



Neutral Citation Number: [2019] EWHC 529 (Admin)

Case No: CO/4345/2018

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 7 March 2019

Before:

LORD JUSTICE LEGGATT
and
MRS JUSTICE FARBEY DBE

Between:

NATIONAL PROBATION SERVICE

Appellant

- and -

**(1) THE CROWN COURT SITTING AT
BLACKFRIARS**

Respondents

(2) ALAN MUSOKE

(3) KAMAL USTEK

David Manknell (instructed by the Government Legal Department) for the Appellant
The Respondents were not represented

Hearing date: 21 February 2019

Approved Judgment

Lord Justice Leggatt:

1. The question on this appeal is whether a court which has made a community order imposing an unpaid work requirement has the power to extend the period during which the work must be performed after the “end date” specified in the order as the date by which all the requirements in the order must have been complied with. In my opinion, for the reasons given in this judgment, the court does indeed have such a power.

The background

2. On 15 February 2017 Alan Musoke, the second respondent to this appeal, was sentenced for an offence of affray to a community order with a single requirement to carry out unpaid work for 60 hours by 14 February 2018. Mr Musoke only completed 15 of the 60 hours. On 6 August 2018 (almost six months after the end of the period during which the unpaid work was required to be completed) the National Probation Service filed an application at Blackfriars Crown Court seeking an extension of the period.
3. The application was heard on 14 August 2018 at the same time as a similar application, also filed on 6 August 2018, in the case of the third respondent, Kamal Ustek. He had been sentenced on 20 April 2017 for an offence of possession of a Class B drug to a community order with a single requirement to perform 100 hours of unpaid work by 19 April 2018. Mr Ustek completed only three hours of work so that 97 hours remained outstanding.
4. On 28 August 2018 HHJ Hillen handed down a judgment in which he ruled that he had no power to grant the applications. His reasoning in essence was that, under the relevant provisions of the Criminal Justice Act 2003, the court has power to extend the time for completing an unpaid work requirement imposed by a community order only while the order remains in force, and that such an order ceases to be in force on the “end date” specified in the order as the date by which all the requirements in it must have been complied with. In the case of a community order which has a single requirement of performing unpaid work, such as the orders made in respect of Mr Musoke and Mr Ustek, the end date specified in the order is required by the legislation to be (and was in each of their cases) a date twelve months after the date of the order. The judge accordingly concluded that, as this date had passed in each case, he had no power to extend the time for completion of the work which either of the two offenders had been required to perform.
5. At the request of the National Probation Service, the judge subsequently stated a case for an appeal to this court.

The law

6. Section 177(1) of the 2003 Act confers a power on the court by or before which an adult offender is convicted to make a community order imposing on the offender any one or more of certain specified requirements. These include an unpaid work requirement, defined by section 199 as a requirement that the offender must perform unpaid work in accordance with section 200 of the Act. Section 177 further provides:

“(5) A community order must specify a date (“the end date”), not more than three years after the date of the order, by which all the requirements in it must have been complied with.

(5A) If a community order imposes two or more different requirements . . . , the order may also specify a date by which each of those requirements must have been complied with; and the last of those dates must be the same as the end date.

(5B) Subject to section 200(3) (duration of community order imposing unpaid work requirement), a community order ceases to be in force on the end date.”

7. The obligations of any person who is subject to an unpaid work requirement are set out in section 200 of the Act, which provides as follows:

“(1) An offender in respect of whom an unpaid work requirement of a relevant order is in force must perform for the number of hours specified in the order such work at such times as he may be instructed by the responsible officer.

(2) Subject to paragraph 20 of Schedule 8 and paragraph 18 of Schedule 12 (power to extend order), the work required to be performed under an unpaid work requirement of a community order or a suspended sentence order must be performed during a period of twelve months.

(3) Unless revoked, a community order imposing an unpaid work requirement remains in force until the offender has worked under it for the number of hours specified in it.

(4) Where an unpaid work requirement is imposed by a suspended sentence order, the supervision period as defined by section 189(1A) continues until the offender has worked under the order for the number of hours specified in the order, but does not continue beyond the end of the operational period as defined by section 189(1)(a).”

8. The power to extend an unpaid work requirement imposed by a community order is contained in paragraph 20 of Schedule 8 of the Act. This provides:

“(1) Where –

(a) a community order imposing an unpaid work requirement is in force in respect of any offender, and

(b) on the application of the offender or an officer of a provider of probation services, it appears to the appropriate court that it would be in the interests of justice to do so having regard to circumstances which have arisen since the order was made,

the court may, in relation to the order, extend the period of twelve months specified in section 200(2).”

Paragraph 18 of Schedule 12 is in similar terms, except that it applies where a suspended sentence order imposing an unpaid work requirement is in force in respect of any offender.

The plain reading of the provisions

9. Following through these statutory provisions:
 - (1) Pursuant to section 200(2) of the Act, the work required to be performed under an unpaid work requirement of a community order must be performed during a period of twelve months – but this is subject to paragraph 20 of Schedule 8.
 - (2) Under paragraph 20 of Schedule 8, it is a condition precedent to the power of the court to extend the period of twelve months specified in section 200(2) that a community order imposing an unpaid work requirement is in force in respect of the offender.
 - (3) Pursuant to section 200(3), a community order imposing an unpaid work requirement, unless revoked, remains in force until the offender has worked under it for the number of hours specified in it.
10. It follows logically that, where an offender has been sentenced to a community order imposing an unpaid work requirement, then unless and until the offender has completed the number of hours of work specified in the order or the order is revoked, the court has power under paragraph 20 of Schedule 8 to extend the period during which the work must be performed (because the order remains in force). On a plain reading of the statutory provisions, this is the position irrespective of whether the twelve month period specified in section 200(2) has ended or the end date specified in the order has passed.

The judge’s reasoning

11. The Crown Court judge accepted that, on first reading, section 200(3) “would seem to create an indeterminate sentence which lasts until the work is completed.” The judge considered, however, that, if this interpretation were correct, it would give rise to unreasonable consequences. In particular, it would mean that a community order imposing an unpaid work requirement would be an order that: (a) has no time limit; (b) overrides the time limit on community orders in both section 177(5) and (5A); (c) is more draconian in terms of length than a suspended sentence with an unpaid work condition; (d) reduces the effect of the requirement for timeous performance of the unpaid work set out in section 200(2); (e) renders the requirement for an application to extend time otiose; and (f) places an offender at risk of breach proceedings for an indefinite period.
12. The judge considered that these adverse consequences could be avoided by interpreting the statute as providing that a community order imposing an unpaid work requirement ceases to be in force on the “end date” which the order is required by section 177(5) to specify, even if the offender has not completed the number of hours of work specified in the order by that date. In the case of a community order imposing a single

requirement of unpaid work, the end date must, by reason of section 200(2), be a date twelve months after the date of the order. Where, however, the community order imposes one or more other requirements as well as an unpaid work requirement, the end date is the last of the dates by which the various requirements must have been complied with: see section 177(5).

13. In adopting this interpretation, the judge invoked the principle that, in interpreting a statute which imposes a penalty, such as in this case a sentence for a crime, if there are two reasonable interpretations of the relevant provisions, the court must adopt the more lenient one.

This appeal

14. On this appeal the National Probation Service contends that the judge was wrong to interpret the relevant statutory provisions in this way. We are told that the issue is an important one for the Probation Service, as there are currently several thousand cases in which it wishes to seek extensions of time for completion of unpaid work requirements after the twelve month period specified in section 200(2) of the Act has expired.
15. Although Mr Musoke attended the hearing, neither he nor Mr Ustek was represented on this appeal and Mr Musoke was not in a position to address the legal issues raised. Although it is regrettable that we have not heard argument in support of the conclusion reached by the judge, even without the assistance provided by counsel for the National Probation Service, Mr David Manknell, I would have had no difficulty in concluding that the plain reading of the statutory provisions is the correct reading and that the interpretation adopted by the Crown Court is not an available, let alone reasonable, interpretation of the statute.

Reasons

16. The short reason why the interpretation adopted by the Crown Court cannot be correct is that it treats the “end date” by which, in accordance with section 177(5) of the Act, all the requirements in a community order must have been complied with as a date on which, necessarily and for all purposes, the order ceases to be in force. However, section 177(5B) makes it expressly clear that this is not the position. Whilst section 177(5B) provides that a community order ceases to be in force on the end date, this is expressly stated to be subject to section 200(3). Section 200(3) then says that, unless revoked, a community order imposing an unpaid work requirement remains in force until the offender has worked under it for the number of hours specified in it. The Act, therefore, establishes a general rule whereby a community order ceases to be in force on the end date specified in the order, but creates a specific exception to that rule for a community order imposing an unpaid work requirement, in circumstances where the offender has not completed the required work. In those circumstances – which are exactly the situation with which this case is concerned – section 177(5B) and section 200(3), read together, unambiguously provide that the order does not cease to be in force on the end date but remains in force until the unpaid work has been completed (or the order is revoked). The interpretation adopted by the Crown Court is therefore flatly inconsistent with what the Act expressly and specifically says.

17. It is clear that, in drafting the relevant provisions, a distinction has been deliberately drawn between the period during which a community order imposing an unpaid work requirement remains in force and the period during which the work is required to be performed. It is the latter period which there is power to extend on an application under paragraph 20 of Schedule 8, provided the order remains in force – which, pursuant to section 200(3), it automatically does until the unpaid work is completed or the order is revoked.

The judge's concerns

18. It would be possible to stop there, but I think it important to consider the concerns which led the Crown Court judge to attempt to interpret the Act as imposing an end date after which a community order imposing an unpaid work requirement ceases to be in force, unless the period of twelve months specified in section 200(2) of the Act has previously been extended by the court to a date beyond the end date. I understand the judge's principal concern to have been that an offender could otherwise be subject to a penal order for an indefinite period of time and that such a sentence of indeterminate length is objectionable in principle.
19. It is correct that, on what I consider to be the unambiguous meaning of the statutory provisions, if an offender fails to complete unpaid work within the prescribed period, the obligation to perform the work does not disappear but continues until the work is done or the order is revoked. I do not, however, see anything inherently objectionable in such an arrangement. It is no different from the position where, for example, an offender who is ordered to pay a fine fails to pay it within the time specified in the order. The result of such a default is not that the order ceases to be in force so that the offender gains the windfall of not having to pay the fine. The obligation to pay continues, unless and until the fine is paid or the order is revoked. There is nothing unreasonable, to my mind, in a scheme which treats an obligation to perform unpaid work in a similar way.
20. The judge was also concerned that the interpretation contended for by the National Probation Service has the result that the time limits on community orders established by section 177(5) and (5A) are capable of being overridden. That is true in the sense that, as discussed, by reason of sections 177(5B) and 200(3) of the Act, a community order imposing an unpaid work requirement, unlike other community orders, does not cease to be in force on the end date specified in the order if the offender has not yet completed the specified number of hours of unpaid work. The distinction between a community order imposing an unpaid work requirement and other community orders is also reflected in paragraph 20 of Schedule 8, which makes special provision for extending the period of an unpaid work requirement: there is no comparable provision for other requirements imposed by a community order. That, as I have indicated, seems to me to reflect the nature of an unpaid work requirement. In the case of other requirements such as, say, a curfew requirement, once the period of the curfew has ended, the requirement has been fulfilled and there is no cause for the order imposing the requirement to remain in force. In the case of an unpaid work requirement, on the other hand, the requirement has not been fulfilled until the work has been done.
21. Next, the Crown Court judge observed that, on the interpretation contended for by the National Probation Service, a community order imposing an unpaid work requirement is “more draconian in terms of length” than a suspended sentence order with an unpaid

work condition. Again, this is true but in my view unsurprising. Paragraph 18 of Schedule 12 of the Act establishes a power to extend the twelve month period during which an unpaid work requirement imposed by a suspended sentence order must be completed which is in similar terms to paragraph 20 of Schedule 8. However, the effect of section 200(4), quoted earlier, is that an unpaid work requirement imposed by a suspended sentence order cannot extend beyond the end of the “operational period” specified in the order during which the suspended sentence may be activated if the offender commits a further offence. As already noted, section 200(3), which is the corresponding provision applicable to community orders, does not provide for any such cut-off date. The distinction is clearly intentional. As explained by the Divisional Court in *West Yorkshire Probation Board v Cruickshanks* [2010] EWHC 615 (Admin), an authority which was not cited to the Crown Court in this case, the inability to extend the period within which an unpaid work requirement must be completed beyond the end of the operational period specified in a suspended sentence order flows from the nature of such an order. The order imposes a sentence of imprisonment which, so to speak, hangs over the head of the offender for a defined period of time (which cannot be more than two years). During that time the sentence is liable to take effect if the offender commits another offence or if conditions of the order, which may include an unpaid work requirement, are not complied with. It is understandable that such a sentence which involves loss of liberty should be subject to a time limit which applies to the sentence as a whole.

22. The difference in this respect between the regime for suspended sentence orders and that which governs community orders with a requirement of unpaid work was pointed out by Leveson LJ (with whom Cranston J agreed) in the *Cruickshanks* case, when he said at para 16:

“Although the language in relation to the issue of a summons for non-compliance is effectively the same (see paragraphs 7 and 8 of Schedule 8 of the Act), section 200(3) of the Act makes it clear that a community order will continue in force, unless revoked, until the offender has worked under it for the number of hours specified. In relation to a suspended sentence order, on the other hand, section 200(4) is equally clear that the order does not continue beyond the operational period.”

23. The Crown Court judge further suggested that giving the Act the interpretation for which the National Probation Service contended would reduce the effect of the requirement for timeous performance of the unpaid work set out in section 200(2) and render the requirement for an application to extend the time for performance otiose. I do not accept this. The fact that an unpaid work requirement remains in force after the twelve month period specified in section 200(2) has expired, if the work has not been completed, does not reduce the effect of the twelve month time limit. An offender who fails to complete the work within that time will be in breach of the order and at risk of being resentenced for the original offence or punished for the breach. For the same reason, the provision which allows an application to be made for an extension of time is not otiose. If granted, such an extension will avoid what would otherwise be a breach.
24. The final adverse consequence feared by the Crown Court judge was that an offender would be placed at risk of breach proceedings for an indefinite period. It is true that an offender who fails to complete unpaid work within the time required will be at risk of

being brought before the court to be dealt with for the breach unless and until he does complete the number of hours of work specified in the order. This follows from paragraphs 7 and 8 of Schedule 8, which enable an offender who has failed to comply with any requirement of a community order to be brought before the court by the issue of a summons or warrant at any time while the order is in force. However, it seems to me entirely reasonable that, for as long as the offender remains in default, the court should retain the power to deal with an offender for failure to comply with an unpaid work requirement without reasonable excuse – as it does under paragraphs 9 and 10 of Schedule 8. It is important to emphasise that the court dealing with such an offender has a wide range of powers available which can be exercised as appropriate to meet the justice of the case. Those powers range from resentencing the offender for the original offence to simply revoking the community order under paragraph 13 or 14 of Schedule 8 without resentencing the offender or imposing any penalty for the breach. If, therefore, the court considers that, although the offender has no reasonable excuse for failing to perform unpaid work as required, lapse of time in bringing the offender before the court means that it would be harsh to impose any penalty for the breach, then the court can exercise such clemency.

Adverse consequences of the Crown Court's interpretation

25. By contrast, the interpretation adopted by the Crown Court, if it were tenable and correct, would have irrational consequences. In the first place, it would mean that the court could extend the period for completing an unpaid work requirement after the period has ended if, but only if, the community order imposing the unpaid work requirement happens also to include another requirement with a later end date which has not yet passed. It seems entirely arbitrary that the existence or otherwise of a power to extend the time for complying with an unpaid work requirement should depend on whether or not the period during which another, separate requirement must be complied with has expired.
26. More fundamentally, particularly in cases where the unpaid work requirement is the only requirement imposed by the order or the order in any case has an end date twelve months after the date of the order, such an interpretation would frustrate the ability of the National Probation Service and the court to enforce the order effectively. It may not be known until the twelve month period has very nearly ended whether the offender will complete the number of hours of work required in time. If the power to extend time can only be exercised before the end of the period, then, in a situation where it only becomes apparent at a very late stage that the offender will not or is unlikely to complete the work in time but that a short extension might be appropriate, it might be very difficult or practically impossible to have an application for an extension heard by the court before the period ends. Yet, if the Crown Court judge's view of how the Act works is correct, unless an application to extend time can be heard and an order made before the period ends, the court's power to grant an extension is lost.
27. More than that, the power to deal with the offender for failing to comply with the order would also be lost on this view unless a summons or warrant was issued before the period ended. Thus, if an offender fails for no good reason to perform unpaid work within the time required but the Probation Service does not apply for a summons or warrant or no such summons or warrant is issued in respect of the breach before the time for completion of the work has expired, on the Crown Court's interpretation it is impossible to do anything about the breach because the community order imposing the

unpaid work requirement is no longer in force. So the offender simply gets off scot-free.

28. As if that were not enough, even if an application to extend time is made and an extension of the twelve month period is granted by the court under paragraph 20 of Schedule 8 before the twelve month period has expired, I cannot see how on the Crown Court's view of when the order ceases to be in force the Act can be construed as imposing any obligation on the offender actually to complete the work within the extended period. That is because, pursuant to section 200(1) of the Act, the obligation to perform the work applies to an offender "in respect of whom an unpaid work requirement of a relevant order is in force." On the Crown Court's interpretation, such an order ceases to be in force on the end date specified in the order even if the offender has not performed the specified number of hours of work. Logically, therefore, if this interpretation were correct, it would mean that an offender such as Mr Ustek, who performed only three of the 100 hours of work that he was required to perform within the twelve month period, would be relieved of the obligation to do any of the remaining 97 hours of work once the period expired, irrespective of whether he had been granted an extension of time. Furthermore, as discussed, unless a summons or warrant had been issued before the period expired to bring him before the court, he could not be penalised for this failure in any way.
29. These consequences demonstrate that, even if the language of the Act had been ambiguous, it could not sensibly be given the meaning attributed to it by the Crown Court in this case. As it is, as discussed earlier, the language of the Act makes it unambiguously clear that, even after the twelve month period specified in section 200(2) or any extension of that period granted by the court has expired, a community order imposing an unpaid work requirement remains in force until the offender has worked under it for the number of hours specified in it.

Authority

30. Lastly, for completeness I should address an authority on which the Crown Court judge relied in reaching his conclusion. In *R v Gulan Ahmed Khan* [2015] EWCA Crim 835; [2015] 2 Cr App R (S) 39 the appellant had been sentenced to a community order which ordered him to complete 100 hours of unpaid work during a period of two years. This was inconsistent with section 200(2) of the Act. In these circumstances the Crown conceded, and the Court of Appeal confirmed, that the order made was unlawful. The question did not arise and there was no discussion of whether the twelve month period could be extended after it had expired.
31. The Crown Court judge in the present case nevertheless relied on the following statement of McGowan J, who gave the judgment of the court in the *Khan* case, at para 8:

"It is clear that the length of a community order should be certain at the time at which it is imposed. If it is an order to perform a number of hours unpaid work and the statute required that that period of unpaid work be completed within 12 months, then it is a community order of 12 months' duration."

She went on to say at para 10: “It must be the position that the order itself cannot exist other than as a vehicle through which a particular requirement is performed.”

32. The Crown Court judge seems to have taken these remarks to signify that, although a community order with a sole requirement of unpaid work can end earlier than the end of the twelve month period specified in section 200(2) if the unpaid work is completed sooner, the order cannot remain in existence after that time even if the work has not been completed, unless the order is extended before the twelve month period expires.
33. It may be that, if the court in the *Khan* case had been faced with the issue that has arisen here, McGowan J would have expressed herself in slightly different terms. However, I am unable to see how her remarks can reasonably be understood as saying anything about when the power under paragraph 20 of Schedule 8 to extend the period of twelve months specified in section 200(2) can be exercised. That power was not discussed at all in the judgment and was specifically said by McGowan J, at para 7, to be “not relevant here”. All that I take McGowan J to have meant in the passage quoted above from para 8 of the judgment is that, as a result of section 200(2), when a community order imposing an unpaid work requirement is made, the order must specify as the date by which the unpaid work requirement must be complied with a date twelve months after the date of the order. In the statement quoted from para 9 of the judgment, McGowan J was, as it seems to me, saying simply that it is not possible to make a community order with a sole requirement of performing unpaid work which has an end date later than the date by which the work is required to be completed (i.e. twelve months), which is what the judge in the *Khan* case had sought to do.
34. At all events, whether my reading of it is correct or not, the judgment of the Court of Appeal in the *Khan* case is of no relevance to the question raised in present case. It contains nothing which casts any doubt on the conclusion that the question stated at the start of this judgment is to be answered in the affirmative.

Disposition

35. I would accordingly allow the appeal and remit to the Crown Court the applications to extend time for the second and third respondents to comply with the unpaid work requirements imposed by the community orders made in their respective cases.

Mrs Justice Farbey:

36. I agree.