Neutral Citation No: [2023] NICA 52	*Ref:* **KEE12263**
*Judgment: approved by the court for handing down (subject to editorial corrections)**	*ICOS No:* **23/21978/A01**
	Delivered: **18/09/2023**

IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

_____

THE KING

v

OMAR AHAMAD

_____

Mr McNeill (instructed by the PPS) for the Applicant
Mr A Thompson (instructed by MacAllister McAleese, Solicitors) for the Respondent

_____

Before: Keegan LCJ, Treacy LJ and McBride J

_____

Delivered Ex Tempore

KEEGAN LCJ *(delivering the judgment of the court)*

Introduction

[1] This is a reference brought by the Director of Public Prosecutions ("DPP") under section 36 of the Criminal Justice Act 1988 as amended by section 41 of the Justice (Northern Ireland) Act 2002.

[2] The sentence we are asked to examine was imposed by His Honour Judge Ramsey KC ("the judge") on 5 July 2023 in relation to six offences relating to drugs. This was after pleas of guilty. The pleas of guilty were entered at arraignment on counts 1 and 2 and on the remaining counts shortly afterwards. The counts are as follows:

Count 1 Attempted possession of a Class A controlled drug, heroin, with intent to supply.

Count 2 A second count of attempted possession of a Class A controlled drug, heroin, with intent to supply.

Count 3 Importing a Class A controlled drug, heroin.

Count 4 A second count of importing a Class A controlled drug, heroin.

Count 5 Possession of a Class A controlled drug, heroin, with intent to supply.

Count 6 Possession of a Class B controlled drug, cannabis, with intent to supply.

[3] The judge imposed a sentence of 18 months' imprisonment in respect of counts 1 and 2, and two years' imprisonment on counts 3, 4, 5 and 6. All sentences were imposed concurrent with each other and suspended for three years. The DPP maintains that the overall sentence we have just explained is unduly lenient.

Background

[4] The factual background is set out in the reference which we summarise as follows. The offences arise after post was intercepted on 22 June 2022 by UK Border Force officers in Coventry. Two packages were involved, both packages were sent from Mombasa in Kenya, to named individuals. One package was addressed to the respondent's home address and contained 576 grams of heroin of 55% purity. The second package was addressed to the address of the respondent's ex-wife and children and contained 344 grams of heroin at 56% purity.

[5] On 18 July 2022, the police stopped the respondent at Belfast International Airport where he was about to fly to Paris. The respondent's car was in the long stay car park. When searched scales were found in the car alongside documentation relating to one of the addresses on the packages where his ex-wife lived. When that flat was searched heroin was found and the respondent's ex-wife confirmed that he used to live there, and she received parcels for him. Heroin and cannabis were found also at the other address.

[6] We also note that messages were found on the respondent's mobile phone indicative of drug transactions and several saved images showed money remittances in Kenyan shillings. The total weight to which the respondent pleaded guilty was 1170.68 grams or just over one kilogram. He also pleaded guilty to importing 920 grams of heroin. The total wholesale value of the heroin and cannabis combined was just over £50,000.

The respondent's circumstances

[7] The respondent was born in Somalia but has been in the United Kingdom since around 2005, having fled his home country due to conflict there and traumatic events he suffered. He claimed asylum on the same day as his arrival in the United Kingdom and whilst asylum was initially refused it was granted on appeal by an immigration judge in a judgment which we have received and read.

[8] The respondent came to Northern Ireland around 2015 after living in Manchester. He has been in employment since coming to the United Kingdom and

has no criminal convictions in that substantial period which is to his credit. We also note the respondent's account that he began using cannabis and then was pressurised through associates to become involved in this enterprise.

[9] There is an issue raised as to the accuracy of the accounts given to probation by the respondent about his background and his involvement with the Belfast Islamic Centre as a volunteer. The accounts he gave to the probation officer in this case have been called into question by subsequent information as to his family life and there is a refutation by the Belfast Islamic Centre that he ever volunteered there. We will refer to this issue in due course, as it was accepted that we would have to consider all of the material now put before us in deciding the outcome of this reference.

Consideration of the issues

[10] We now turn to the reference itself. This court has recently explained the nature of a reference in the cases of *R v Ali* [2023] NICA 20 and *R v McKenna & Sheridan* [2023] NICA 43. A reference does not provide a general right of appeal and to succeed a sentence must not simply be lenient but must be unduly lenient. In this case two points are raised in support of the reference as follows:

(i) That the sentence imposed is outside the guidance for offences of this nature and so, wrong in principle.

(ii) That the basis for suspension of the sentence did not exist and so suspension was not properly imposed.

[11] We then turn to the sentencing authorities. There was no real dispute as to the applicable guideline cases in this jurisdiction. We refer to the case of *Gary McKeown, DPP's Ref (No.2 of 2013), R v Han Lin* [2013] NICA 28. In that case the court reviewed the authorities and reiterated the guidance previously provided by the case of *R v Hogg* [1994] NI 258 which adopted a case of *R v McCay* [1975] NI 5 and the well-known *R v Aramah* guidelines reported at (1983) 76 Cr App R 190.

[12] Paras [28]-[33] of the DPP's reference comprehensively deal with the law as follows:

> ***"Sentencing authorities on the importation of Class A drugs***
>
> 28. In *R v Hogg* [1994] NI 258 Hutton LCJ approved the guidance given by Lowry LCJ in *R v McCay* [1975] NI 5, in particular, that Class B drugs offending is less serious than that concerning Class A drugs. The fourth through to the eighth further points made by the court in *McCay* are relevant here:

'4. In connection with the offences of supplying and permitting premises to be used, a previous conviction for a similar offence should weigh heavily against the accused;

5. A previous clear record in connection with drug offences is relevant but is not by itself a clear indication against a custodial sentence;

6. In possession cases, and to a lesser extent in cases of supply and permitting premises to be used, a previous criminal record unconnected with drugs is of minor importance;

7. Severe sentences, including custodial sentences of any kind, are of assistance in signifying the community's rejection of drug-taking and its hostility to traffickers in drugs and even to those who supply them free of charge;

8. The importation of drugs, especially when done for gain, ought to be very severely punished.'

29. The court in *Hogg* went on to hold the following:

'(ii) There are several different levels of gravity of involvement in the supply of drugs. In general, the importer of substantial quantities is to be regarded as the most serious offender, to receive the heaviest punishment. Below him is the wholesaler, who supplies the small retailers with drugs for distribution to the public on commercial arrangements which may be straight sale, sale or return or the retention by the retailer of a percentage of the selling price. The next category in descending order of culpability is the retailer who sells to the public for commercial gain. At the bottom of the scale is the person who supplies a small amount without a commercial motive, for example, where cannabis is supplied at a party (see *R v Aramah*).

(iii) The offenders in drugs cases are generally young people, frequently of good backgrounds and without any previous criminal involvement. Not uncommonly the major suppliers use the services of such people for retailing, as the importers use young people of presentable appearance as couriers, in order to attempt to avoid detection of the traffic. In many cases a custodial sentence can blight a promising career. It is always right for a court to keep such considerations in mind when sentencing, but the importance of deterrence of others and the marking of the community's rejection of drug-taking will often prevail and lead to the imposition of an immediate custodial sentence …'

30. Hutton LCJ then summarised the law in the following three paras (underlining added):

'1. Importation of drugs on a large scale is the most serious offence in this area, and is invariably to be visited with a substantial custodial sentence. We respectfully agree with the guidelines set out by Lane CJ in *R v Aramah* (1982) 4 Cr App R (S) 407.

2. Supplying drugs is the next in descending order of gravity, with possession with intent to supply a short distance behind. In many cases there may be little distinction between them, for the charge may depend on the stage of the proceedings at which the defendant was apprehended. In all, but exceptional cases, they will attract an immediate custodial sentence, which may range from one of some months in the case of a small quantity of Class B drugs to <u>one of four or five years or more in the case of supply of appreciable commercial quantities of Class A drugs</u>. We do not find it possible to narrow the range any more closely, for much will depend on the circumstances of the supply, its scale, frequency and duration, the sums of money involved and the defendant's previous record, together with his or her individual circumstances.

> 3. More flexibility may be adopted by the sentencing court in the case of possession where there has been no supply of drugs or intent to supply them to other persons. Large-scale possession, even without supply to others, and repeated offending may still require an immediate prison sentence. Possession of Class B drugs may generally be regarded as less heinous than possession of Class A drugs. In many cases of the former at least there will be room to consider a suspended sentence or non-custodial methods of dealing with the offender.'

31. The guidelines in *R v Aramah* (1983) 76 Cr App R 190 approved in *Hogg*, so far as Class A drugs are concerned, are as follows (underlining added):

> 'Then I turn to the importation of heroin, morphine and so on. Large scale importation, that is where the street value of the consignment is in the order of £100,000 or more, sentences of seven years and upwards are appropriate. There will be cases where the values are of the order of £1 million or more, in which case the offence should be visited by sentences of 12 to 14 years. <u>It will seldom be that an importer of any appreciable amount of the drug will deserve less than four years</u>.
>
> This, however, is one area in which it is particularly important that offenders should be encouraged to give information to the police, and a confession of guilt, coupled with considerable assistance to the police can properly be marked by a substantial reduction in what would otherwise be the proper sentence.
>
> Next, supplying heroin, morphine, etc. It goes without saying that the sentence will largely depend on the degree of involvement, the amount of trafficking and the value of the drug being handled. It is seldom that a sentence of less than three years will be justified and the

> nearer the source of supply the defendant is shown to be, the heavier will be the sentence. There may well be cases where sentences similar to those appropriate to large scale importers may be necessary. It is however unhappily all too seldom that those big fish amongst the suppliers get caught.'

32. Lord Lane CJ also made the following observation in respect of importers of cannabis, which it is submitted applies with equal or greater force to those importing Class A drugs:

> 'The good character of the courier (as he usually is) is of less importance than the good character of the defendant in other cases. The reason for this is, it is well known that the large scale operator looks for couriers of good character and for people of a sort which is likely to exercise the sympathy of the court if they are detected and arrested. Consequently one will frequently find students and sick and elderly people are used as couriers for two reasons: first of all they are vulnerable to suggestion and vulnerable to the offer of quick profit, and secondly, it is felt that the courts may be moved to misplaced sympathy in their case. There are few, if any, occasions when anything other than an immediate custodial sentence is proper in this type of importation.'

(See also the similar observations made by Holroyde J in *R v Quinn* [2010] 1 Cr App R (S) 34 at para [7].)

33. *Hogg* has been repeatedly affirmed as the guideline case in this jurisdiction, in particular in *R v McKeown, DPP's Ref No 2 of 2013, R v Han Lin* [2013] NICA 28 at para [14] and in *R v Hughes and ors;* DPP Ref's Nos 1, 2, 3 and 4 of 2015 [2015] NICA 53 at para [31]. In *Hughes* the court added the important qualification that:

> 'The weight of drugs alone, however, will not determine the sentencing bracket. In *Hogg* this court indicated that it was not possible to narrow the range of sentencing because much will depend on the circumstances of supply, its

> scale, frequency and duration, the sums of money involved and the defendant's previous record together with his or her individual circumstances. The aggravating and mitigating factors identified by the Sentencing Guidelines Council can be of great assistance in helping the judge to find the appropriate sentence. It is with that guidance in mind that we approach the individual cases.'

[13] There was no issue taken by the respondent's legal representatives to this recitation of the applicable law. It follows from the guidelines in *Aramah* as approved by *Hogg* that the importation of an appreciable amount of Class A drugs will attract sentences of 4-5 years or more.

[14] This was a case where the judge accepted that the respondent had been pressurised to involve himself in the criminal drugs enterprise and had no trappings of wealth. He is also a person with a tragic and difficult background who was open to exploitation by others. That all meant that even though he pleaded guilty to importation he was sentenced for a much lesser role in this drugs enterprise associated with supply. He was not at the top of the pyramid described above.

[15] This assessment of the judge by which we are bound was favourable to the defence as the prosecution had argued for greater culpability. The England & Wales Guidelines for a category 2 lesser role case provide a starting point of six years and a range of five to seven years. In addition, we note the authority of *R v Boyake* [2013] 1 Cr App R (S) 2 which is an England & Wales case which deals with revised and reduced sentences for offenders, who are disadvantaged, who have come from underdeveloped countries and been exploited in the drugs world. Whilst sentences for this category of offender have reduced in recent times to reflect exploitation, the sentences for an offender found to have been pressurised remain four to five years as a starting point to reflect the seriousness of these offences and the fact that deterrence is required. We must proceed on that basis.

[16] In this case prosecution counsel, Mr McNeill, and defence counsel, Mr Thompson, agreed that a starting point of four to five years is correct, although Mr Thompson submitted that the judge was entitled to go outside the range given the flexibility afforded by the sentencing process and that the judge may have intended a three-year starting point in this case.

[17] We see no reason why the judge should have departed from the range we have described which is well settled in law. This offending involved importation of Class A drugs with intent to supply. A custodial sentence was required and should, to our mind, have been no less than five years. We agree that this was a case where maximum credit should have been given for the plea, therefore the sentence after

reduction for the plea should have been one of some three years and four months' imprisonment.

[18] We then turn to the suspended sentence. It is clear to us that the judge relied heavily on the respondent's difficult background circumstances and his purported involvement with the Belfast Islamic Centre indicative of good character and a clear record in reaching his decision to suspend the sentence of imprisonment which he had chosen. We think that he has fallen into error in this analysis. First, the personal circumstances have already been factored into the starting point as allowance was made there for a lesser role which takes into account pressure and the deprivation of the respondent. Second, good character does not reduce culpability in a case of this nature. Even without the considerable question marks over the respondent's accounts of his past and involvement with the Belfast Islamic Centre, we do not think that there are the exceptional circumstances present to justify a suspension of sentence in this case. Affording due respect to the position of the trial judge we consider that he has fallen into error in deciding to suspend the sentence in a case of this nature.

[19] The final point raised is that if the court were to now impose an immediate custodial sentence some reduction should be made to reflect the fact that the respondent did not think that he would be imprisoned. The text *Blackstone's Criminal Practice* 2023 at paragraph D28.5 refers to the fact that when the Court of Appeal increases the sentence under the reference procedure its practice has often been to allow some discount on the sentence it would consider appropriate because of what is usually termed the double jeopardy of the offender having to wait before knowing if the sentence is to be increased. Where an offender has a substantial part of a long determinate sentence remaining this principle is of limited effect. However, where an offender is close to release or had a custodial sentence substituted for a non-custodial sentence a reduction should be applied. Blackstone's refers to a discount of 30% in such circumstances. We also refer to the case in this jurisdiction of *R v Corr* [2019] NICA 64. In this case we have considered the argument that the offender did not think that he was going to be subject to a period of imprisonment following his sentencing and so we will apply some reduction for double jeopardy, in the order of 10 months.

Conclusion

[20] For the reasons given we will grant leave for the reference and quash the sentence imposed which was a suspended sentence. We substitute a sentence of immediate imprisonment of two years and six months split equally between custody and licence.

[21] Finally, in reaching this conclusion and providing this judgment, we reiterate the fact that cases involving importation of, and intent to supply, Class A drugs will attract immediate custodial sentences in this jurisdiction. Personal circumstances provide little mitigation given the need for deterrence in this area. The respondent's personal circumstances and the pressure put upon him as a disadvantaged person

were reflected in the starting point, otherwise he would have received a higher sentence for these offences.

[22] An important point also made to us is that had this sentence been maintained our jurisdiction would have been out of step with other parts of the United Kingdom. That is not the policy of our courts as regards drugs offences of this nature which span across borders, have considerable societal impact here, and need to be deterred.