Neutral Citation No: [2018] NIQB 2 *Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Ref:* **McC10520** **JR 17/047881/1** *Delivered: 10/01/18*

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

IN THE MATTER OF AN APPLICATION BY DESMOND DEEHAN FOR JUDICIAL REVIEW

-V-

PROBATION BOARD OF N. IRELAND

McCloskey J

INTRODUCTION

[1] Leave to apply for judicial review having been granted, the Applicant challenges the following:

> "A decision of the Probation Board of Northern Ireland to require the Applicant to keep a written diary of how he meets his sexual needs."

The Applicant's central contention is that the impugned decision infringes his rights under Article 8 ECHR, contrary to section 6 of the Human Rights Act 1998. I shall describe the Respondent as "the Board".

EVIDENTIAL MATRIX

[2] The Applicant, who is aged 42 years, is a perpetrator of sexual crimes. His offending began in his teens and, with the passage of time, he has accumulated a total of 45 convictions which include, most prominently, gross indecency with a child (1990), kidnapping (1990) and, most recently, three inter-related offences of kidnapping and indecent assault (twice) giving rise to the imposition of a sentence of life imprisonment, with a tariff of five years (later increased to six years, upon his transfer to Northern Ireland), on 08 January 1998. The balance of his criminal record comprises sundry offences of dishonesty, arson and driving offences.

[3] Having spent approximately 16 years in prison pursuant to the index offences, the Applicant was released on licence on 15 November 2013. He was recalled to prison on 12 August 2016 on the initiative of his probation officer ("BG") and, following a Parole Commissioner's hearing on 10 January 2017, was released on licence again. His licence is attached as Appendix 1 to this judgment. Conditions (b) and (k) are the most significant in the context of this challenge:

> "(b) You must place yourself under the supervision of whichever probation officer is nominated for this purpose and co-operate with risk assessment procedures required by this probation officer to enable your safe management and supervision ….
>
> (k) You must comply with any requirements specified by your probation officer for the purpose of ensuing that you address your sexual offending behaviour."

[4] On 21 February 2017 BG sought to devise an agreed case plan in conjunction with the Applicant, who avers:

> "[At the meeting BG] … indicated he wished to try a new approach with me [namely] that I keep a written diary which includes a section where I update how I meet my own private sexual needs …. I was completely shocked by this demand. I felt it was a huge invasion of my privacy and was a completely demeaning and embarrassing demand."

The ensuing PAP letter from his solicitors formulates the complaint that this requirement –

> " … is neither proportionate nor necessary and goes beyond what is reasonable in managing his risk."

[5] Issue was joined between the parties in the PAP response on behalf of the Board, which contains the following passage:

> "The request to complete a diary is an attempt to encourage Mr Deehan to self-manage his risk and to be transparent with his supervising Probation Officer as he has shown reluctance to do this verbally in the past."

The letter further elaborates on the contention that this measure is a proportionate feature of the risk management of the Applicant in the community.

[6] Elaboration is provided in two affidavits sworn on behalf of the Board, supplemented by a large volume of documentation. In his affidavit BG discloses that the victims of the Applicant's sexual offending were female children aged 5, 7 and 10 years respectively and a female student aged 19. Responding directly to the Applicant's challenge, BG avers that this measure is designed "… to identify risky thinking and behaviours that the offender will be able to address to reduce the likelihood of recidivism and causing harm to others". Elaborating, he explains that "sexual preoccupation" is a known risk factor. He further avers that the Applicant had been more forthcoming about his sexual needs before his recall to prison. Expanding, the deponent explains that this approach is based on an assessment tool, namely the "Stable and Acute 2007 Dynamic Supervision Project Model" (the "assessment tool") which is "widely used in probation and correctional services" and is –

> ".. … designed for use with adult males who have been convicted of sexually motivated offences against an identifiable victim."

[7] BG explains further:

> "Acute risk factors include sexual pre-occupation which reflects acute expressions of sexual drive, sex as coping and deviant sexual interests …
>
> They are current expressions of risky behaviour and provide evidence that chronic risk relevant propensities are currently active and present ….
>
> A key area assessed … is that of sexual preoccupation. It seeks to gauge changes in the offender's sexual thoughts, fantasies, urges and/or sexual behaviour …."

BG deposes that he specialises in working with those who have committed sexual offences and has over six years' experience in this field. He first undertook training in the assessment tool in 2011 and has undergone updated annual training subsequently.

[8] With specific reference to the Applicant, BG deposes:

He suggests that having regard to the range of options available in the Assessment Tool, the sexual needs question is ".. the least intrusive question that could be asked". He continues [my emphasis]:

> "It was my hope that discussing the diary entries would build the Applicant's confidence to disclose more relevant information and promote greater transparency. **In the circumstances, I say there is no basis for the Applicant's assertion …. that he is the subject of a 'demand' or that he is 'required' to keep the diary ….**"

He elaborates on this in a later passage:

> "Although the Applicant's licence requires that he must comply with any requirements specified by his PO, the Applicant was never directed or required to complete the diary. The intention was that completion of it be utilised as a motivational risk management tool leading to engagement with the Applicant beyond the superficial level. I did not enforce completion of the diary either formally or informally. Such a step would, in any event, likely result in token compliance which would be of little or no assistance to PBNI or the Applicant himself."

BG then highlights the apparent inconsistency between the Applicant's protestation that he had no sexual thoughts with his disclosure that he was "on the way" to loving an adult female with whom he had regular contact, suggesting also that this demonstrated the possible need for intervention in the event of an intimate relationship developing. BG also places some emphasis on the <u>voluntary</u> nature of the proposed diary recording:

[9] Finally, BG explains that the rationale of the recall from licence in August 2016 was his assessment that the Applicant's behaviour could not be safely managed in the community until he had "… completed focused work on self-risk management, decision making and relationships". BG has had no personal involvement in managing and supervising the Applicant since February 2017.

[10] I consider it unnecessary to outline the second of the PBNI affidavits, sworn by the relevant Area Manager. It suffices to highlight one of the documentary exhibits which demonstrates that subsequent to the transfer of supervisory responsibilities from BG to another officer, the Applicant has actively co-operated in the suggestion that he diarise his "thoughts about sex".

CONSIDERATION AND CONCLUSIONS

[11] As already indicated, I granted leave to apply for judicial review in this case on the central ground of Article 8 ECHR, having assessed the other grounds as essentially make weights which added nothing of substance to the Article 8 case and did not overcome the leave threshold.

[12] The evidence, considered as a whole, satisfies the court that the impugned measure entails no compulsion for the Applicant. It is, rather, an act of voluntary co-operation on his part. While Mr Burns sought to argue that there is some inconsistency between the PBNI affidavits and the PAP response, I prefer the submission of Mr Eagan which, in particular, draws attention to the word "request" in the latter.

[13] Given the foregoing analysis, the conclusion that the impugned measure does not interfere with the Applicant's right to respect for his private life follows inexorably. I should add that if an interference had been found it is more likely than not that the Court would have held this to be lawful on the grounds of proportionality and legitimate aim. However, this issue does not arise for final determination.

[14] In passing, and for future reference, the correct approach for the Court in this species of challenge is now well settled. It was considered *in extenso* in R (SA) v Secretary of State for the Home Department [2015] UKUT 536 (IAC). This decision highlights the distinction between human rights and public law grounds of challenge. In Convention rights cases the question is not whether the impugned decision is vitiated by one or more of the established public law misdemeanours. Rather, the question is whether a breach of the Convention right involved has been demonstrated. In judicial review, the role of the Court in determining issues of proportionality is limited by the principle of the discretionary area of judgment, albeit the intensity of review will depend upon the context. It was further held in SA that issues of proportionality may legitimately be informed by public law principles. The correctness of this approach was affirmed subsequently in a decision of the English Court of Appeal: see R (Caroopen) v - SSHD [2016] EWCA Civ 1307, at [76] per Underhill LJ.

[15] I dismiss the application for judicial review and, for the reasons elaborated in my *ex tempore* judgment, I make no order as to costs *inter – partes* and order taxation of the Applicant's costs as an assisted person.