

*Judgment: approved by the Court for handing down
(subject to editorial corrections)**

Delivered: 10/06/14

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

Nash's (Thomas Christopher) Application [2014] NIQB 76

IN THE MATTER OF AN APPLICATION BY THOMAS CHRISTOPHER NASH
FOR JUDICIAL REVIEW

AND

IN THE MATTER OF DECISIONS OF THE PROBATION BOARD FOR
NORTHERN IRELAND

TREACY J

Introduction

[1] The applicant, a sentenced prisoner, sought leave to judicially review decisions of the Probation Board for NI ('PBNI') including its failure to conduct a risk assessment of the applicant. I dismissed the application. I set out below the background to the decision and detailed reasons for dismissing the application.

[2] The centrepiece of the applicant's challenge is to the failure of the PBNI to conduct a risk assessment in respect of the applicant by reason of the "terrorist or politically motivated nature" of his convictions. Relatedly the applicant challenges the failure of the respondent PBNI to adopt a suitable tool for this assessment if, as claimed by the respondent, the ACE assessment is unsuitable for this purpose.

Grounds upon which Relief is Sought

[3] The elaborately pleaded basis upon which relief is sought is as follows:

(a) That the PBNI has acted unlawfully by failing to engage with prisoners convicted of offences of a terrorist or politically motivated nature for the purposes of conducting risk assessments as:

- (i) This discriminates against such persons on the grounds of their political opinion.
- (ii) The decision of whether or not a Pre-Sentence Report should be produced lies with the Court.
- (iii) One of the purposes of a Pre-Sentence Report is to aid the Court in assessing an offender's 'dangerousness'.
- (iv) The statutory regime does not provide for the provision of a Social History Report in lieu of a Pre-Sentence report.
- (v) The PBNI bears the responsibility of conducting an assessment(s) of the risk posed by an offender.
- (vi) Most of the information to be provided to Parole Commissioners in the Parole Dossier for the determination of whether a prisoner should be released is to be provided by the PBNI.
- (vii) Release of a prisoner following the imposition of a public protection sentence will be dependent upon evidenced risk reduction whilst in custody.
- (viii) The PBNI bears the responsibility for the effective assessment and management of such risk.
- (ix) There is no lawful basis for distinguishing prisoners convicted of terrorist or politically motivated offences from other types of prisoner in respect of conducting assessments of risk.

- (x) There is no lawful basis for failing to apply the ACE assessment to prisoners convicted of terrorist or politically motivated offences.
 - (xi) There is no lawful basis for failing to assess the risk of prisoners convicted of terrorist or politically motivated offences due to difficulties, whether perceived or real, in applying one risk assessment tool.
 - (xii) There is no lawful basis for withdrawing services from prisoners based on a perceived danger from offenders without following the correct procedures.
- (b) The PBNI has failed to take into account, or given manifestly insufficient weight to, relevant considerations, namely:
- (i) Distinguishing between prisoners convicted of terrorist or politically motivated offences from other types of prisoner in conducting risk assessments is to discriminate on the grounds of political opinion.
 - (ii) Drawing a distinction between prisoners convicted of politically motivated offences places them at a disadvantage compared to other prisoners.
 - (iii) The decision of whether or not a Pre-Sentence Report should be produced lies with the Court.
 - (iv) One of the purposes of a Pre-Sentence Report is to aid the Court in assessing an offender's 'dangerousness'.
 - (v) The statutory regime does not provide for the provision of a Social History Report in lieu of a Pre-Sentence report.

- (vi) The PBNI bears the responsibility of conducting an assessment(s) of the risk posed by an offender.
- (vii) Most of the information to be provided to Parole Commissioners in the Parole Dossier for the determination of whether a prisoner should be released is to be provided by the PBNI.
- (viii) Release of a prisoner following the imposition of a public protection sentence will be dependent upon evidenced risk reduction whilst in custody.
- (ix) The PBNI bears the responsibility for the effective assessment and management of such risk.
- (x) There is no justification for distinguishing prisoners convicted of terrorist or politically motivated offences from other types of prisoner in respect of conducting assessments of risk.
- (xi) There is no justification for failing to apply the ACE assessment to prisoners convicted of terrorist or politically motivated offences.
- (xii) There is no justification for failing to assess the risk of prisoners convicted of terrorist or politically motivated offences due to difficulties, whether perceived or real, in applying one risk assessment tool.
- (xiii) There is no justification for withdrawing services from prisoners based on a perceived danger from offenders without following the correct procedures.
- (xiv) There is no objective justification for an assessment that engagement by its staff with the Applicant would place their lives in danger.

(c) The PBNI took irrelevant considerations into account, and, in particular, took into account the politically motivated nature of the Applicant's convictions.

(d) The PBNI has breached its duty to act in a procedurally fair manner, and has done so, in particular, by:

- (i) Failing to provide the Applicant with an opportunity to engage with it in order to facilitate challenging its assessment that engagement with him put its employees' lives in danger.
- (ii) Placing the Applicant at a distinct disadvantage to other prisoners convicted of offences that are not regarded as being of a terrorist or politically motivated nature in respect of parole.
- (iii) Failing to develop or utilise alternative tools for the assessment of risk posed by a prisoner if the ACE assessment is unsuitable.
- (iv) Failing to conduct risk assessments of the Applicant to evidence his risk reduction.

(e) The aforementioned decisions of the PBNI are *Wednesbury* unreasonable in that it reached conclusions which no reasonable body properly directing itself could have reached.

(f) The PBNI has failed in its duty to engage in reasonable inquiry, in particular, by:

- (i) Failing to explore whether the ACE assessment is wholly unsuitable to assessing the risk of causing serious harm posed by persons convicted of terrorist or politically motivated offences.
- (ii) Failing to explore alternative means of assessing the risk of causing serious harm

posed by persons convicted of terrorist or politically motivated offences if the ACE assessment is unsuitable for this purpose.

(g) The PBNI has misdirected itself in respect of relevant facts, in particular, by assuming that the risk of causing serious harm posed by persons convicted of terrorist or politically motivated offences cannot be assessed.

(h) The importance of being assessed as not posing a risk of serious harm to the public to the Parole Commissioners' determination that a prisoner may be released on licence prior to the expiry of the full custodial element of a public protection sentence imposed on a prisoner, and the PBNI's responsibility for conducting such assessments gave the applicant a legitimate expectation that the PBNI would assess his risk in this regard.

(i) The PBNI has improperly fettered its discretion by:

(i) Using only the ACE assessment to conduct an assessment of the risk posed by prisoners; and

(ii) Automatically refusing to complete risk assessments in respect of persons convicted of terrorist or politically motivated offences.

Factual Background / Sequence of Events

[4] The applicant is a prisoner currently detained at HMP Magilligan. On 4 June 2011 he was convicted of 1 count of possessing a firearm and ammunition with intent to endanger life, 2 counts of possessing an imitation firearm and 1 count of possessing CS spray canister at Laganside Crown Court. At the hearing the Court ordered that a pre-sentence report be obtained.

[5] The applicant was interviewed on two occasions by Michael Higgins of the Probation Board for NI at which Mr Higgins informed the applicant that he could not ask the applicant questions about the offences as they were of a political nature, but that he could produce a social background report instead. The applicant asked Mr Higgins to make a note that the applicant was willing to engage with PBNI to which Mr Higgins agreed. Mr Higgins subsequently produced the social background report which, as indicated, did not contain any analysis of the offences or the applicants' risk of causing serious harm to others.

[6] In August/September 2011 the pre-sentence report/social history was provided to the Court without a risk assessment. On 2 September 2011 the applicant was sentenced at Laganside Crown Court. During the sentencing hearing Judge Burgess stated that due to the lack of a risk assessment from PBNI he had to conduct his own assessment of 'dangerousness'. The court imposed an Extended Custodial Sentence consisting of 7 years custody with an extension of 5 years on licence. It was explained to the applicant that the effect of the sentence is that the applicant will be eligible for parole after he has served half of his custodial sentence and that if he is not granted early parole he will be released after the 7 year custodial period. After the 7 year custodial period the applicant will then remain on licence for a further 5 years and even if he is released early on parole he will remain on licence until the full 12 year period of the sentence has elapsed. In light of the nature of his offences the applicant was placed on the Republican wing within HMP Maghaberry.

[7] On 3 September 2011 a member of PBNI visited the applicant. During interview he informed PBNI that he wanted to move from the Republican wing as 'I wanted to distance myself from the political nature of my offences'. Subsequently the applicant was moved to alternative accommodation within Maghaberry. A few days later the applicant was presented with his sentence plan and he agreed to be enrolled on the suggested courses. The Sentence Manager was accompanied by another member of PBNI who told the applicant that 'we can't deal with you'.

[8] In September 2011 the applicant was moved from HMP Maghaberry to HMP Magilligan. Shortly after the move the applicant met with Ms Martina Quigg from PBNI who told the applicant that due to the nature of his offences she could not deal with him as they had been instructed by their superiors not to talk about political offences as they felt it may endanger staff personally. The applicant asked Ms Quigg whether the lack of risk assessment would hurt his chances when his case would be considered for Parole and she replied that 'she would not lie to [him], it would not do [him] any favours'. The applicant sought legal advice.

[9] On 10 November 2011 the applicant's solicitors wrote to the PBNI in the following terms:

"You will be aware that our client received an extended custodial sentence with a custodial term of 7 years and extension period of 5 years. Our client's eligibility for parole date (PED) is 12th February 2014. We understand however that there may be [sic] a difficulty with that insofar as Probation have indicated that they cannot get involved in any assessment of our client as regards risk as that potentially puts their lives in danger. You will understand how that can work against our client in terms of his being

released on parole and we would grateful (sic) if you could formally state the position to us in writing as we may have to refer this matter back to the Court as it seems to us that the sentence that the Court imposed is simply unworkable in these circumstances”.

[10] A holding response from PBNI was received by the applicant’s solicitors on 15 November 2011. On 5 December 2011 the applicant’s solicitor requested a full response from PBNI.

[11] In December 2011 the applicant met with Ms Quigg again and informed her that he was taking legal advice in relation to the risk assessment matter. On 17 January 2012 the PBNI responded to the letter from the applicant’s solicitor dated 10 November in the following terms:

“Given the nature of these offences and in accordance with PBNI practice a Social History Report was prepared and not a full Pre-Sentence Report. Again due to the nature of these offences an assessment of the likelihood of Mr Nash’s reoffending (ACE assessment) was not completed as this assessment tool is not designed for use in relation to terrorist/politically motivated offences...

...

... As an ECS Prisoner a PBNI Case Manager and a NIPS Sentence Manager will meet with Mr Nash on a monthly basis. The focus of this contact will be in relation to resettlement issues...”

[12] On 30 January 2012 the applicant’s solicitors wrote again to PBNI highlighting that their response of 17 January did not deal with the issues raised in the earlier correspondence. On 14 February 2012 the PBNI responded to this letter repeating its position of 17 January regarding PBNI’s inability to complete an assessment of the applicant due to the nature of the offences and the unsuitability of the ACE tool. As far as relevant that letter also states:

“...As is the case with all prisoners, a Sentence Plan will be completed in respect of Mr Nash and he will be offered the opportunity to progress through the prison regime. This will include his engagement with other disciplines and programme providers within the prison setting in relation to the constructive use of his time, for example, attendance at education and training programmes.

As you will be aware in relation to ECS prisoners, eligibility for release is determined by the Parole Commissioners. At Mr Nash's Parole Eligibility date a dossier will be submitted to the Parole Commissioners. Whilst PBNI are unable to assess Mr Nash's likelihood of re-offending, information will be provided to the Parole Commissioner's detailing his compliance with the prison regime and his engagement with other programme providers."

[13] On 23 February 2012 the applicant's solicitor sought confirmation from PBNI that whilst they were unable to complete an assessment of his likelihood of re-offending it would not affect his eligibility for early release. The PBNI responded on 6 March 2012 stating:

"... As Mr Nash's eligibility for release will be determined by the Parole Commissioners I cannot comment upon whether the absence of a PBNI assessment regarding his likelihood of re-offending will impact upon this decision."

[14] On 27 April 2012 the applicant's solicitor sent a letter before application.

[15] On 14 May 2012 an application for legal aid was signed by the applicant and submitted to the Legal Services Commission. The applicant was notified on 25 May 2012 that his application had been refused. A Notice of Intention to appeal the refusal was lodged on 29 May 2012 and an appeal hearing took place on 20 July 2012 at which a certificate to initiate judicial review proceedings was granted. This was received on 25 July 2012.

[16] On 2 August 2012 a further letter before application was sent. The PBNI responded by letter dated 23 August 2012 reiterating its previous position. The response denied that the reason the PBNI did not complete an ACE assessment on the applicant was because engaging with him would put PBNI employees' lives in danger. The response further noted that this position was 'understood' by the Northern Ireland Courts and Tribunal Service, the Parole Commissioners for Northern Ireland and the Northern Ireland Prison Service. It further submitted that the lack of risk assessment in these circumstances had not been an impediment to a direction for release for terrorist/politically motivated prisoners in the past.

[17] On 30 January 2013 a report was obtained from Dr Adrian East, Consultant Forensic Psychiatrist on the following issues:

- a. Is PBNI correct in its assertion that ACE assessments are unsuitable for assessing the dangerousness of a person convicted of terrorist or politically motivated offences?

b. If the ACE Assessment is unsuitable for carrying out such an assessment can this be assessed by any other means?

c. The report firstly covers the background of the Applicant under several headings. In particular it notes the Applicant's denial of the offences and his belief that he was 'taken advantage of' by 'paramilitaries' and that he pleaded guilty to avoid a long sentence. It also states that *'The Probation Board for Northern Ireland have described the index offences as being 'terrorist/politically motivated offences'. Mister Nash has denied to me being a member of any proscribed organisation and I have not received any evidence to the contrary. There may well be intelligence in this regard to which I do not have access.'*

[18] In response to the instructions Dr East noted that:

a. 'I do not believe that an ... ACE assessment has a role to play in the assessment of 'dangerousness in any context...I can make no comment as to the suitability of such an assessment in the case of a person convicted of a terrorist or politically motivated offence

b. ...

c. I do not believe that there is evidence to support the use of different risk assessment processes for offences that are deemed to be terrorist or politically motivated as opposed to other offences of serious violence.

d. A risk formulation can only be carried out by considering the offence cycle demonstrated by an offender taking into account the demonstrated capacity for offending as well as any criminogenic and protective factors... It is by understanding the risk profile presented by an offender that the likelihood of future offences together with the potential nature of offending and those likely to be at risk can be identified.'

[19] The applicant's Parole Eligibility date ("PED") was 12 February 2014 at which the respondent's interim decision was to take effect.

[20] The expiration of time limit for applying for judicial review in respect of the PBNI's decisions to refuse to engage with the applicant on the grounds of the political

nature of his offences, to consider the ACE assessment as being unsuitable for the applicant, and to refuse to assess his 'dangerousness' was 12 May 2014. The applicant's Custody Expiry Date ("CED") is 13 August 2017 and his Sentence Licence Expiry Date ("SLED") is 13 August 2022.

Statutory / Policy Framework

[21] So far as relevant The Parole Commissioners' Rules (Northern Ireland) 2009 ("the 2009 Rules") provide:

Information and reports by the Secretary of State

8.-(1) Within 8 weeks of the case being listed for hearing, and subject to paragraph (2) and rule 9, the Secretary of State shall serve on the Commissioners and the prisoner or the prisoner's representative:

- (a) The information specified in Part a of Schedule 1;
- (b) The reports specified in Part B of that Schedule; and
- (c) Such further information as the Secretary of State considers to be relevant to the case.

Schedule 1 (Information and reports for submission by the Secretary of State on a reference to the Commissioners under Article 6 of the 2001 Order or Article 18 of the 2008 Order.

Part A (Information relating to the Prisoner)

Part B (Reports Relating to the Prisoner)

1. Any per-trial and pre-sentence reports examined by the sentencing court and any police report on the circumstances of the offence(s).
2. ...
3. Any current reports on the prisoner's performance and behaviour in prison, where relevant, ..., including any:

Prison reports

Record of offences against discipline;

Reports on any temporary release;

Details of, and reports on compliance with any sentence management plan;

Reports on the prisoner's health including mental health

Psychology reports;

Assessment of the likelihood of re-offending and the risk of the prisoner being a danger to the public if released immediately; or

Assessment of suitability for release on license and license conditions

1. An up-to-date report prepared for the Commissioners by a probation officer, including any reports on the following:

Details of the prisoner's home address, family circumstances, and family attitudes towards the prisoner;

...

An assessment of the likelihood of re-offending and the risk of serious harm

...

A view on suitability for release; and

Recommendations regarding any special licence conditions

2. Any interview report prepared at the direction of the Chief Commissioner under Rule 3(4)

3. Any other information which the Secretary of State considers relevant to the case and wishes to draw to the attention of the Commissioners.

Further evidence and information

11.-(1) Following receipt of the papers from the parties, the single Commissioner or the chairman of the panel may require either party to produce further evidence or information on any topic relevant to the conduct or determination of the case and may stay the progress of the case until a response to their requirement has been received.

[22] The Criminal Justice (Northern Ireland) Order 2008 (“the 2008 Order”) provides as follows:

“The Parole Commissioners

46.-(1) The Life Sentence Review Commissioners shall be renamed the Parole Commissioners for Northern Ireland.

(2) In discharging their functions the Parole Commissioners shall –

(a) Have due regard to the need to protect the public from serious harm; and

(b) Have regard to the desirability of:

(i) Securing the rehabilitation of prisoners; and

(ii) Preventing the commission of further offences by prisoners

...

Duty to release prisoners serving indeterminate or extended custodial sentences

18.-(1)...

(3) As soon as –

(a) P has served the relevant part of the sentence, and

(b) The Parole Commissioners have directed P’s release under this Article,

The Secretary of State shall release P on licence under this Article

(4) The Parole Commissioners shall not give a direction under paragraph (3) with respect to P unless –

- (a) The Secretary of State has referred P's case to them; and
- (b) They are satisfied that it is no longer necessary for the protection of the public from serious harm that P should be confined.

[23] The PBNI Best Practice Framework states:

1.3.2 Improving PBNI Performance

...

- PBNI values diversity and difference and treating people with respect.
- Everything we do will be underpinned by equality, openness, fairness, honesty and integrity.
- PBNI Staff shall demonstrate their commitment to these values including fulfilling requirements under Section 75 Northern Ireland Act 199 and the Human Rights Act 1998.
- The work of all PBNI staff, and all others who work in partnership with PBNI, shall be free from discrimination in terms of all groups set out in section 75: age; marital status; gender; dependants; disability; religious belief; sexual orientation; and political opinion.
- 1.4 Offender Risk Management
- Risk Management in relation to managing offenders is the process of addressing the identified risk of serious harm and formulating and implementing a Risk Management Plan which targets each identified risk factor through lawful, necessary, adequate and proportionate actions
- Effective Risk Management is founded on a Risk Assessment process which is dynamic and in which the changing features of an offender's circumstances, and new or updated information, are constantly appraised to

evaluate whether they indicate that the offender is more or less of a threat to others

- ...
- It is essential for the assessment/risk assessment to be accurate and defensible. Defensible assessments shall always be based on principles of legality, necessity, accountability, proportionality and ethical practice requiring a solid evidence base (as far as is possible and practical) to support necessary restrictions on liberty to protect the public.

[24] The PPANI Manual states:

4. Risk Assessment

...

4.2 Evidence Based Practice

For public protection practice to be effective and remain within the boundaries of law it must be based on the evidence available in each individual case. This, 'evidence based practice' requires agencies at the LAPPP to integrate all the available information relating to a relevant offender with the best and most up to date scientific evidence from systematic research.

Evidence based practice is an approach that helps people make well-informed and defensible decisions about the risk of causing serious harm that an individual might pose and the interventions that are necessary to manage or reduce that risk. The approach requires that every decision is based not only on the evidence that can be presented to support the existence of a factor but also that the best available evidence from research suggests that each factor is relevant to a risk of serious harm.

...

4.4 Defensible Decision Making

The principle of defensible decision making is intended to ensure that the risk assessment process and its outcome comply with the law

Kemshall suggests that defensible decision making can be demonstrated through:

1. Ensuring decisions are grounded in the evidence
2. Using reliable risk assessment tools

[25] The PBNI Risk of Serious Harm to Others Procedure states:

1.3 Risk of Serious Harm Assessment

1.3.1 ACE... is a structured assessment tool used by PBNI in conjunction with professional judgement to assess the likelihood of general re-offending within a two year period. Included within the ACE assessment is a Risk of Serious Harm Filter which triggers a Risk of Serious Harm assessment in cases where such concerns exist.

1.3.2 The RA1 is a structured process used by PBNI for assessing the Risk of Serious Harm through gathering, verifying and evaluating a wide range of relevant information, including details from an ACE assessment. The eventual decision as to whether or not an offender is considered a significant Risk of Serious Harm is taken at a Risk Management Meeting. When assessing the risk of serious harm the following information should be considered:

- Pattern of offending...
- ...
- Triggers and situations that have been associated with harmful behaviour in the past and whether they still exist

[26] The PBNI Risk of Serious Harm to Others Policy states:

"2.2 Scope

...

Release into the community will be dependent on evidence risk reduction while in custody, and will be decided upon by Parole Commissioners.

5. Risk Assessment

5.1 What is Risk Assessment?

... It is about making an informed judgment about whether or not, in what way, to whom and in what circumstances an offender is likely to cause Serious Harm to others.

...

5.5 What Functions do Risk Assessments inform?

...

Risk assessment is a major factor in deciding whether an offender is eligible for release on parole or release on licence; however it is not the sole variable that decides whether they are released."

Arguments

Applicant's Arguments

Obligation to Conduct Risk Assessments

[27] The applicant accepted that it is for the Parole Commissioners, and not the PBNI to assess whether he must remain in custody beyond his PED for the protection of the public from serious harm. However, the applicant submitted that the Parole Commissioners make this decision in light of the information provided in the parole dossier and that the PBNI bears responsibility for providing an assessment(s) of the applicant's risk of causing serious harm for inclusion in same. This submission is based on the following documents:

- a. Rule 8(1)(b) in conjunction with paragraphs 3 and 4 of Schedule 1 Part B of the Parole Commissioners Rules (NI) 2009.
- b. Parole Commissioners Guide on the Parole Review Process for ECS Prisoners.
- c. NIPS - Interim Offender Management Practice Manual.

d. NIPS – Interim Parole Review Guidance.

[28] The applicant further submitted in this regard that PBNI’s own guidance shows that PBNI itself accepts responsibility for the production of risk assessments. This contention is based on the following documents:

e. PBNI’s Risk of Serious Harm to Others Policy.

f. PBNI’s Risk of Serious Harm to Others Procedure.

[29] The applicant submitted that the PBNI bears the responsibility for the effective assessment and management of an offender’s risk of serious harm to others from the point of first contact through the custodial phase of any relevant sentences and beyond. This contention is based on sections 1 & 6 of PBNI’s Risk of Serious Harm to Others Policy. Further it is submitted that the PBNI recognises in the same document that release into the community following the imposition of a public protection sentence under the 2008 Order will be dependent upon evidenced reduction of this risk while in custody.

[30] The applicant submitted that nowhere in the Risk of Serious Harm to Others Policy or Procedure is a distinction made for politically-motivated or terrorist offences, nor is there any reference to the ACE tool being unsuitable for such offenders, nor is there any reference to the ACE tool as being the only assessment method PBNI can use.

[31] The applicant submitted that PBNI’s Best Practice Framework Incorporating Northern Ireland Standards reiterates that PBNI’s tasks must be completed free from discrimination in terms of the groups set out under section 75 of the Northern Ireland Act 1998 and that, as stated in PBNI’s Best Practice *‘Assessment is central to and underpins all PBNI work with offenders from pre-sentence to sentence completion stage’*.

[32] While the applicant accepted that PBNI’s Best Practice notes that suitability for various forms of treatment/programmes etc. is a key factor in assessing an offender, it does not provide for offences for which an ACE assessment is unsuitable, nor that where there is a perceived risk of danger to PBNI personnel an ACE assessment is unsuitable, nor does it restrict PBNI to only use the ACE tool for risk assessing prisoners.

[33] The applicant submitted that the practice whereby the PBNI do not conduct risk assessments in respect of persons convicted of terrorist/politically-motivated offences does not have any foundation in statute or policy and is in fact contrary to PBNI’s obligations.

Parole Commissioners

[34] In response to the respondent's contention that Rule 11 of the 2009 Rules allows the Commissioners to seek a risk assessment in respect of the applicant if they desire one, the applicant submitted that it is clear from the Parole Commissioners' letter of 7 May 2013 that the 2009 Rules in fact require an up-to-date assessment of the likelihood of the prisoner re-offending and the risk of serious harm to be provided by the PBNI and included within the parole dossier.

[35] Further, in this regard, the applicant submitted that a proper reading of Rule 11, particularly when read in conjunction with Rule 8, reveals that it is designed to allow the Commissioners to seek further or additional information.

[36] The applicant further submitted that Rule 11 does not negate the strict obligations within Rule 8 and that such an approach would result in an injustice to the applicant as to insist that he must wait until after the Commissioners consideration of the dossier before a risk assessment may be ordered creates a real risk of delay in the Commissioners' decision being taken and thereby a potential delay in his release.

Suitability of the ACE Assessment

[37] In response to the PBNI's arguments in relation to the unsuitability of the ACE assessment in the production of risk assessments on prisoners convicted of terrorist/politically motivated offences the applicant submitted:

(a) The PBNI's obligations relate simply to conducting risk assessments, there is nothing within statute or policy tying PBNI to use only this tool for risk assessment.

(b) Expert evidence calls into question the suitability of the ACE assessment in conducting any form of assessment of risk of prisoners. In this regard, the rationality of the PBNI's insistence on the exclusive use of this test, and its reliance on the unsuitability of this test in certain circumstances to excuse its failure/refusal to discharge its obligations is questionable.

(c) While it is accepted that there may be difficulties in assessing the risk posed by prisoners who offend due to political motivations, it is wrong to automatically assume that the actual motivation of all persons guilty of offences perceived to be of a political nature is in fact political. In the

instant case the Applicant does not regard himself as being a Republican but the PBNI's stance suggests either that it believes he possessed such motivations, or that it has failed to look beyond the perceived nature of his offences.

(d) It is unreasonable for PBNI to rely upon the unsuitability of one assessment method as an excuse for failing to fulfil its obligations.

(e) Case law exists which provides guidance as to how the risk posed by persons convicted of terrorist or politically motivated offences may be assessed.

Risk to safety of Personnel

[38] The applicant asserted that PBNI personnel indicated to him that they could not be involved in any risk assessment of him on the basis that to ask him questions about his current offences could potentially put their lives in danger (this alleged fact is not accepted by the PBNI). In this regard it is submitted that in the PBNI's Risk Management Policy and Procedure there is no explicit recognition that a perceived delay from an offender can justify withdrawal of services, and that in respect of any perceived risk there is a clear process to be followed which must include monitoring and reporting. Further, the applicant wishes to engage with PBNI and has been able to engage with other service providers whilst in custody.

Delay

[39] The applicant submitted that while the initial impugned decisions date back to July 2011, the relevance of the earlier decisions in these proceedings is to evidence the practice being employed by PBNI in respect of the applicant due to the perceived nature of his offences.

[40] In response to the respondent's contention that the instant proceedings are both too late and too premature (in the sense that the process of compiling the parole dossier will not begin in respect of the applicant until August 2013) and that the applicant must wait until the PED before being able to launch proceedings the applicant submits that to do so would impact the applicant unfairly due to the potential for creating delay in his parole proceedings and thereby lead to the applicant spending a longer period in custody than may otherwise be the case if PBNI fulfilled its obligations.

[41] The applicant further submitted that the respondent has taken an interim decision not to produce a risk assessment for inclusion within the Applicant's parole dossier and as such the applicant does not need to wait for an interim decision to crystallise before being permitted to initiate judicial review proceedings. The fairer

course of action would be for these issues to be determined before the submission of the Parole Dossier to the Parole Commissioners.

General

[42] It is submitted that the lack of any involvement of PBNI beyond resettlement arguably will prevent the Parole Commissioners from having a full understanding of the risk posed by the applicant.

Respondent's Arguments

[43] The respondent argued that the applicant is seeking to challenge the propriety of a decision yet to be taken by the Parole Commissioners. The basis of the challenge is that when they come to take their decision the Parole Commissioners will not have before them information which they properly should have before them. In particular the Applicant fears that the Parole Commissioners will move to make a decision in the absence of information which should be provided to them by PBNI.

[44] The respondent submitted that the ACE assessment tool has no applicability in assessing the relevant risk in relation to terrorist and politically motivated offenders. Therefore the PBNI cannot properly be criticised for failing to deploy an assessment tool which has nothing to say to the very question which the Parole Commissioners have to consider i.e. the risk of serious harm.

[45] In relation to the applicant's fear regarding whether or not the Parole Commissioners will have access to all the information which they should take into account in deciding whether the applicant poses a risk of 'serious harm' it is submitted that that is a matter of the Parole Commissioners, not PBNI.

[46] The respondent submitted that it will, as it always does, provide whatever information it has which might assist the Parole Commissioners.

Discussion

[47] Pursuant to the Criminal Justice (Northern Ireland) Order 1996 and the Criminal Justice (Northern Ireland) Order 2008, the PBNI has been vested with various functions over and above those with which it was vested at the time of its establishment. These additional functions have arisen in response to the introduction of new types of sentences. The relevant functions for the instant application are (as listed in the affidavit of Roisin Muldoon, an Assistant Director within PBNI) assessing convicted offenders and preparing reports for Courts, Parole Commissioners and others, preparing behavioural change programmes and working alongside the police, prison service and other agencies to manage the risk posed by the most serious offenders.

[48] One of the types of reports prepared as a matter of course by PBNI are risk assessments to aid the Parole Commissioners in their duties. Normally, for relevant prisoners i.e. those who are initially assessed as presenting a significant risk of serious harm to others, the PBNI will include in this report an assessment of the likelihood of re-offending and the risk of serious harm of the offender. Parole Commissioners are obliged to consider all the materials in relation to an offender and decide whether they are satisfied that it is no longer necessary for the protection of the public from serious harm that the prisoner should be confined. If they are so satisfied, and the other conditions for parole are satisfied, the prisoner will be released.

[49] In PBNI's policy document it is noted that the risk assessments which are produced must be 'accurate and defensible'. This need for defensibility is repeated in the PPANI manual. PBNI's risk of serious harm to others procedures outlines that in considering the risk of serious harm to others one of the pieces of information to be considered is 'Triggers and situations that have been associated with harmful behaviour in the past and whether they still exist'. The applicant's own expert forensic psychiatrist report states '*A risk formulation can only be carried out by considering the offence cycle demonstrated by an offender taking into account the demonstrated capacity for offending as well as any criminogenic and protective factors*'. Criminogenic factors are those which produce or tend to produce crime or criminals.

[50] In the context of offenders convicted of terrorist/politically motivated offences, clearly a key criminogenic factor/trigger or situation associated with harmful behaviour in the past, will be the individuals continuing links with his cause/associates and the activity levels associated with that cause/those associates. Arguably this would be the *most* important criminogenic factor or relevant situation. Roisin Muldoon deposes that PBNI is not privy to intelligence or security information and thus is incapable of creating a risk assessment which is defensible. To create an assessment of this nature and to allow the Parole Commissioners to rely upon it would clearly *not* assist them in their duties in any way. Given their duty to produce defensible assessments, to produce an assessment without the relevant security information would be *ultra vires*. Further it appears from the letters exhibited to Ms Muldoon's affidavit that the Parole Commissioners were aware of this approach taken by PBNI since 2005 and were reminded of same in 2010.

[51] PBNI also has a duty use reliable risk assessment tools and it seems to be the case that there is no such tool in existence in relation to terrorist/politically motivated offenders, and even if there were, PBNI would be incapable of completing it due to a lack of relevant evidence.

[52] If it is the case that when offenders convicted of terrorist/politically motivated offences come before the Parole Commissioners there is a difficulty for the prisoner in putting forward his case because he cannot evidence any reduction in risk, then I accept

that there is a lacuna in the regime and these offenders are at a disadvantage when compared to other offenders, however, if this is the case no fault lies with PBNI as it is simply not in a position to provide relevant reports. It may be that evidence of reduction of risk can and does come from other sources in which case the disadvantage does not arise, but clearly this is outside the scope of this application.

[53] The applicant makes the point that it is irrational to assume that all offenders who are convicted of offences which appear to be terrorist/politically motivated may not in fact be so motivated but there is no evidence before the court in the instant application as to how the conclusion in relation to the nature of the offence is arrived at and so I cannot comment on it. In any event, there does appear to have been some element of paramilitarism in relation to this applicant's index offences whether or not the applicant was actually involved in same.

[54] For these reasons the application for leave must fail on each of the grounds contended for, and specifically as follows:

- (i) In relation to the ground at 3A, there was in fact no failure to engage with the applicant for the purposes of a risk assessment. PBNI were and are currently incapable of producing any such assessment meaningfully.
- (ii) In relation to the ground at 3B, the 'relevant considerations' argued for fall away when it becomes clear that the decision was not whether or not to engage for the purposes of compiling a risk assessment, but whether or not the applicant fell into the category of offender capable of being assessed with the available tools or not.
- (iii) In relation to the ground at 3C, the political nature of an offence is clearly a relevant consideration when deciding whether or not the available tools were capable of being used with the applicant.
- (iv) In relation to the ground at 3D, in light of all the above I can see no procedural unfairness on the behalf of PBNI.
- (v) In relation to the ground at 3E, in light of the above clearly *Wednesbury* unreasonableness is not established.
- (vi) In relation to the ground at 3F (duty of reasonable inquiry), PBNI have had expert opinions which outline the limitations of the ACE assessment tool. There is no evidence presented that PBNI have failed to explore alternative risk assessment tools. The case law presented would tend to suggest that the risk assessment of terrorist/politically motivated offenders is an ongoing problem and at the material time no useful risk assessment tool is in existence.

- (vii) In relation to the ground at 3G (misdirection as to facts), I accept the evidence that it is a fact that there is currently no validated tool in existence that allows for a meaningful and defensible risk assessment of a terrorist or politically motivated offender.
- (viii) In relation to the ground at 3H (legitimate expectation), there can be no legitimate expectation that PBNI would depart from their policy and produce a report which is not defensible and which could mislead the Parole Commissioners.
- (ix) In relation to the ground at 3I (fettering of discretion), no evidence has been presented that there is a viable alternative to the risk assessment tool currently in use by PBNI and in fact the evidence tends to suggest that PBNI do not have any discretion to use an alternative tool as no such tool exists.

Conclusion

[55] For the above reasons leave is refused.