CO/1789/2010

Neutral Citation Number: [2010] EWHC 433 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2A 2LL

Tuesday, 16th February 2010

B e f o r e:

MR JUSTICE COLLINS

Between:
THE QUEEN ON THE APPLICATION OF M

Claimant

v

THE CHIEF MAGISTRATE

Defendant

and

SECRETARY OF STATE FOR JUSTICE

Interested Party

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(Official Shorthand Writers to the Court)

Ms Felicity Williams (instructed by the Howard League for Penal Reform) appeared on behalf of the **Claimant**
Mr Simon Murray (instructed by the Treasury Solicitor) appeared on behalf of the **Interested Party**

J U D G M E N T
(As approved by the Court)

1. MR JUSTICE COLLINS: This claim comes before me as a result of an order by Nicola Davies J made on 8th February last, the claim having been lodged on that day. The reason for speed was that the claimant is an under 18 who is at present serving a sentence of two years plus 12 months extended licence imposed for an offence of affray. That offence involved him, together with his elder brother and some others, making what appears to have been a sort of revenge attack upon individuals who had for some reason incurred their displeasure. It is not necessary to go into the full details, suffice it to say that a victim was severely injured in that he suffered a slash to his face, albeit it was the claimant's brother and not he who had been responsible for that. It is obvious that the judge at the Crown Court took a serious view since he imposed on the claimant, who was then 16, having been 15 at the time the offence was committed, the sentence that I have indicated.

2. The sentence itself was imposed on 27th November 2007. That meant that, subject to a possibility of parole, the first date for which would have been November 2008, he would be released on licence on 27th November 2009, which is when the custodial part of the sentence would normally have come to an end. In any event, he would have been due for release on 27th November 2009 in the normal course of events and then of course the licence would have extended and will still extend until November of this year.

3. Unfortunately, he has found himself in a position of facing a considerable number of disciplinary charges in the Young Offender Institutes in which he has been incarcerated. I gather that, as at today, he has been involved in no less than some 78 adjudications, of which 13 were for assaults of various sorts. In fact, if one looks at the decision of the Parole Board given in November 2008, one sees that then it is recorded that he had "accumulated a formidable number of adjudications" for "fighting and threatening language" and "his violent and threatening behaviour" and there was an indication of his "immaturity and deficits" in his thinking skills. But sometimes he behaved well. It depended, it was said, upon what appeared to be his mood.

4. In any event, as a result of all these occasions of misbehaviour and breaches of the rules, he was in due course ordered to serve by way of punishments what amounted to a total of 120 days of extra custody. There is power, in accordance with the regulations, which are in the Young Offender Institution Rules 2000 (2000 No 3371). In that order, paragraph 60A deals with adjudicator's punishments and provides that:

> "If he finds an inmate guilty of an offence against discipline the adjudicator may ... impose one or more of the following punishments:
>
> ...
>
> (b) in the case of an inmate who is a short-term prisoner or long-term prisoner or fixed term prisoner, an award of additional days not exceeding 42 days."

A fixed term prisoner is defined in section 237 of the Criminal Justice Act 2003 as a

person serving, for the purposes that are material to this case, "a determinate sentence of detention under section 228 of this Act". Section 228 permits extended sentences such as were imposed on the claimant to be imposed for certain violent or sexual offences. It is said in section 257 of the 2003 Act that prison rules or rules made under section 47 of the Prison Act 1952 (and the Young Offender Institution Order to which I have referred is made under section 47) "may include provision for the award of additional days ... to fixed-term prisoners", and that is the power to impose penalties of additional days. Such a penalty can only be imposed by an independent adjudicator and thus, if a governor takes the view that the disciplinary offence which is alleged should result in additional days' custody, he must refer the matter to an independent adjudicator.

5. This claim concerns two different adjudications. The first one was imposed in the Young Offender Institution Ashfield, where the claimant was then serving his sentence, imposed as long ago as 17th October 2008. The offence in question was an assault on an officer, the assault being spitting at the officer and the spit hit her on her chest and shoulder. She was not injured but it was treated, and is always treated, as a serious matter. The penalty was 30 days extra custody. The second adjudication which is under attack was imposed at Huntercombe Young Offender Institution on 17th June 2009 and on that occasion the claimant received an additional ten days for failing or refusing to obey a lawful order, the order in question being that he should go to a particular unit in the institution.

6. However, in between those two there was a further determination when the claimant faced a number of charges, two of which I think were assaults, in December 2008, when the punishment imposed was one of no less than 80 days additional custody. That is not under attack because he was then represented and the main basis for the claim, which is brought on his behalf by the Howard League for Penal Reform, is that, where young offenders are considered to have committed offences which merit increases in custody and so are referred to an independent adjudicator, they should be granted legal representation and it is a positive requirement, so that it is not sufficient that the offer is made, as it is routinely, if turned down, no further consideration is given to it. Rather, it is submitted that there is a positive duty to be proactive and what should happen is that a young offender is told that he ought to be represented and that only if he knows that it is there for the taking, that he ought to take it and that it is in his interest to take it, but he refuses, that such a refusal should be accepted. It is said that the general practice is merely to offer and the forms that have been produced in this case show that nothing more than that was done.

7. This claim was, as I have said, lodged on 8th February, albeit there was a pre-action protocol letter written on 26th January, and the reason for the urgency is that, if these two adjudications under attack are set aside, the claimant stood to be released yesterday. The effect of the extra 40 days is that he will not be released until 26th or possible 27th March (there were various dates given in the papers). His 18th birthday is on 21st June. It is important in his case, and it may be important in many young offenders' cases, that he is able to take the benefit of the Children Act. Southampton Council has, with the assistance no doubt of the social services and those who assist in the prison service, made arrangements to look after him on his release. It apparently is

not easy, and indeed not desirable, that he should return to live at his mother's home, which is where he was living at the time the offence was committed, and the alternative suggested by him is for other reasons not at all satisfactory. Accordingly, arrangements have been made to give him support and it is important, it is said, and I can well understand why, that such support under the Children Act is able to continue after he reaches the age of 18 and that is largely dependent on whether he has been the subject of such support for at least 13 weeks before his 18th birthday. If he is released on 26th or 27th, he will not be able to achieve that 13 weeks and the result is, or the effect rather of the ten days imposed by the Independent Adjudicator in June 2009, is that he will not be able to take advantage of the facilities that otherwise would be available to assist him. That he requires assistance is clear beyond any doubt, because his attitude in custody has shown that he has real problems in accepting any degree of control and his offending behaviour in the past equally has given rise to real concerns that we have here someone who, without assistance, is likely to degenerate into a life of persistent crime. Of course, there is no guarantee that even with assistance there will be an improvement in the long run, but at least it is a matter that ought to be attempted and it is important to note in this context that the welfare of the child is an important and indeed fundamental consideration in determining how a child who has committed offences should be dealt with. Of course, in one sense it may be said that it is not a question of welfare that he is incarcerated in a Young Offender Institution, but there is of course the balance to be taken into account, namely the effect on the public and the damage to the community if young criminals are not kept out of circulation. But, as I have said, and there is no dispute about this, a young person's welfare is something that has to be properly taken into account and, indeed, that is clear from section 37 of the 1998 Act.

8. This claim also is against the Chief Magistrate because an application was made to him to review the decisions of the two adjudicators in question. That application was not made until long after the 14 day period which is normally to be allowed. I say normally because there is a discretion to extend time in an appropriate case.

9. The initial application was made to the Chief Magistrate on 23rd December 2009. That was rejected on the same day when it was indicated that it was out of time and therefore he was unable to review. It was then pointed out to him by the letter of 5th January that there was a discretion and it was said that there were good reasons for the delay, which really lay in the fact that the Howard League was not instructed until June 2009 and had taken some time to get the necessarily documentation and they had, they felt, a strong case to suggest that the hearings, both of them, were unsatisfactory because there was no legal advice or representation granted and therefore the claimant's welfare had not been properly taken into account.

10. The answer by the Chief Magistrate to that was:

> "Your letter has been shown to the Judge who originally reviewed your appeal and the contents of that letter were noted[.] Given the length of delay, the Independent Adjudicator is not prepared to exceptionally accede to review out of time."

It is said that that was the wrong approach, that the Chief Magistrate ought to have considered the merits and not simply to have rejected the application on the ground of delay.

11. The matter was ordered in, as I have said, by Nicola Davies J for a rolled up hearing today. That left very little time for the defendant, and more particularly the interested party, that is to say the prison service, to produce evidence to show what actually happened in relation to representation in these cases, perhaps to obtain evidence from the Adjudicators themselves to indicate what, if anything, they had in mind when conducting the hearings, and more generally to produce evidence as to the general approach that is adopted. This is an important issue and, for reasons which were clearly appropriate, it was brought in very quickly.

12. It seemed to me that one of the important factors here was what I will call the 13 week point, that is to say the need to give the opportunity, because of course I recognise that it is possible he might throw it away if he breaches his conditions or commits any offence between his release and his birthday, and no doubt he will be strongly advised as to that aspect. Nonetheless at the end of the day it is down to him whether he takes the opportunity, but it seems to me important in the circumstances that, if possible, and if appropriate, having regard to my duty only to act if persuaded that there is a proper ground for so doing, to enable that opportunity to be taken and that can happen if the adjudication of June 2009, or rather the penalty imposed, is removed. Of course, then the release will be before the three week period is made impossible.

13. Perhaps slightly unusually, and exceptionally, and it is not something that I would encourage in other circumstances, I put to Ms Williams the options, that either I dealt with the June 2009 adjudication on its own or I put over at least until next week, and probably the beginning of the following week, a more general consideration of the claim as a whole. I would be minded in those circumstances, if I did that, to grant permission on the argument as to whether fairness and Article 6 of the Convention required that there should be positive steps to try to ensure that young persons who faced increased terms of actual custody should have legal representation. There is some evidence produced before me from the representatives of the Howard League making clear that there are many circumstances in which it is in their view desirable, and indeed helpful, to those facing disciplinary hearings to have representation and further that there are many hearings, or many cases, where no representation is granted. Indeed in some cases the representative attends on behalf of inmate A, who has representation, and finds him or herself asked whether he or she could represent inmate B, C or D, or certainly others, who have not got representation but who, on the face of it, would be assisted by such representation. So this is undoubtedly a problem which exists and, as I have said, I took the view that it certainly was arguable that what is called a proactive attitude should be taken. But, in the light of the problems and, more importantly, in the light of the very great delay in dealing with the 2008 determination, it seemed to me that it would not be inappropriate if I adopted the approach that I am proposing. I indicated I might be minded to do this to Ms Williams and she sought, and I granted, the opportunity for her solicitors' representative to contact the claimant to obtain specific instructions on the matter and he indicated that he would wish that I

adopted the approach that I am adopting, that is to say to deal with the June 2009 adjudication on its own.

14. Ms Williams did submit that I should nonetheless give permission, so that it is heard at a later date, to seek to deal with the refusal of the Chief Magistrate to grant a review. However, as I have said, it seems to me that the decision of 2008 should have been dealt with much earlier. It is to be noted that the claimant was represented in December 2008, albeit not I think by any representative of the Howard League, and they were aware from mid 2009 at least that there were questions to be raised about these two adjudications. It seems to me in those circumstances that delay is a bar to consideration of the 2008 determination and thus I would not be minded to grant permission to pursue the matter through the Chief Magistrate. I should add that on the facts, and I could not need to go into them in any detail, the case on behalf of the claimant is, it seems to me, much weaker in relation to the circumstances of the 2008 determination than it is in relation to the 2009 determination.

15. Let me now turn to that. It involved, as I have already indicated, an allegation of failing to obey a lawful order. He was on the ISU. The record there shows that his behaviour could be excellent and very poor, depending on his mood. What happened on this occasion was that he was told to go to the Howard Unit, which is, as I say, the relevant unit. He said "I can't hear". The order was repeated and he continued to say he could not hear. In due course he pleaded guilty and it was suggested that that was wrong because on the face of it he appeared to have a possible defence. Without, of course, in any way knowing or seeking to know what his precise instructions were or would be in relation to that, it is obviously a pretty unlikely defence in the circumstances. The reality is that he was concerned, he said, that he had been bullied in that unit and he did not want to go back there for that reason. Indeed, that that is likely to have been the situation appears from his application for a review put in on 22nd June 2009, in which he said this:

> "I would like [to] appeal because I was given 10 days [for] refusing [to] go [to] the wing but I don't feel safe in Huntercombe and I have got problems with people on the wings and there[fore] I don't think I should spend an extra 10 ten days in custody because I fear being assaulted and getting into fights. Thanks [M]"

And it is clear from that, on the face of it, that there was a serious matter to be taken into account which might well have justified the imposition of a less severe penalty than one involving ten extra days in custody.

16. The Adjudicator notes on the form:

> "Got problems on wing and don't [sic] want to go back on wing. A problem with London lads. They're all London lads."

This does not really go into any detail which might have been important and which could have been elicited by proper representation on his behalf. There was clearly an issue to be considered there and if there was bullying, if there was suffering in the way

that he asserts, then something clearly needed to be done about it and certainly the matter ought to have been explored but was not.

17. The other matter to be taken into account, which was not in any way put before the Adjudicator, and it may be argued that in those circumstances he can hardly be blamed for not taking it into account, is what I would call the 13 week point. The Adjudicator after all knew when his 18th birthday fell. By then it should have been clear that this young man needed some serious assistance when he was released and, if he was to be released, assistance would have to come from the social services of the local authority concerned and it could only continue in a proper form after his 18th birthday if at least 13 weeks before that 18th birthday were available to him at large because, of course, if in custody he would not be under the care in any way of the local authority.

18. Now, that is a factor which, in the case of any young offender who has had family difficulties in the past and who may need some sort of assistance for the future, is going to face when he comes out of custody and it is in my view important that that sort of matter should be able to be put before the Adjudicator. It is true that it may be that as a general proposition it would be asking a lot of an adjudicator to go into those issues, but that is precisely why it is important in some cases, and this is such a case, coupled with the question of the reasons why he disobeyed the order, because he feared bullying, that, as it seems to me, the Adjudicator erred in not going into the matter in greater depth. Whether he ought to have granted representation in all the circumstances may be dependent to some extent upon what actually was done to achieve representation, but it certainly does not appear from the records that I have seen that the adjudicator took any positive steps to try to ensure that he was represented, having regard to the length of time that he had already spent, already been punished and had added to his term in custody, coupled, as I say, with the proximity of his 18th birthday.

19. It is not for me to, and I do not in the course of this judgment, decide the more general issue as to the extent to which the prison service may or may not be at fault, or adjudicators may or may not be at fault, in the approach they take to grant of legal representation. Suffice it to say that I am quite clear that the point is arguable, but the argument may well have to be raised in another case, hopefully one which is dealt with within a short time of the adjudication in question. But it is an issue that will not go away and it seems to me that there are formidable arguments in favour of a proactive approach and it may be that the prison service and the Adjudicators may want, in the light of my observations, to consider carefully whether there should not be a change to the way in which representation is considered where young offenders are put before an independent adjudicator because there is a real possibility of an increase the period of custody. I cannot make any order, and do not, in relation to that issue, and I emphasise that I have not, as I indicated at the outset, been able to take account of any evidence that might be put forward by the prison service or the adjudicators.

20. I should add that Ms Williams submitted that it can never be appropriate for there to be an additional custody imposed upon an under 18. That would involve a claim that paragraph 60A(1)(b) of the 2000 Order was *ultra vires* and in any event in my view it is a hopeless point and I would certainly not have granted permission on that. She also sought to argue that Articles 5 and 8 were in issue. Again, that does not seem to me to

be an appropriate argument. Article 6, of course, is and fairness allied to Article 6 seems to me to be the main argument in relation to the fairness of the hearings, without there being, if possible, representation of the young offenders in question. After all, the possibility of a penalty is a maximum of 42 days, which equates to a sentence of imprisonment, if imposed by a criminal court, of double that and that is a serious matter. Indeed any extra custody is serious matter, and, as is made clear, both internationally and indeed internally, it should be a matter of last resort. We do not send under 18s to custody unless the view is that there is no alternative which can properly be applied in the given case and that is a consideration, again, that adjudicators in this context should always bear in mind.

21. In all the circumstances, I am satisfied, as I say, that things did go wrong, as I have indicated, in the June hearing and in those circumstances I am prepared to grant permission, notwithstanding the delay, in dealing with that adjudication, to accept that the imposition of the penalty of ten days was excessive and so to quash that penalty. In all the circumstances, it does not seem to me that it is going to be of assistance to anyone to remit the matter for consideration of an alternative penalty at this late stage. If one were cynical, one would say that the claimant has had enough adjudications and no doubt has suffered a number of penalties as a result and this additional one is not going to make a great deal of difference. That perhaps is not the proper basis for not sending it back, but, unless Mr Murray submits that I ought to, I propose to take no further action in relation to that. I should say, that I do not quash the finding of guilt, I do not think that would be appropriate, but merely the penalty imposed. Otherwise, I should say, I refuse permission and the balance of the claim is dismissed.

22. MR MURRAY: Having regard to the welfare principle, I do not propose to make any submissions.

23. MR JUSTICE COLLINS: I do not think it really is necessary in the circumstances of this case. The result of my decision is that the ten days imposed disappears and so his release date is whatever it is -- now, which would be presumably 17th or 16th March. But that can be conveyed to the prison, to the Young Offender Institution, as soon as may be.

24. MR MURRAY: Just a matter of clarification, my Lord, you referred, when you were discussing the June 2009 incident, to the question of representation at that hearing. Obviously you were just describing the submissions rather than making any findings on that point.

25. MR JUSTICE COLLINS: Yes.

26. MR MURRAY: I am very grateful.

27. MR JUSTICE COLLINS: I mean, what I had said, and what I hope I have made clear, is I think things went wrong there, possibly or probably because the Adjudicator did not pick up properly the mitigation point and he was not aware of, or did not consider, the 13 week point and that may well be because there was not representation and in the

circumstances of this case he should either have gone into it in far more depth or to have said to himself that there should be representation.

28. MR MURRAY: I am very grateful.

29. MR JUSTICE COLLINS: And I have made my observations on the other matter, which are of course obiter but may be not unhelpful.

30. MS WILLIAMS: Thank you. My Lord, just two matters. Firstly --

31. MR JUSTICE COLLINS: You are legally aided, I take it.

32. MS WILLIAMS: My Lord, yes.

33. MR JUSTICE COLLINS: I think, in all the circumstances, the right order is no order for costs, but you can have, of course, your legal aid. I mean, you can -- I suppose I have said things have gone wrong in that one instance and perhaps you should have some costs there. What about half costs?

34. MS WILLIAMS: Yes, my Lord. I do not have any details of costs --

35. MR JUSTICE COLLINS: No. Well, it would have to be, because it is legally aided, detailed, if not agreed. I mean, it is your vote, whichever way, but it is a different part of your vote.

36. MR MURRAY: Well, I suppose it comes out of the defendant being the Court Service.

37. MR JUSTICE COLLINS: My vote.

38. MR MURRAY: Indeed, it is my Lord's vote. I would favour my Lord's initial view, no order as to costs.

39. MR JUSTICE COLLINS: Well, I know, but I think on reflection that is wrong. I think he has got something out of this.

40. MR MURRAY: As against the defendant, not the interested party.

41. MR JUSTICE COLLINS: Yes. Well, you tell me the defendant is responsible for the adjudicators.

42. MR MURRAY: That is certainly my understanding.

43. MR JUSTICE COLLINS: Whoever is responsible for the adjudicators should pay. I think in effect it is the Ministry of Justice and there may be a quarrel as to which particular part of the vote it comes out of and in a sense it is one part of the vote paying another, but that is the way -- I mean, legal aid is also the MOJ, but it is a different sub-vote, if that is the right expression, than the Court Service and the prison service and it is important, as I learnt when I was Treasury Counsel, that the right part of the vote has to pay the money. We all know they are all strapped for cash and the legal aid -- so is, in particular, the Court Service too.

44. MS WILLIAMS: My Lord, thank you. One other matter is in relation to the release date. I wonder if we could have a straightforward order from the court relating to the release on the 17th March, in case there is any --

45. MR JUSTICE COLLINS: It is not for the court to decide the release date. All I have done, all the court can do, is to remove the ten days, ie quash the ten days, which is what I have done. You will have to notify the prison and the prison will then have to -- sorry, the Young Offender Institution.

46. MS WILLIAMS: My Lord, we are simply asking for something, I believe, in writing, so that we can --

47. MR JUSTICE COLLINS: Well, you will get a court order.

48. MS WILLIAMS: Thank you.

49. MR JUSTICE COLLINS: What I suggest you do -- yes, there is an associate here. I was not sure there was. That is all right, you will get the court order. If you want a transcript of the judgment -- do you?

50. MS WILLIAMS: My Lord, yes, that would greatly assist.

51. MR JUSTICE COLLINS: In that case you can have that at public expense. You will not get it, I suspect, until at least I return from New York, but --

52. MS WILLIAMS: Thank you, my Lord.

53. MR JUSTICE COLLINS: -- you will in due course. All right. Well, thank you both.