**Neutral Citation No. [2015] NICA 18** | *Ref:* **MOR9612**

*Judgment: approved by the Court for handing down* | *Delivered:* **21/04/2015**

*(subject to editorial corrections)**

**IN THE HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND**

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**Nash's (Thomas) Application [2015] NICA 18**

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW BY THOMAS NASH**

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**Before: Morgan LCJ, Coghlin LJ and Horner J**

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**MORGAN LCJ (giving the judgment of the court)**

[1] This is an appeal from a decision by Treacy J refusing the appellant's application for leave to apply for judicial review of a decision by the Probation Board of Northern Ireland ("PBNI") whereby it refused, inter alia, to provide the Crown Court and the Parole Commissioners with a risk assessment of the appellant because the ACE Assessment tool utilised by the PBNI could not be used for offenders convicted of terrorist-related offences. Mr Scoffield QC and Mr Coyle appeared for the appellant and Mr Colmar for the proposed respondent. We are grateful to counsel for their helpful oral and written submissions.

**Background**

[2] The appellant was convicted on 3 June 2011 upon his pleas of guilty to one count of possession of a firearm and ammunition with intent to endanger life, two counts of possessing an imitation firearm and one count of possessing a canister of CS spray. The background to the offences was that the appellant's home was searched on 14 August 2010 following the bombing of a hijacked car. At his home, police found a bag in the garage containing a rifle, rounds of ammunition and other equipment. At the rear of the house they found rounds of ammunition and an imitation AK-47 rifle together with other items including an AK-47 butt, mobile phones, batteries and tape.

[3] The Crown Court ordered a pre-sentence report to be provided by the PBNI. The appellant indicated that he was happy to engage with the probation officer on

the background to the offences but the probation officer declined to pursue this. The probation report provided some social background but did not contain a risk assessment as to whether the applicant posed a significant risk of serious harm to the public. PBNI claimed to be unable to do so because the appellant had been convicted of terrorist-related offences. On 2 September 2011 HHJ Burgess, sitting in the Crown Court, found the appellant to be a dangerous offender under the Criminal Justice (NI) Order 2008 ("the 2008 Order") and imposed an extended custodial sentence, comprising 7 years custody and an extended period of 5 years. Taking into account the time he had already spent in custody, the appellant's Parole Eligibility Date ("PED") was 7 February 2014.

[4] While serving his sentence the appellant renewed his request to the PBNI to carry out a risk assessment upon him, the purpose of which was to enable him to show a reduction in risk when he came before the Parole Commissioners for release. The PBNI continued to refuse to carry out a risk assessment and also advised the appellant that, when the Parole Commissioners came to assess him for release, the PBNI would not be able to provide a risk assessment to the Parole Commissioners either.

[5] On 5 March 2013 the appellant lodged an application for leave to apply for judicial review of the PBNI's decisions not to undertake or provide a risk assessment of him. For various reasons the hearing of this application was delayed and a written judgment giving reasons for the refusal of the application for leave to issue judicial review proceedings was handed down on 10 June 2014.

[6] In accordance with their usual practice the Parole Commissioners began their assessment of the appellant in August 2013. On 7 February 2014 the Panel issued its decision finding that on the balance of probabilities it was not satisfied that the appellant would present a risk of serious harm to the public if he were released. It commented on the absence of a risk assessment from PBNI at paragraph 30 of its decision.

> "The Panel have considered the entirety of the written and oral evidence before them. Whilst there is no risk assessment using the ACE score the Panel are not precluded from relying on the evidence adduced. The Panel notes that Mr Nash was convicted of offences under the Firearms (NI) Order 2004 and, as noted by the Consultant Forensic Psychiatrist, there is no direct evidence of paramilitary involvement or acts of terrorism. The Panel are, therefore, concerned that they do not have the benefit of PBNI risk assessment to assist in their assessment and records its dissatisfaction that PBNI's inability to assess risk is based solely on their view that acts of terrorism

impede making such risk assessments. In this regard the Panel notes that the letter from the PSNI that they do not hold any information that Mr Nash is involved in terrorism." (sic)

**Statutory Background and Guidance**

[7] The circumstances in which an extended custodial sentence can be imposed for certain violent or sexual offences are prescribed by Article 14 of the 2008 Order. Of particular relevance to this application is the requirement that the court must be of the opinion that there is a significant risk to members of the public of serious harm occasioned by the commission by the offender of further specified offences. In order to carry out that task the court ordered a pre-sentence report which is defined in Article 4 of the 2008 Order as a report in writing which is made or submitted by a probation officer with a view to assisting the court in determining the most suitable method of dealing with the offender. PBNI was established by the Probation Board (Northern Ireland) Order 1982 and included among its functions are an obligation to secure the maintenance of an adequate and efficient probation service and to make and give effect to schemes for the supervision and assistance of offenders and the prevention of crime. The Probation Board may conduct or promote or assist any person conducting research relevant to the functions of the Board. It is the duty of probation officers to supervise the persons placed under their supervision and to advise, assist and befriend them.

[8] The release provisions in relation to those serving an extended custodial sentence are contained in Article 18 of the 2008 Order. A prisoner cannot be released during the period of his sentence after his PED unless the Parole Commissioners have directed that he should be. The Parole Commissioners cannot give such a direction unless they are satisfied that it is no longer necessary for the protection of the public from serious harm that the prisoner should be confined.

[9] The Parole Commissioners' Rules (Northern Ireland) 2009 (the Rules) were made under powers contained in the 2008 Order. The Rules provide for the listing and hearing of cases concerning prisoners who have reached their PED. Within eight weeks of the case being listed for hearing the Department of Justice must serve on the Parole Commissioners the reports relating to the prisoner set out in Part B of Schedule 1 to the Rules. These include any pre-trial or pre-sentence report examined by the sentencing court and any police report on the circumstances of the offences, any current reports on the prisoner's performance and behaviour in prison including any assessment of the likelihood of his reoffending and the risk of the prisoner being a danger to the public if released immediately, an up-to-date report prepared for the Commissioners by a probation officer including any report on the prisoner's view of the index offence, the prisoner's attitude to the prospect of release and the requirements and objectives of supervision and any assessment of the likelihood of reoffending and the risk of serious harm.

[10] The final relevant provision in the 2008 Order is Article 50 which provides that the Department of Justice may issue guidance to agencies, including the Probation Service, on the discharge of any of their functions which contribute to the more effective assessment and management of the risks posed by persons of a specified description. Such guidance may contain provisions for the purpose of facilitating co-operation between agencies including the exchange of information. Agencies are required to give effect to guidance issued under the Article.

[11] There are a number of non-statutory guidance documents which are of significance. The most comprehensive of these is the Probation Service's Best Practice Framework Incorporating Northern Ireland Standards (the Best Practice document). This document identifies PBNI's commitment to equality at paragraph 1.3.2. The opening sentence in the section dealing with risk assessment is that assessment is central to and underpins all PBNI work with offenders from pre-sentence to sentence completion stage. The PBNI approved assessment tools are the ACE (Assessment, Case Management and Evaluation) and the RA1 Risk of Serious Harm to Others Assessments. ACE is a structured assessment tool used by PBNI in conjunction with professional judgement to assess the likelihood of general reoffending within a two-year period. The section on methods of assessment also recognises that additional PBNI approved assessment tools may also be applied in relevant cases.

[12] The requirements of the Rules are effectively repeated in the Parole Commissioners' Guide on the parole review process for extended custodial sentence prisoners. Assessments using the ACE tool are referred to in the Interim Offender Management Practice Manual and Interim Parole Review Guidance issued by the Northern Ireland Prison Service. The importance of the ACE tool and the RA1 assessment are emphasised in the Risk of Serious Harm Procedures produced by the Probation Board in November 2013.

[13] The author of the ACE tool was Dr Colin Roberts, Emeritus Fellow of Green Templeton College at the University of Oxford. He has indicated that it is not a suitable tool to assess the risk of reoffending by offenders who have committed offences which could be seen as involving terrorism or political motivation. In an affidavit submitted on behalf of the proposed respondent it was indicated that a key factor in assessing the risk of offending by persons convicted of committing terrorist or politically motivated offences was intelligence collated by the police and other agencies. The Probation Board did not have access to any of that information. The appellant introduced a report from Dr East who contended that the ACE tool itself did not assist with the assessment of the risk of re-offending.

**The Submissions of the Parties**

[14] Mr Scoffield submitted that the issue in this case was whether the PBNI policy of not providing a risk assessment in cases involving perceived terrorism or political motivation was unlawful. He accepted that risk assessment involved the evaluation of on-going and dynamic factors undertaken by persons with relevant experience. He also accepted that the primary issue in cases involving terrorism or political motivation was the risk associated with any continuing link or involvement with the terrorist organisation. His objection was to the blanket nature of the policy. He pointed out that this was a case in which the police confirmed to the Parole Commissioners that they had no intelligence to suggest that the appellant was involved with any terrorist organisation. He further submitted that the Department of Justice could give some form of guidance as to the exchange of information between PSNI and PBNI. The suggested obligation on the Department did not arise on this challenge to the actions of PBNI only.

[15] The appellant submitted that it was striking that this policy was not contained within any of the guidance documents issued on behalf of the proposed respondent. The statutory architecture recited above clearly demonstrated the importance of the PBNI in the assessment of risk. To exclude a significant body of prisoners from the benefit of that assessment was inconsistent with that architecture. At the very least there was a duty of enquiry on the PBNI to ascertain some method of ensuring that an appropriate assessment tool could be devised. The appellant relied on a number of cases which it was contended suggest such an approach. We will examine this case-law below.

[16] Mr Colmar submitted that there was no statutory obligation to provide a risk assessment. The Rules only imposed an obligation to provide such an assessment if any such assessment was available. In appropriate cases the ACE tool applied by those who were experienced and trained in respect of it provided a proper basis for evaluation. It was clear, however, that this tool was not validated in relation to perceived terrorist or politically motivated crime and the cases upon which the appellant relied did not assist.

[17] The position of the Probation Board in respect of this has been clear for some time. There was correspondence on 6 December 2005 with the Parole Commissioners in which it was agreed that assessments would not be provided in relation to such prisoners. That was repeated in correspondence dated 2 July 2010. In the absence of a validated tool PBNI is not in a position to provide a risk assessment in relation to such prisoners.

**Consideration**

[18] We have concluded that this application for leave to issue judicial review proceedings should be refused broadly for the reasons given by the learned trial

judge. We accept that the assessment of risk lies at the core of PBNI's work. That is expressly recognised in the Best Practice document and is the basis for the inclusion of a report on the assessment of risk provided for in Part B of Schedule 1 of the Rules. We also consider that it is implicit in the definition of pre-sentence report in Article 4 (1) of the 2008 Order which requires such a report to assist the court in determining the most suitable method of dealing with the offender. An assessment of the factors giving rise to the risk of reoffending will inform the protective elements that can be put in place and assist in the determination of the appropriate method of dealing with the offender.

[19] It follows that the making of assessments must lie at the core of the maintenance of an adequate and efficient probation service which by virtue of Article 4 (1) of the Probation Board (Northern Ireland) Order 1982 PBNI must secure. We accept, however, that any such assessments must be valid. We consider that this is appropriately captured by the assertion in the Best Practice document that assessments must be accurate and defensible.

[20] It is not suggested that the ACE tool is capable of producing an accurate or defensible assessment of risk in relation to perceived terrorist or politically motivated offences. That is clear from the opinion of Dr Colin Roberts who was the author of the tool and is supported by Dr East who would go further and suggest that ACE is not an effective risk assessment tool in any event.

[21] The core of this application lies, therefore, in the proposition that PBNI have failed to develop such an accurate and defensible tool. It is common case that PBNI is authorised to carry out research with a view to devising such a tool but it is asserted by the proposed respondent that those who have examined the assessment of such cases have been unable to devise an answer. Essentially two reasons are advanced for this. The first is that PBNI does not have access to intelligence material both in relation to the offender himself and his relationship with any terrorist or politically motivated grouping or in relation to the terrorist or politically motivated organisation which might assist in explaining how he got involved and what protective factors might be put in place to prevent further involvement. The second reason is that even where no intelligence material is available background factors in relation to the offender himself, his upbringing, his family and his place in the community give little or no assistance in relation to the risk of reoffending. In those circumstances it is submitted that no accurate or defensible assessment of an expert nature could be offered but the decision maker will still be provided with a social history and a record of the activities of the offender during this period in prison to enable the decision maker, having heard the offender, to make a judgement about risk.

[22] The appellant relied on three cases to challenge this reasoning. The first was R (on the application of Botmeh and another) v Parole Board and another [2008} EWHC 1115 (Admin). In that case a psychologist had used a tool developed for

serious violent offences in considering the risk associated with an offender convicted of a terrorist offence. The Home Office, for whom she had prepared the report in connection with the hearing before the Parole Board, was dissatisfied with her conclusion arising from that exercise that there was only a moderate risk of the offender committing further terrorist acts if released. Further expert psychology evidence was produced indicating that there was no suitable tool to assess risk in relation to terrorist offenders and that the original psychologist's opinion should therefore be discarded.

[23] The Parole Board Panel concluded that the available advice and opinion from the psychology practitioners did not materially assist them in their task. The Panel were left with the impression from a range of distinguished experts with varied expertise and experience that the psychology profession accepts that the risk assessment of politically motivated offenders presents a unique problem for the resolution of which they still seek an answer. Subsequently the offender sought to secure a disciplinary sanction on the original psychologist but this claim was dismissed. In our view this case is of no assistance to the appellant as it does not support the submission that a suitable assessment tool is available or can be devised. In fact the case supports the proposed respondent's position.

[24] The second case is R (on the application of Andrew Rowe) v The Parole Board [2010] EWHC 524 (Admin). This was a judicial review application by a prisoner, who was about to have an oral hearing, for information held by the Security Service and other agencies. The appellant placed reliance on paragraph 25 of that judgement in which it was recorded at a multiagency meeting that an appropriate person had been trained to employ a new risk assessment tool for Terrorism Act offenders such as the claimant in that case. It appears, however, from the remainder of the quoted passage that the assessment did not address the question of political or religious motivation but looked at a general trend of anti-social criminal behaviour on the offender's part in that case. That tends to reinforce the view that there was no tool to deal with political or terrorist motivation.

[25] The third case is R (on the application of Hindawi) v Secretary of State for Justice [2011] EWHC 830 (QB). That was an application by the offender to overturn a decision by the Secretary of State to reject the recommendation from the Parole Board that the prisoner should be released. The issue of risk assessment through psychological or psychiatric evidence was considered from paragraph 26 on. At paragraph 28 there is recorded a substantial body of expert evidence agreeing with the proposition that there was no demonstrated value in using standard risk assessment for appraising future risk in relation to terrorist activity. We do not consider that this passage is of any assistance to the appellant.

**Conclusion**

[26] For the reasons given we conclude that there are no accurate or defensible assessment mechanisms available to PBNI which would enable it to carry out an assessment of risk in relation to the applicant. There were a number of subsidiary matters pursued by the applicant in the skeleton argument which did not feature in the oral presentation. We consider that those matters were adequately dealt with by the judgement of the learned trial judge.

[27] We have had the advantage of detailed and comprehensive submissions from the appellant but we do not consider that he has demonstrated an arguable case with a reasonable prospect of success. The appeal is dismissed.