forensic Psychologist in training. The focus of the 14 individual sessions was to gather a psycho-social history from the applicant and record his account of the index offence, including his perception of the victim. Following these sessions a report was forwarded to the Probation Service. The report did not refer to psychometric evaluation pre- or post- intervention nor did it make any recommendations as to the nature and type of follow on programme best suited to the applicant's risks and needs, all of which were necessary to accurately determine the applicant's point of entry into the Community Sex Offender Group Work Programme once he was released on licence.

[28] The custodial element of the applicant's sentence expired on 27 May 2013 and he was then released on licence which contained a provision that the applicant must not have unsupervised contact either directly or indirectly with children under the age of 18 without the prior approval of his probation officer and/or the relevant Social Services Trust. Again the ultimate arbiter as to whether the applicant could have contact with his daughter is the family court. The Probation Service assessed him as ready for a SOTP in September 2013. He was offered a place and commenced the Community Sex Offenders Group Programme on 18 November 2013.

### **The proceedings in the family courts**

[29] On 11 August 2010 the applicant's partner sought and obtained an order in the Family Proceedings Court that there should be no contact whether direct or indirect between the applicant and his child.

[30] On 25 March 2011 the applicant commenced proceedings seeking contact with his daughter. The proceedings were transferred to the Family Care Centre and on 10 June 2011 Her Honour Judge Loughran made an order for indirect contact. The applicant's partner appealed that decision to the Family Division of

the High Court. Weir J ordered an investigation under Article 56 of the Children's Order (NI) 1995. During the course of that investigation a senior social work practitioner visited the applicant's daughter to ascertain her wishes and feelings in relation to both direct and indirect contact with the applicant. A position paper was filed on behalf of the Trust with the court for the purposes of the appeal. The position paper raised a number of complex issues relating to the family, including relationships between the applicant's child and her half-sibling. It recorded that the applicant's daughter had said "I would like to see my daddy as well ... Just once ... because I miss him." She was asked how she viewed the future if contact was a positive experience and said "Not sure, don't know" and then went on to state "If the meeting was really good I probably want to see him another time." At paragraph 9(k) of the position paper it was stated:-

"The Trust understood from PBNI that (the applicant) has not yet undertaken any offence focused work, in particular he has not yet completed any treatment programmes in respect of alcohol use or sexual offending. He is currently assessed as medium to high risk of re-offending."

It also added that:-

"(The applicant) has not yet been rehabilitated following his offence against (his victim) He has undertaken no work to address same, ..."

It was not clear from the Trust position paper as to the reason why the applicant had not undertaken any offence focussed work. Accordingly on 19 September 2012 Weir J enquired the reason of the applicant and was informed that he "was still on the waiting list for the programme and that he had been on the same waiting list for a considerable period of time". It is stated that Mr Justice Weir then indicated that if the Prison Service failed to provide the SOTP then a judicial review should be sought to challenge the decision of the Prison Service.

[31] In the event Weir J confirmed the order for indirect contact and refused the applicant any direct contact with his child.

### **The initial reason for the applicant not being offered a place on either the core or the rolling SOTPs**

[32] Both the core and the rolling SOTPs are not suitable for an offender who denies all responsibility and maintains his innocence. The applicant at the time of his pre-sentence report denied all responsibility. He persisted in his denial of the offences and stated that he was not responsible on 27 July 2010 as part of his resettlement psychology induction interview. On 30 September 2010 the applicant was interviewed and he accepted performing one act in relation to his



victim. This was insufficient acceptance. Accordingly, the applicant was considered to be inappropriate for both the core and the rolling SOTPs on the basis that he was maintaining his innocence.

[33] However, during interviews conducted by a senior member of the Magilligan psychology team on 24 March 2011 and on 27 April 2011 the applicant accepted responsibility for some aspects of the offending sufficient to warrant his participating in a core SOTP. This was confirmed on 21 June 2011 when the applicant was again interviewed and it was noted that he was motivated to participate in the core SOTP and was willing to transfer to HMP Maghaberry to do so.

[34] Accordingly, since 24 March 2011 the applicant has been eligible for a place on a core SOTP.

**The reason for the applicant not being offered a place on the rolling SOTP in HMP Magilligan.**

[35] The initial reason for the applicant not being offered a place on the rolling sex offenders' programme was that he was denying all responsibility. That was no longer the reason after 24 March 2011. Thereafter he was not admitted to the rolling programme because he was not a low risk offender. In the pre-sentence report he was assessed as medium risk. On 2 August 2010 the applicant was assessed as medium risk under the RM 2000 Risk Assessment process. The applicant's case is that consideration ought to have been, but was not, given to his being placed on the rolling SOTP despite the fact that he posed a greater than low risk.

**Discussion**

[36] The applicant wished to have contact with his daughter. The family courts have allowed him indirect contact by letter but not direct contact either supervised or unsupervised. A major reason for his contact with his daughter being restricted and for his daughter not being allowed any direct contact with him, is that he is a convicted sex offender and he poses a risk to his daughter. A SOTP aimed at reducing the risk would facilitate, though not necessarily be determinative of, his being allowed some form of direct supervised contact with his daughter and her being allowed to have such contact with him.

[37] It was accepted by Dr McGleenan on behalf of the Prison Service that:-

- (a) The Article 8 rights of the applicant were engaged.
- (b) The Article 8 rights of the applicant's daughter, who is entirely innocent of any of her father's shortcomings, were also engaged.

- (c) That the applicant in these judicial review proceedings can rely on his daughter's Article 8 rights. "The private and family life of an individual is multifaceted. It is the nature of any relationship between two or more persons that the relationship has effects on each of the parties to the relationship", see King v Sunday Newspapers Ltd [2011] NICA 8 and see also paragraph 14 of ZH (Tanzania) (FC) v Secretary of State for the Home Department [2011] UKSC 4.
- (d) That there was an obligation on the Prison Service to consider the Article 8 rights of the applicant's daughter when deciding on whether the applicant should be placed on a SOTP. That this obligation arose even if the applicant did not bring the issue to the attention of the Prison Service: rather that the Prison Service had an obligation to inquire.
- (e) That the Prison Service failed to take into account the family life of the applicant's daughter and the impact on her of failing to provide the applicant with a place on a SOTP.

[38] Kerry Hunter, Principal Forensic Psychologist in HMP Maghaberry, states that the contact rights of the applicant's daughter were not considered as a factor when deciding prioritisation of the Prison Service resources. I find that there was a failure on the part of the Prison Service to take into account the Article 8 rights of the applicant in that the Prison Service failed to consider the impact on the applicant's daughter and the impact on the applicant.

[39] The failure to take into account the Article 8 rights of the applicant and of his daughter is to be seen in the context of the NOMS publication. The purpose of the document is to provide guidance on the targeting and selection criteria for accredited programmes. It sets out criteria in the custodial setting which may assist in situations where demand for programme places is higher than places available. None of the criteria refer to the impact of the decision on the family life of the children of offenders.

[40] As I have indicated it has been conceded, and I consider correctly, that it is not necessary for the applicant to bring the family circumstances of his daughter to the attention of the Prison Service before they are obliged to make enquiries and to take those circumstances into account. In any event, I find that the Prison Service were in fact aware of the applicant's daughter and of the applicant's attempts to obtain a contact order.

[41] Accordingly there was a failure by the Prison Service to take into account a relevant factor in arriving at its decisions. The applicant's daughter, a child who is totally innocent, is entitled to have her family life taken into account when arriving at a decision. She lived in the same house as the applicant for the

first six years of her life. Some attachments would have been formed during that period though there is evidence as to a lack of strength of those attachments. The question as to what if any direct contact she is to have with her father will involve finely balanced factors but, absent any addressing of risk posed by the applicant, her prospects of seeing her father are negligible. If there is any prospect of reducing risk and thereby progressing to direct supervised contact, then that should occur at a time suitable to the child. That may be earlier rather than later but absent reduction in risk at the earlier stage that option is removed from Social Services and from the family courts.

[42] The applicant has now been released from prison. He does not seek any damages and he does not seek any remedy save a declaration. The Prison Service, whilst acknowledging that it failed to take into account a relevant factor, contends that a declaration should not issue on the basis that the ultimate reason for the applicant not being placed on a SOTP was due to lack of resources. That is not a lack of financial resources but rather the unavailability of sufficiently trained staff and/or a sufficient cohort of prisoners at any one time. For that reason it is contended that, even if the Article 8 rights had been taken into account, the outcome would have been exactly the same, namely that the applicant would not have been placed on a SOTP.

[43] Factually I do not accept that the Prison Service lacked resources. In July 2011 there were sufficient offenders to enable a core SOTP to be run. It was asserted that there were insufficient numbers of trained facilitators to commence the programme. However, table 4 shows that three facilitators were available in July 2011. Also for substantial periods in 2012 there were a sufficient number of facilitators.

[44] I also reject the contention that resources were not available in 2012 for the core SOTP. There were enough facilitators. There is no sufficiently persuasive evidence that there was an insufficient number of prisoners. If there was a problem with the training of facilitators, then that was a problem which could and should have been anticipated. In any event I am not persuaded that sufficient steps were taken by the Prison Service to secure training of facilitators. I was informed that the training is carried out by NOMS, that training is outside the control of the Prison Service and that there have been no training events available to the Prison Service between 2011 and 2014. However, the correspondence was not exhibited and no particulars were given as to the attempts that have been made to secure training. I do not consider that this aspect of lack of resources has been made out.

[45] On the alternative ground that the Prison Service failed to consider placing the applicant on the rolling SOTP I am not persuaded that the Prison Service did give consideration to the applicant's being placed on the rolling SOTP. The evidence as to whether the Prison Service considered placing the applicant on the rolling SOTP is at its best equivocal and as I have indicated I am

not persuaded that this occurred. Accordingly, in arriving at a decision as to the SOTPs available for the applicant the Prison Service left out of account a relevant consideration, namely, whether in the exercise of clinical judgment the applicant would have been suitable for the rolling SOTP despite the fact that he was assessed as posing a medium risk.

### **Conclusion**

[46] I consider that the applicant has made out the grounds of challenge which rely on both Rule 65 and Article 8. I grant a declaration that the Prison Service ought to have but failed to take into account the applicant's family life in relation to its decisions as to whether to place the applicant on a SOTP.