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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

**KING'S BENCH DIVISION
(JUDICIAL REVIEW)**

**IN THE MATTER OF AN APPLICATION BY DARRYL McCANN
FOR JUDICIAL REVIEW**

**AND IN THE MATTER OF A DECISION OF
THE NORTHERN IRELAND PRISON SERVICE**

**Justin Byrne (instructed by Emmet J Kelly & Company, Solicitors) for the applicant
Terence McCleave (instructed by the Departmental Solicitor's Office) for the respondent**

SCOFFIELD J

Introduction

[1] These proceedings concern the calculation of the release date for the applicant, who is a sentenced prisoner in HMP Magilligan. The respondent, the Northern Ireland Prison Service (NIPS), has calculated his release date as being 4 May 2023. The applicant contends that this is wrong as a matter of law; and that he is entitled to be released on 23 January 2023.

[2] The applicant relies on two grounds of challenge, namely irrationality and failure to take into account material considerations. However, the irrationality case also amounts to a contention that the respondent erred in law and, if the respondent was correct in law in its view of the matter, the other grounds of challenge fall away.

[3] The issue turns on the applicant's status during a period when he had appealed against a custodial sentence imposed in the magistrates' court but before his appeal had been determined by the county court, in circumstances where he had been released on bail pending appeal but then had that bail revoked. If, as the applicant contends, he was then detained on remand pending appeal, his time in custody would count towards the reduction of a later sentence on another matter (a robbery charge).

If, however, as NIPS contends, the applicant was then in custody as a sentenced prisoner, he would not be entitled to credit for time spent on remand which counted towards service of his robbery sentence.

[4] Mr Byrne appeared for the applicant; and Mr McCleave appeared for the respondent. I am grateful to both counsel for their helpful written and oral submissions.

Factual Background

[5] On 20 December 2021, at Laganside Magistrates' Court, the applicant was given a sentence of 8 months' imprisonment relating to offences of criminal damage ("the original criminal damage charge") and a number of driving offences, which offences were committed on 10 December 2019 ("Case 1"). There were a range of offences in respect of which different sentences were imposed but, for present purposes, it suffices to note that on charges 1 and 2 the applicant was sentenced to four months' imprisonment respectively, with these sentences to run consecutively, giving an effective overall sentence of eight months. On that same date, the applicant applied to appeal the sentence and was granted bail pending appeal by District Judge (Magistrates' Courts) Henderson. The appeal was to be heard at Belfast County Court on 14 January 2022.

[6] However, the applicant failed to attend for his appeal on 14 January 2022. A warrant for his arrest was issued by the county court judge, His Honour Judge McGurgan. The warrant directed that the applicant be arrested and brought before the court.

[7] Just over a week later, on 22 January 2022, the applicant was arrested by police for a further offence of criminal damage ("the new criminal damage charge") ("Case 2"). He was taken to Newry Magistrates' Court on 24 January 2022. On this date, he was remanded into custody in relation to the new criminal damage charge.

[8] In addition, the applicant had been on bail in relation to a Crown Court case involving a charge of robbery alleged to have occurred on 17 September 2020 ("Case 3"). When he was remanded on the new criminal damage charge, his Crown Court bail was also revoked. Furthermore, on that same date, the warrant issued by Judge McGurgan was executed and proved in court, with the applicant's bail pending appeal on the original criminal damage charge revoked. Accordingly, he was then in custody in relation to the new criminal damage charge *and* the Crown Court robbery matter *and* the original criminal damage charge which was under appeal.

[9] On 11 May 2022, the applicant was sentenced by His Honour Judge Kerr KC to a two year determinate custodial sentence in relation to the robbery matter (consisting of a one year custodial period and one year on licence). At that point, he undeniably became a sentenced prisoner, rather than a remand prisoner. However, he has averred that he expected to be credited with time served on remand in relation to the robbery

charge from when he was taken into custody on 24 January 2022 and his bail in Case 3 was revoked (with additional credit for a further six days he had previously spent on remand in relation to the robbery charge, before having initially been granted bail in relation to it).

[10] On 18 May 2022, a three month sentence of imprisonment was imposed at Newry Magistrates' Court by District Judge (Magistrates' Courts) King in relation to the new criminal damage charge. This sentence was ordered to run concurrently to the sentence the applicant was by then serving on the robbery matter.

[11] Finally, on 20 May 2022, the appeal in relation to the original criminal damage charge was heard. His Honour Judge McGurgan dismissed the appeal against sentence and affirmed the sentence of eight months' imprisonment which had been imposed by the court below. This sentence was again to run concurrently with the two other sentences the applicant was serving.

[12] On 24 May 2022, the applicant's solicitor emailed the Custody Office at HMP Maghaberry (where the applicant was then detained) asking for a breakdown of his current sentence position in order to determine his release date. NIPS replied stating that the release date on the robbery offence was 4 May 2023.

[13] The applicant disagreed with this and pre-action correspondence ensued. The applicant asked NIPS to amend his release date to 23 January 2023. This is because he believed he ought to have been given credit for time spent on remand from 24 January 2022, which was the day when his bail in relation to that offence was revoked, until he was sentenced in Case 3 on 11 May 2022 (a period of some 107 days). The applicant has averred that he understands the principle that remand time cannot be 'double counted' but contends that, given that his bail in Case 3 was revoked on the same day as his bail was revoked in the appeal on the original criminal damage charge (Case 1), the remand time "should be allocated to the offence which was dealt with first". On NIPS' analysis, when the bail pending appeal was revoked on 24 January 2022, the applicant was subject to the initial sentence imposed in the magistrates' court of eight months' imprisonment and became a sentenced prisoner. The applicant relies on the fact that, at this time, he was still incarcerated on the remand wing within the prison; and also on the fact that his appeal to the county court was 'still live', with the judge retaining the option of allowing his appeal against sentence. He contends that it was not right to treat him as being detained at that point as a sentenced prisoner but that he was, in effect, still on remand pending appeal.

[14] On the contrary, the respondent's analysis led it to conclude that the applicant was detained as a sentenced prisoner on 24 January 2022 in relation to the original criminal damage charge, with his eight month sentence set to expire on 22 May 2022. Taking into account only six days' police custody or remand time in relation to Case 3, NIPS calculated the custody expiry date in relation to the robbery matter as being 4 May 2023 (that is, 359 days after the sentence was imposed on 11 May 2022). The respondent has maintained this analysis, which was set out in its response to

pre-action correspondence, in its evidence in these proceedings. Its deponent was Ms Julie Clingan, the Head of Central Custody Office within NIPS, who has explained the NIPS approach and the sentence calculation reports along with, inter alia, the warrants of commitment which were issued by the magistrates' court on 20 December 2021.

Relevant statutory provisions

[15] Section 26(2) of the Treatment of Offenders Act (Northern Ireland) 1968 ("the 1968 Act") is the provision which requires time spent on remand awaiting trial for an offence to be taken into account towards service of a sentence of imprisonment later imposed in relation to that offence. It is in the following terms (insofar as material):

"The length of any sentence of imprisonment... imposed on or ordered in relation to an offender by a court shall be treated as reduced by any relevant period, ..."

[16] By section 26(2A) the phrase "relevant period" is defined for this purpose. It includes "any period during which the offender was in police detention in connection with the offence for which the sentence was passed" and "any period during which he was in custody... by reason only of having been committed to custody by an order of a court made in connection with any proceedings relating to that sentence or the offence for which it was passed or any proceedings from which those proceedings arose". It is common case that the latter of these qualifying periods (set out in section 26(2A)(b)(i)) does *not* include a period of time spent in remand in relation to Offence A where, at the same time, the offender was also detained as a sentenced prisoner in pursuance of a sentence for Offence B. In such a case, the offender is not in custody "by reason only" of having been committed to custody by an order of a court made in connection with any proceedings relating to Offence A. Section 26 is not designed to give credit for "sentenced custody": see para [13] of McCloskey LJ's judgment in *Re Allen's Application* [2020] NICA 40; and see para [21] of Humphreys J's judgment in *Re Conway's Application* [2022] NICA 18.

[17] Where an accused is remanded in custody in relation to a variety of different cases at the one time but is not sentenced, an issue may arise as to which sentence the remand time later 'attaches' to. This may be simplified, or sometimes complicated, by the fact that various terms of imprisonment (even when the sentences are passed on different occasions) are treated as a single term in certain circumstances (see section 33(2) of the 1968 Act). In the present case, however, these complications are not the issue. It is agreed between the parties that, if the applicant's basic contention is correct, the January to May period he spent in custody is to be credited towards service of his sentence in Case 3, as the first case in which he came to be a sentenced prisoner, which also in this case happens to be the longest sentence of those at issue. (Indeed, it is likely this factor which resulted in the applicant having sentence passed on the robbery charge first, with his appeal on the original criminal damage charge and sentencing on the new criminal damage charge being case managed to fall later dates).

[18] The applicant's status after sentence in the Magistrates' Court but pending appeal is in my view properly to be determined by reference to the provisions set out in Part XII of the Magistrates' Courts (Northern Ireland) Order 1981 ("the 1981 Order"). A right of appeal against conviction or sentence is conferred by Article 140. The powers exercisable by the county court are set out in Article 145, read with Article 28 of the County Courts (Northern Ireland) Order 1980 and section 22 of the Interpretation Act (Northern Ireland) 1954. This includes power to confirm, reverse or vary the sentence imposed, including by awarding any punishment, whether more or less severe, which the magistrates' court might have awarded. Article 148 of the 1981 Order provides the magistrates' court with power to grant bail to a person in custody who has given notice of appeal to the county court.

[19] Article 153 of the 1981 Order, entitled 'Computation of sentence on appeal', is an important provision in the present context and I therefore set it out in full:

- "(1) Where a person who has been sentenced to imprisonment by a magistrates' court appeals to the county court or, by way of case stated under this Part or under Article 61 of the County Courts (Northern Ireland) Order 1980 to the Court of Appeal –
- (a) the time during which the appellant, pending the determination of his appeal, is not detained in custody shall not count as part of any term of imprisonment under his sentence;
 - (b) the time during which the appellant is in custody pending the determination of his appeal shall, subject to any direction which the county court or, as the case may be, the Court of Appeal may give to the contrary, be reckoned as part of any sentence to which he is for the time being subject.
- (2) When the county court or the Court of Appeal gives a direction under paragraph (1)(b), it shall state its reasons for giving it.
- (3) The term of any sentence passed by the county court or the Court of Appeal in exercise of its powers under this Part or under any other statutory provision shall, unless the county court or, as the case may be, the Court of Appeal otherwise directs, begin to run from the time when it would have begun to run if passed in the proceedings from which the appeal lies."

[20] Finally, it is worth drawing attention to Article 6 of the Criminal Justice (Northern Ireland) Order 2003 (“the 2003 Order”). It confers power on a court to issue a warrant for arrest in respect of a person who has been released on bail and is under a duty to surrender into the custody of the court who fails to surrender at the time appointed for him to do so (see Article 6(1)). This was the power exercised by His Honour Judge McGurgan on 12 January 2022. Article 6(3) provides a power of arrest to a constable, without warrant, where there are reasonable grounds for believing that a person is not likely to surrender to the custody of a court or for believing that they have breached their bail conditions, amongst other things. A person arrested under Article 6(3) must be brought before a magistrates’ court as soon as practicable after the arrest and in any event not later than the next day following the day on which he is arrested.

[21] When the individual is produced in court, the district judge has a number of options under Article 6(6) of the 2003 Order. He or she must first consider whether they are of the opinion that the person is not likely to surrender to custody *or* has broken or is likely to break any condition of his bail. If not of that opinion, the district judge must grant him bail subject to the same conditions (if any) as were originally imposed. If the district judge is of that opinion, he or she “may remand [the individual] in custody or commit him to custody, as the case may require, or alternatively, grant him bail subject to the same or to different conditions” [underlined emphasis added]. Although Article 6(6) is not expressed to apply where an individual is arrested pursuant to a bench warrant issued under Article 6(1) for failure to surrender, when a person is arrested in that way and brought to court the same options obviously apply to the judge dealing with them. The warrant will have been issued for failure to surrender, so that it is clear that a term of bail has been breached. The judge before whom the arrested individual is brought (in this case, District Judge (Magistrates’ Courts) King) may remand him in custody or commit him to custody, as the case may require, or grant him bail subject to the same or different conditions.

Consideration

[22] I accept the respondent’s submission that the answer in this case is to be found in Article 153(3) of the 1981 Order. As a result of this, the sentence of imprisonment passed by the county court on 20 May 2022 (when it affirmed the order of the magistrates’ court imposing an effective sentence of eight months’ imprisonment) began to run from the time when it would have begun to run if passed in the proceedings from which the appeal lay. That is to say, it began to run from 20 December 2021 when sentence (in materially identical terms) was passed by the magistrates’ court. In the absence of any contrary direction from His Honour Judge McGurgan that that sentence should commence at some different point, by operation of law it ran from 20 December 2021. This means that, when the applicant was taken back into custody in respect of the original criminal damage charge, he was detained as a sentenced prisoner. This position is now clear, in light of the provision made in Article 153(3) and the absence of any contrary direction by the county court. That is

sufficient to dispose of the issue in these proceedings. The respondent correctly calculated the applicant's release date in possession of all of the relevant facts, including the ultimate outcome of his (unsuccessful) appeal against sentence to the county court.

[23] The position as it stood at the relevant time – that is, pending appeal and before the order of the county court was known – might be thought to be more complex. To some degree, an appellant who remains in custody pending appeal of a custodial sentence will have something of a hybrid status because the nature of their sentence has not been finally settled until their appeal is disposed of. For instance, if, in the present case, Judge McGurgan had been asked to direct under Article 153(3) that the eight month sentence of imprisonment only commence from the date of his order on 20 May 2022, it is clear that the applicant would then have been a remand prisoner only in the period from 24 January 2022 to 11 May 2022. He would not have been serving a sentence of imprisonment during that time. But the default position where a sentence has been passed by a court below and the defendant is in custody pending appeal (either because bail pending appeal has been refused or the conditions of such bail have been breached and it has been revoked) is that the defendant will be serving that period of imprisonment.

[24] In the case of appeal from the magistrates' court, that the sentence is operative during this period also appears from Article 153(1) of the 1981 Order, in two respects. First, Article 153(1)(a) makes clear that a defendant who is released on bail pending appeal is not considered to be serving the sentence whilst he is at liberty. That provision would be unnecessary if the sentence of imprisonment was automatically stayed or suspended until the outcome of the appeal. Second, Article 153(1)(b) makes clear that any time the appellant spends in custody pending appeal shall (subject to any contrary direction given by the appeal court) "be reckoned as part of any sentence to which he is for the time being subject". This provision has some practical overlap with that set out in Article 153(3), discussed above. It ensures that an appellant who is denied bail pending appeal (or who has such bail revoked) gets credit towards the service of their sentence (to which he is "for the time being subject", pending a successful appeal or a direction deferring the commencement of any sentence imposed on appeal). As Mr McCleave observed in the course of his submissions, if the appellant was simply taken to be on remand at this point (as Mr Byrne submitted), there would be no need for this provision, since the appellant's position would be protected by section 26 of the 1968 Act. Similar provision is made in relation to the position of an appellant from the Crown Court to the Court of Appeal in section 29 of the Criminal Appeal (Northern Ireland) Act 1980. There is no reason in principle why an appellant from the magistrates' court seeking to appeal a sentence of imprisonment should be considered to be in a different position from an appellant appealing against a sentence imposed by the Crown Court. Although the court to which they will appeal will be different, in each case, they are properly to be viewed as a sentenced prisoner if detained pending appeal, on foot of the order of the court below, unless and until the appellate court gives a direction to the contrary.

[25] The applicant considered that the respondent wrongly treated the warrant issued on 14 January 2022 as a “sentence warrant”; but, in fact, it was the warrant of commitment issued by the Magistrates’ Court on 20 December 2021, after he was sentenced, which was the basis for the applicant’s detention in Case 1 after 24 January 2022 when his bail in that case was revoked. The applicant is correct to say that the warrant issued by Judge McGurgan on 14 January was only authority to bring the defendant before the court to be further dealt with. But the key issue is that Newry Magistrates’ Court later revoked the grant of bail pending appeal. The circumstances of the case as they then stood required his being *committed* to custody (rather than *remanded* in custody) because he was subject to a lawful sentence of imprisonment from the magistrates’ court and no longer benefitted from bail pending appeal.

Conclusion

[26] For the reasons given above, I dismiss the application for judicial review. In my judgment, the respondent was correct in law to consider the applicant to be a sentenced prisoner when, on 24 January 2022, his bail was revoked in relation to the original criminal damage charge and he was taken into custody. At that point, the basis for his detention was not simply that he was awaiting trial or appeal but that he had been sentenced to imprisonment by the magistrates’ court and was not (or was no longer) admitted to bail pending appeal.

[27] It is worth noting that the 1981 Order envisages an expedited hearing of a county court appeal where the appellant remains in custody pending the hearing (see Article 144(4) of the 1981 Order). In any event, as discussed in the course of exchanges during the hearing of this application, the applicant could have avoided his present predicament if, at the hearing of his appeal, he had successfully applied to Judge McGurgan to direct that the eight month sentence of imprisonment he imposed should only commence on the date he dealt with the appeal (replacing and superseding the previous disposal in the magistrates’ court). If he had done so, the respondent would obviously have had to have taken this into account in calculating the applicant’s release date and the allocation of time spent on remand up to that point. Whether or not it may be open to the applicant to now seek such a direction is a matter on which I express no view. One outcome of these proceedings, however, may be to alert practitioners to the issue thrown up by this case and to encourage careful consideration of these matters at the appropriate time in cases where circumstances analogous to those described above have arisen. It should also go without saying, of course, that the applicant is unlikely to have found himself in this situation of dashed expectations if he had not failed to appear in answer to his bail to prosecute his appeal in January of this year.

[28] I will hear the parties on the issue of costs but provisionally take the view that the usual orders should follow, namely an order that the applicant should bear the respondent’s reasonable costs of these proceedings (such costs to be taxed in default of agreement), but with this order not to be enforced without further order of the court, in light of the fact that the applicant is a legally assisted person; and an order

for legal aid taxation of the applicant's costs (pursuant to Article 13 of, and Schedule 2 to, the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981).