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(subject to editorial corrections)*

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY HW

AND IN THE MATTER OF THE DECISION OF THE GOVERNOR OF HMP MAGILLIGAN

HW's Application [2016] NIQB 18

COLTON J

Background

[1] The applicant is a prisoner in HMP Magilligan.

[2] On 10 March 2011 he was sentenced to 14 years' imprisonment following his conviction after a trial for a series of sexual offences against his nephew and niece including offences of buggery and rape.

[3] He appealed the conviction and his appeal was dismissed by the Court of Appeal on 18 May 2012. His earliest date of release will be 7 December 2017.

[4] He continues to deny his guilt. He has applied to the Criminal Cases Review Commission ("CCRC") seeking a reference of his case to the Court of Appeal. It is not clear upon which date he actually applied to the CCRC, nor has the court seen any of the grounds upon which he relies. The prison records record that the applicant asserted that his "papers" were with the CCRC on 25 November 2013. According to a letter from his solicitors of 26 September 2014 he instructed them that "the matter is at an advanced stage with the CCRC". By letter of 30 April 2015 the CCRC confirmed that they had received an application from the applicant and that his case was under active review. It was not possible to give any indication of when a decision would be made and as far as the court is aware the matter remains with the CCRC.

[5] The applicant complains about the Prison Service's failure to grant him enhanced status under the PREPS Scheme operated by the prison authorities. This scheme is designed to prepare prisoners for release by encouraging, motivating,

supporting and rewarding them for working towards, *inter alia,* risk reduction, rehabilitation and good behaviour. Participation is rewarded with various privileges. There are three levels within the scheme, basic, standard and enhanced. All persons entering custody start at standard level. Prisoners may move up and down through the levels based on their behaviour which is measured in particular against their sentence plan. A fundamental element of eligibility for enhanced status involves an acceptance of responsibility on the part of a prisoner for his offending behaviour.

[6] In this case the applicant has been refused enhanced status because of his failure to accept responsibility for his offending behaviour and thereby comply with his offender management plan.

Chronology leading to the Judicial Review Application

[7] The applicant has been denied enhanced status since August 2011. The prison records indicate that he was clearly unhappy about his failure to be granted enhanced status. On 21 August 2014 the records indicate that he said he was "taking the prison to court" over the issue of enhancement and that 'a QC' is meeting him in the next coming weeks to interview him (test case)". On 26 September 2014 his solicitors wrote to the prison governor complaining about the decision not to elevate him within the PREPS scheme and asking for him to be "considered for enhancement". The Prison Service replied on 1 October 2014 setting out its position. In particular I refer to the following paragraphs:

> "Once sentenced, the Prison Service is obliged to treat the prisoner as guilty. We are however fully entitled to apply the PREPS regime to those denying their guilt. There is significant discretion built into the application of the scheme, and in the case of those individuals in denial of their offence, and where an appeal with the courts has been lodged, the targets and goals set within the sentence plan would be deemed long term objectives, thereby allowing prisoners under appeal of conviction access to the enhanced regime. The sentence plan would be reviewed when the outcome of the appeal is known. Further reviews are undertaken to ascertain the prisoner's continued stance to his conviction and in this case HW was last reviewed on 9 July 2014 when he responded, 'I will not ever accept anything in which I have never done or took part in'.
>
> … Should the CCRC refer HW's case to the Court of Appeal and we are supplied a copy of the statement of reasons, we will review HW's position within PREPS immediately."

[8] The applicant made internal complaints about his situation on 29 December 2014 and on 6 January 2015. He appears to have been interviewed about this and an investigation was conducted. The complaint was dismissed on 18 February 2015 and this appears to have been communicated to the applicant on 19 February 2015.

[9] In the course of these proceedings it emerged that the applicant had also made a complaint to the Prisoner Ombudsman. By letter dated 8 May 2015 the Ombudsman informed the applicant that his complaint was not upheld. A pre-action protocol letter dated 6 March 2015 but not received until 30 March 2015 was issued on the applicant's behalf. The letter challenged the decision to refuse his application for the PREPS scheme. At that stage the focus of the complaint was on alleged less favourable treatment in comparison with other individuals within the prison regime. The Prison Service replied on 9 April 2015 confirming its view that it did not consider the applicant as being suitable for the enhanced regime. An *ex parte* docket together with the Article 53 Statement was then issued on 11 May 2015.

[10] The applicant brings these judicial review proceedings to challenge the decision of the governor to refuse him enhanced status under the PREPS scheme. He seeks an order of *certiorari* to quash the governor's decision, an order of *mandamus* directing the governor to reconsider his status within the prison and a declaration that the decisions are unlawful, *ultra vires* and have no force or effect. He further seeks a declaration that the PREPS scheme unlawfully fetters the governor's discretion and therefore constitutes an unlawful policy.

[11] The matter was originally listed for a "rolled up" hearing on 13 November 2015 but at that hearing leave was granted to amend the Order 53 Statement and the matter was then adjourned and heard on 4 December 2015.

[12] I am grateful for the assistance of counsel in this case namely, Mr David Heraghty for the applicant and Mr Steven McQuitty for the respondent for their helpful and concise written and oral submissions.

The Issues

[13] There are four issues to be determined by the court, namely:

(i) Should the applicant be granted leave having regard to the issue of delay?

(ii) Should the applicant be granted leave having regard to the duty of candour required of an applicant?

(iii) Has the applicant established sufficient grounds to be granted leave on the merits?

(iv) If the applicant is granted leave is he entitled to any of the relief sought in the Order 53 Statement?

Delay

[14] It is axiomatic that judicial review proceedings should be issued promptly particularly having regard to the desirable objectives of legal certainty and good public administration. Order 53 Rule 4(1) stipulates:

> "An application for leave to apply for judicial review shall be made promptly and in any event within 3 months from the date when grounds for the application first arose unless the court considers that there is good reason for extending the period within which the application shall be made."

[15] Leaving aside ongoing complaints made by the applicant to the authorities in 2013 and 2014, it is clear that the issue raised in this application must have crystalised for the applicant on 1 October 2014. At that stage he had instructed solicitors who had written to the prison authorities complaining about the issue of his enhanced status and the proposed respondent had set out his position in his reply dated 1 October . It can reasonably be argued that time began to run against the applicant from 1 October 2014. Yet no pre-action protocol letter was sent until 30 March 2015 almost 7 months post that date. *Prima facie* therefore there clearly is gross delay here. The applicant responds by relying on the argument that he sought an alternative remedy by way of the formal complaints on 29 December 2014 and 6 January 2015. Of course this does not explain any delay between 1 October and 29 December, almost two months. Furthermore, the complaint on 29 December 2014 was quite similar to the types of complaints made in 2013 and 2014 internally. In any event he received a formal response to his complaint on 19 February 2015. The court received an affidavit from Mr James Ferrin, Trainee Solicitor, employed by the applicant's solicitors setting out the steps taken by him after receiving instructions on 19 January 2015. I am satisfied that he acted promptly and professionally in relation to his conduct of the matter from that date until the issuing of these proceedings.

[16] I accept that there has been significant delay on behalf of the applicant in relation to this matter, particularly for the period 1 October 2014 and 29 December 2014. On balance I have come to the view that between 29 December 2014 and 19 February 2015 the applicant could fairly have been considered to have been pursuing an alternative remedy which means that the application was lodged within a 3 month period of that date. Of course, I remind myself that the obligation is to act promptly.

[17] In addition to the argument that the applicant sought an alternative remedy he also relies on the fact that what is being challenged here is a continuing decision.

Thus it is argued that it would be artificial to treat the impugned decision as one which was made on 1 October 2014, 19 February 2015 or indeed 8 May 2015 which was the date upon which the complaint to the Prisoner Ombudsman was dismissed.

[18] Returning to the rules on this point, the key issue is to identify "when grounds for the application first arose". In my view they "first arose" on 1 October 2014 at the very latest from the applicant's point of view. Under the rule the court has a discretion to extend the period within which the application can be made.

[19] On balance in this case I have decided to so extend the time period in question. I do so for the following reasons. Firstly, in his terms the applicant did continue to raise the issue with the authorities and made a formal complaint on 29 December which would be within the 3 month period. Secondly, I am satisfied that after he instructed solicitors on 19 January 2015 they did deal with the matter properly. Thirdly, I consider that this is a matter which may well come back to the court in any event and that there is a public interest in determining the issue raised by the applicant.

Duty of Candour

[20] In this regard the respondent complains that the applicant did not disclose to the court that he had made a prior complaint about these issues to the Prisoner Ombudsman who had rejected that complaint on 8 May 2015. It is argued that this is a material omission from the factual matrix by the applicant and it is also suggested that this may have been of relevance to the LSA had it been disclosed to it prior to the issue of proceedings. This matter was only brought to the court's attention when raised by the respondent on 18 June 2015. In submissions the applicant's lawyers have averred that they were unaware of this until 18 June 2015 and I accept this. Nonetheless, this of course does not reflect on the applicant's candour and no explanation has been provided by him for his failure to inform his lawyers of this material point. Notwithstanding the absence of an explanation, bad faith is not expressly averred. No disadvantage or prejudice arises from the failure to disclose this matter in the application and I have decided not to refuse leave on the grounds of a failure to comply with the duty of candour in this particular case.

Leave

[21] In my view the applicant meets the test for granting leave. As is clear from the submissions in the case and from the judgment on the merits the applicant has met the modest hurdle of establishing an arguable case.

The Merits

[22] Essentially the applicant makes two points in support of his challenge.

[23] Firstly, he argues that the PREPS scheme's terms are mandatory, the consequence of which is that they fetter the governor's decision with respect to decisions on regime levels. I shall refer to this as the "blanket rule argument".

[24] Secondly, he argues that the principles in the case of Mark Harbinson's Application for Judicial Review [2012] NIQB 38 should be extended so that prisoners who have an extant application to the CCRC should be treated in the same way as prisoners who are seeking leave to appeal their convictions to the Court of Appeal. In short they should be treated as "denier/appellants" under the scheme. I shall refer to this as "the appellant argument".

[25] In considering the PREPS scheme in the context of a legal challenge I want to make a number of general points before addressing the arguments to which I have referred above.

[26] Firstly, it seems to me that the concept of the scheme is an entirely justified and laudable approach by the prison authorities to the treatment of prisoners whilst in custody and for the purposes of preparing them for release. The legality of such a scheme was considered by Kerr J as long ago as 2003 in the case of McKinley [2003] NIQB 20. In his judgment he confirmed the legal basis of the scheme and held that it was entirely *intra vires* the power of the governor. Further, in his judgment Kerr J in considering an Article 6 argument came to the conclusion that enhanced status is in essence a privilege which can be earned rather than a right to which a prisoner may claim to be entitled.

[27] Finally, I particularly bear in mind the comments of Weatherup J in the case of Re Winchester's Application [2002] NIQB 65 as follows:

> "The operation of PREPS and the requirement of fairness
>
> [15] While Article 6 is not engaged it is nevertheless necessary that the operation of PREPS should satisfy the requirements of fairness, with due regard being had to the operational difficulties involved in prison management.
>
> [16] The English equivalent of PREPS was considered in R v Secretary of State for the Home Department ex parte Hepworth (Unreported 25 March 1997) which application arose out of prisoners convicted of sexual offences being unable to attain enhanced status if they continued to deny their guilt. By reason of the denial they were not admitted to the sex offender treatment programme and therefore could not satisfy the criteria for enhanced status. Laws J made the following comments

about the place of judicial review in relation to such decisions as to status –

> 'I should say first that I have some misgivings in principle as regards the privilege cases. They are attempts to review executive decisions arising wholly within the context of internal prison management, having no direct or immediate consequences for such matters as the prisoner's release. While this court's jurisdiction to review such decisions cannot be doubted, I consider that it would take an exceptionally strong case to justify its being done. There are plain dangers and disadvantages in the courts maintaining an intrusive supervision over the internal administrative arrangements by which the prisons are run, including any schemes to provide incentives for good behaviour, of which the system in question here is in my judgment plainly an example. I think that something in the nature of bad faith or what I may call crude irrationality would have to be shown, which is not suggested here.'

[17] However, the proper concern that the Court should exercise caution in considering matters relating to internal prison management should not diminish the overall requirement that the Court exercises its supervisory role in a manner that ensures that decisions in relation to the status of prisoners comply with the demands of fairness, impacting as such decisions do on the privileges to be enjoyed during detention. As stated by Moses J in R (On the application of Potter) v Director General of the Prison Service [2001] EWHC Admin 1041 at [41], -

> 'Thus requirements of fairness which are of sufficient flexibility to encompass operational difficulties and problems do provide a standard against which to test the quality of decisions in relation to IEPS [the English version of PREPS]. Fair schemes fairly applied are of importance to the quality of a prisoner's life in prison and to

> effective management, provided it is appreciated that the courts must be sensitive to those difficulties and alive to the fact that those who manage prisons are better placed to take a wider view of the demands of fairness than an aggrieved prisoner, who must necessarily have a confined perspective.'"

(My underlining)

The Blanket Policy Argument

[28] In short, the applicant's argument is that the Prison Service's approach to CCRC applicants amounts to a blanket ban on such persons being permitted access to the PREPS and to retaining enhanced status. It is argued that this constitutes an unlawful policy. Mr Heraghty points to the wording of the PREPS policy itself which states in relation to the enhanced regime:

> "**Enhanced**
>
> 12. Expectations to attain and remain on enhanced regime;
>
> In addition to meeting the expectations for standard regime, those seeking promotion to Enhanced must also;
>
> - ✓ Accept responsibility for their offending behaviour (sentenced prisoners)
> - ✓ Comply fully with an agreed offender management plan
> - ✓ Demonstrates that they can be trusted to work with a reduced level of supervision
> - ✓ Demonstrates a willingness to use their personal time constructively."
>
> (My underlining)

[29] He says that the use of the word "must" indicates a mandatory requirement. He contrasts this with the wording of the scheme in existence prior to the Harbinson decision which, when referring to endorsement and review of regime level, states:

> "A prisoner who continually refuses to admit his guilt or avoids taking a required programme recommended by professional staff cannot be deemed to be addressing

> their offending behaviour and may be subject to a reduction in regime level." sic (Again my underlining)

[30] He says, therefore, that the applicant's situation is similar to that experienced by the applicant in the case of R (On the Applications of Ian Shutt and John Tetley) v the Secretary of State for Justice [2012] EWHC 851 (Admin).

[31] In that case the High Court condemned a local policy applicable to HMP Isle of Wight which adopted a points scoring system for the earning of extra privileges, the effect of which was to ensure that a prisoner in denial would never achieve enhanced status. In that case the court came to the following conclusion:

> "Whilst fully mindful that the Prison Service should be able to make operational decisions without undue interference from the court, I have come to the conclusion that a local policy which excludes any element of discretion in the decision making process as to whether an Unready Denier should be denied Enhanced status is unlawful and outwith the framework in PSI 11 2011."

[32] However, notwithstanding that, the court found that there had been no injustice to either claimant from the application of the unlawful policy.

[33] It is argued further that not only is the wording clear in terms of a blanket policy but in practice no discretion is exercised and he refers to a letter from the Deputy Governor of the Prison Service on 7 June 2015 which confirms that:

> "For the avoidance of doubt we are not aware of any non-appellant denier who has been admitted to enhanced status beyond the prisoner that you reference in your PAP letter dated 6 March 2015. However, this was done in the exceptional circumstances of that case and was only done on a temporary basis pending further review."

[34] In addition to the Shutt case Mr Heraghty referred me to the text in *Fordham on Judicial Review* which refers to the well-established principle of public law that a policy should not be so rigid as to amount to a fetter on the discretion of a decision maker.

[35] In considering this matter it is important to look at the PREPS policy as a whole. In this regard I note that the preamble to the PREPS policy includes the express provision that:

> "There may also be a requirement for establishments to make variations on how PREPS is applied to meet the

> needs of individuals or groups in line with the legislation, policies, strategies and guidelines listed below".

[36] It points out that the PREPS policy is "a working document and may be subject to change". Paragraphs 21 and 26, which deal with regime promotions and demotions, point out that "prisoners will be considered for promotion or demotion based on the following". (My underlining)

[37] Again, the word "considered" is used and underlined when referring to demotions from enhanced status. Thus I consider that there is a degree of flexibility in the scheme and that the use of the word "must" should not be construed as lawyers might as signifying a "mandatory condition" in the context of an interpretation of a statute, for example.

[38] Throughout this application the Prison Service has asserted that it does have a discretion in this matter. Thus in its letter of 1 October 2014, and before any "blanket policy" argument was made, the Prison Service states as follows:

> "Once sentenced, the Prison Service is obliged to treat the prisoner as guilty. We are however fully entitled to apply the PREPS regime to those denying their guilt. There is significant discretion built into the application of the scheme, and in the case of those individuals in denial of their offence, and where an appeal with the courts has been lodged, the targets and goals set within the sentence plan would be deemed long term objectives, thereby allowing prisoners under appeal of conviction access to the enhanced regime. The sentence plan would be reviewed when the outcome of the appeal is known. Further reviews are undertaken to ascertain the prisoner's continuing stance to his conviction and in this case HW was last reviewed on 9 July 2014 when he responded 'I will not accept anything on which I have never done or took part in'.

Responding to the Order 53 Statement by letter of 17 June 2015 the deputy governor asserts:

> "The Prison Service are aware of the need to retain an open mind so as to take into account the individual circumstances of each prisoner in respect of decisions that affect them, including decisions on regime level.
>
> It is Prison Service Policy that denial (and consequent failure to address risk etc …) for Non-Appellant Deniers will result in consideration for demotion in regime level

> or consideration of refusal and promotion to a higher regime level. As such it is not a blanket policy and each prisoner will be considered individually albeit the denial of enhanced status to those in the applicant's position would be the likely outcome in the vast majority of cases absent some exceptional circumstances (which do not arise in your client's case). This is a lawful policy position." sic

[39] This position is maintained in the affidavit from the deputy governor sworn on 23 November 2015.

[40] It is also clear that one prisoner identified as "UJ" did remain on enhanced status notwithstanding that he had an extant CCRC application. The exact circumstances in which "UJ" retained his enhanced status were a matter of some controversy at the hearing. However, it is not necessary to go into this issue in any detail as for the purposes of this argument the point is that this demonstrates that the PREPS scheme did have adequate flexibility to permit this exception. Indeed, part of the initial grievance of the applicant was based on what he perceived as an unfair difference in treatment between him and UJ.

[41] I accept that there are good legal and practical reasons for the policy position of the Prison Service in terms of their approach to "non-appellant deniers".

[42] Paragraph 12 of the PREPS document, to which the applicant refers, is a document designed to give clear and unambiguous guidance to those who are required to administer the scheme. I accept the argument of the Prison Service that clarity and consistency are important for prison staff and prisoners alike so as to avoid arbitrary decisions.

[43] Nonetheless, I am satisfied that there is sufficient flexibility within the scheme to provide for exceptional circumstances that would justify dis-applying the general policy. For that reason I refuse relief under the blanket policy argument.

The Appellant Argument

[44] Prior to the decision in *Harbinson* in this jurisdiction prisoners who were appealing their conviction and who were denying their guilt were held by the prison authorities not to be fully compliant with their sentence plan and generally were not deemed suitable for enhanced status under the PREPS scheme. Harbinson was a sentenced sex offender who was appealing his conviction. He was reduced from the enhanced regime to the standard regime because he was appealing his conviction and not complying with his sentence plan. He challenged the prison authorities on two matters; the decision to demote him and the decision to include an admission of guilt as part of his sentence plan. In quashing both decisions, Treacy J stated as follows:

> "There is a clear difference between the capacity of appellant and non-appellant deniers to act deliberately or choose to engage fully in the relevant scheme. These terms imply an unburdened mind free to make a selection between a range of options. However, for an appellant denier, the continued availability of an appeal, which could lead to the quashing of his conviction and return of his personal liberty, must be seen to weigh heavily on any capacity to choose or act deliberately. The nexus of unfairness in this case lies in the neglect of the factual differences between appellant and non-appellant prisoners, and the associated prospect that the appellant prisoner will ultimately be acquitted. Requiring an admission of guilt while this process is in train is irrational and operates unfairly against the appellant prisoner. This is the position that obtains under the England and Wales NOMS policy and I find no logical reason why considerations of fairness as regards appellant deniers should be different under the Northern Irish scheme. Failing to take account of this fundamental pragmatic difference resulted in vitiating unfairness."
>
> (My underlining)

[45] It will be seen that in addition to setting out the relevant principle the court was also influenced by the fact that the policy in England and Wales was different from the Northern Irish scheme. In this regard the court was clearly influenced by the decision in the case of Green v the Governor of HMP Risley, the Secretary of State for the Home Department [2004] EWHC 596 (Admin). The relevant section of the judgment in that case is as follows:

> "[15] The relevance of that is said to relate to a policy of the Prison Service that a prisoner who is on an enhanced level should not have that reduced or removed while he is an appellant. It may be, but it is difficult to be sure about this because I have no evidence about it and no statistics before me, that there are some prisoners who despite denial are on enhanced status, in respect of whom denial might otherwise have been a bar to enhanced status. An appeal against conviction would normally indicate a denial of guilt of the offence of which the prisoner had been convicted, but it was apparently recognised that it would not be fair to remove the enhanced status merely because an appeal was being

pursued, and that, as I understand it, was the basis of the policy.

[16] Again, I say, "as I understand it", because I have no direct evidence about the matters, save that in a statement by Mr Norbury, who is Governor of the prison, which has been filed on behalf of the defendant, it is said in paragraph 14;

> 'I am aware that some confusion appears to have arisen in the correspondence where the claimant's representatives and Wing Governor Jarvis concerning the effect on the IEPS of a prisoner's appeal to the Court of Appeal. It is correct that if a prisoner has been granted permission to appeal to the Court of Appeal (Criminal Division) he is entitled to remain on enhanced status if that is the level he has already achieved. However, a prisoner's status under the IEPS is unaffected by an application to the Criminal Cases Review Commission, until such point as the matter is referred to the Court of Appeal.'

That, no doubt, is because the referral by the CCRC to the Court of Appeal is to be treated as an appeal. It certainly suggests that the policy relates not to applications but only to appeals. However, it seems to me that the only conceivable relevance of policy in the circumstances of this case is, as Mr Blake puts it, that it would be unfair to penalise someone who is either an appellant or, indeed seeking leave to appeal, if otherwise he ought to be eligible for enhanced level. The fact that he is appealing is indicative of the reasonableness of his denial. That, as I understand it, is essentially the way in which it is put."

[46] It is interesting to note that it appears that in England and Wales a prisoner's status under IEPS is unaffected by an application to the CCRC.

[47] In any event, arising from the decision in Harbinson the prison authorities made appropriate changes in accordance with that judgment. On 5 July 2012 an "Offender management-practice" note entitled "*Sentencing Planning Offenders Appealing Conviction*" was issued. It states *inter alia*:

> "We should not, however require those formally appealing their conviction to:
>
> (i) admit guilt as part of their Sentence Plan nor for acceptance onto Offending Behaviour Programmes.
>
> …
>
> If a need for an intervention requiring an admission of guilt, eg SOTP is identified as part of the Sentence Planning Process, non-engagement in this programme should not be determined as Not Following Offender Management Plan and should not automatically lead to a subsequent consideration for a regime demotion under PREPS for those formally appealing their conviction.
>
> If the individual remains in custody after their appeal has been heard by the courts … non-engagement at this stage will form part of the measurement in overall sentence plan engagement and regime levels with PREPS … .
>
> This change only applies to those prisoners who have a formal appeal of conviction lodged with the courts. It will not apply to those … denying their offences without an appeal."

[48] It is clear from these extracts that the authorities now apply the Harbinson decision to all persons who have an application to appeal against conviction lodged with the court, whether they are applicants (pre-leave) or appellants (awaiting their full hearing). In this challenge Mr Heraghty argues that this policy should be extended to those who have lodged an appeal with the CCRC. He says that this is consistent with the reasoning behind the decision in Harbinson and that there is no material difference between a prisoner who has lodged papers seeking leave to appeal to the Court of Appeal and a prisoner who has lodged papers with the CCRC seeking a reference to the Court of Appeal. He argues that the applicant in this case is not in possession of "an unburdened mind" as referred to by Treacy J in the Harbinson judgment and, as a matter of practicality, he is in the same position as someone seeking leave to appeal. He points out that an application for leave to appeal against conviction is not an application to have a conviction quashed, rather it is an application to a single judge to grant leave to appeal. He says that the CCRC is in a similar position to that of a single judge. The CCRC does not have the power to quash the conviction but has the same power as a single judge to refer a case to the full court, the equivalent step to the single judge granting leave.

[49] In response Mr McQuiltty argues that a prisoner who has referred his case to the CCRC is in an entirely different legal and factual situation from someone who

has lodged papers seeking leave to appeal to the Court of Appeal as such a person is deemed to be "an appellant" both in law and for the purposes of the Prison Service Policy.

The Legal Framework – Appellant/Referral to CCRC

[50] Under Section 1 of the Criminal Appeal (Northern Ireland) Act 1980 a person convicted on indictment may appeal to the Court of Appeal against his conviction (i) with the leave of the Court of Appeal or (ii) if the trial judge grants a certificate within 28 days of conviction. The latter power is only to be exercised in exceptional circumstances and its use is extremely rare in this jurisdiction. Leave of the Court of Appeal may be granted by a single judge thereof. If leave is refused, a defendant may apply for leave of the full court in open court. As a matter of practice in this jurisdiction applications for leave, if refused by the single judge, and the full hearing are dealt with together. That was what was done in the case of Mr Harbinson when at a full hearing of the Court of Appeal on 15 June 2012 leave to appeal was refused.

[51] Under Section 30 of the Criminal Appeals (Northern Ireland) Act 1980 "an appellant includes a person who has given notice of application for leave to appeal".

[52] Thus as a matter of practice when a prisoner who has been convicted lodges an appeal with the Court of Appeal the prisoner will be shown as an appellant within ICOS (the NICTS computer system). This triggers a message to the Prison Service via the "Causeway" data sharing mechanism to inform the Prison Service of the fact that a prisoner has filed an appeal. In turn the Prison Service's own PRISM system then automatically deems that prisoner an appellant.

[53] The CCRC's powers and duties can be found in the Criminal Appeal Act 1995 which states *inter alia:*

> "10. Cases dealt with on indictment in Northern Ireland
>
> (1) Where a person has been convicted of an offence on indictment in Northern Ireland, the Commission—
>
> (a) may at any time refer the conviction to the Court of Appeal, and
>
> …
>
> (2) A reference under subsection (1) of a person's conviction shall be treated for all purposes as an appeal by the person under section 1 of the 1980 Act against the conviction."

[54] Thus it can be seen that a person who refers a matter to the CCRC only achieves the same legal position as an appellant under the 1980 Act when the CCRC refers the conviction to the Court of Appeal, which has not occurred in this case at this stage. In my view this constitutes a significant legal distinction between the two scenarios.

[55] Section 13 of the Criminal Appeal Act 1995 goes on to state:

> ***"Conditions for making of references***
>
> (1) A reference of a conviction, verdict, finding or sentence shall not be made under any of sections 9 to 12 unless—
>
> (a) the Commission consider that there is a real possibility that the conviction, verdict, finding or sentence would not be upheld were the reference to be made,
>
> (b) the Commission so consider—
>
> (i) in the case of a conviction, verdict or finding, because of an argument, or evidence, not raised in the proceedings which led to it or on any appeal or application for leave to appeal against it; or
>
> (ii) in the case of a sentence, because of an argument on a point of law, or information, not so raised; and
>
> (c) an appeal against the conviction, verdict, finding or sentence has been determined or leave to appeal against it has been refused.
>
> (2) Nothing in subsection (1)(b)(i) or (c) shall prevent the making of a reference if it appears to the Commission that there are exceptional circumstances which justify making it."

[56] Thus before a defendant can be deemed an appellant under the 1995 Act he must meet the onerous conditions set out in Section 13 above. In simple terms, the CCRC will be looking for significant new evidence or a new legal argument before making a referral. Furthermore, it is stated that the CCRC will normally require that a person has exhausted the usual appeal route to the Court of Appeal at first instance before coming to the CCRC. The test for referral by the CCRC differs from the test exercised by the Court of Appeal or single judge when considering whether or not to grant leave to appeal. The test to be applied in determining the question of leave is whether or not the grounds of appeal are arguable. See, for example, the approach of McCloskey J in the decision of O'Brien [2011] NICA 37. In my view this

represents a further significant material difference between a prisoner who has lodged an appeal seeking leave and a prisoner who has referred his case to the CCRC.

[57] The applicant argues that this distinction is not a material one in that an application to the CCRC can result in a case being referred to the full court which in turn has the power to quash the conviction. Such a person, therefore, is not in possession of an unburdened mind to quote from the judgment of Treacy J.

[58] Leaving aside for a moment the legal distinction between the two scenarios, the Prison Service argue that there are significant policy and practical reasons for drawing a distinction. These are set out in the affidavit of the deputy governor at HMP Magilligan in the following terms:

> "29. The Prison Service would be very concerned about the potential implications of substantially enlarging the pool of prisoners who could continue to deny their offending behaviour yet still be entitled to be treated as enhanced prisoners under PREPS. To adopt the approach advocated by the applicant would be to allow Non-Appellant Deniers to continue to be treated as Appellant Deniers (contrary to the distinction made in Harbinson) for a protracted period, depending on how long it takes for the CCRC to determine an application, no matter how objectively weak any such application might be.
>
> 30. This scenario would fundamentally undermine the practical operation of the PREPS policy. For example, if an appellant denier, on enhanced status, had their appeal dismissed they could continue to enjoy enhanced status by submitting an application to the CCRC. Adverse consequences (ie demotion to a lower regime) for failure to address offending behaviour for those whose appeals have been dismissed could be avoided for a potentially long time by making an application to the CCRC, irrespective of the merits of same. Such prisoners would be immune from the normal operation of PREPS during the currency of such an application and so there would be no incentive, as such, for prisoners to admit their offending behaviour and take steps to address same. This undermines both the prospects of rehabilitation and the prospects of reduction of risk to the public upon release from prison. There is a wider public interest in the successful and meaningful operation of PREPS.

> 31. Likewise, if the applicant were correct, the legitimacy of PREPS would also be undermined in the eyes of not only the wider public but also in the eyes of the many prisoners who have admitted their guilt and who are working hard to address their offending behaviour. The wider public interest includes not only the safety of the public but also the interests of the victims of crime. Victims should be entitled to the assurance that – when an offender has been caught, prosecuted, convicted and that conviction upheld on appeal – then they will not be entitled to the highest level of privilege under PREPS when they continue to deny their guilt."

[59] I consider that these arguments are both rational and reasonable.

[60] I would note at this stage that in this particular case it appears that the matter has been with the CCRC since at least November 2013 without as yet any decision. In terms of the numbers of cases actually referred to the Court of Appeal by CCRC I have been referred to its annual report of 2014/2015 where it is noted that for that period it referred 36 cases to the Court of Appeal out of 1,632 cases concluded in that period, ie 2.2%. It can fairly be said that reviews by the CCRC are lengthy with an extremely low referral rate.

[61] It cannot be said that the Prison Service policy in this regard is an example of "crude irrationality" to quote Laws J. More importantly, does it meet the requirement of fairness as applied by Weatherup J in Winchester's Application and Treacy J in Harbinson?

[62] In coming to a conclusion on this matter I of course have regard to the passages I have already quoted from these decisions.

[63] Having considered all the circumstances of this case, I have come to the conclusion that there is nothing irrational, unreasonable or unfair about the approach of the Prison Service to HW in particular and to the distinction they make between those prisoners who have lodged an appeal to the Court of Appeal under the Criminal Appeal (Northern Ireland)Act 1980 and those who have referred their case to the CCRC under the Criminal Appeal Act 1995. For the reasons I have set out above I consider that there are sufficient legal and factual differences which justify the approach taken by the Prison Service.

[64] Accordingly, whilst I have granted leave in this matter, judicial review is refused on the merits.