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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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KING'S BENCH DIVISION
(JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY GABRIEL MACKLE FOR JUDICIAL REVIEW

AND IN THE MATTER OF DECISIONS OF THE DEPARTMENT OF JUSTICE

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Karen Quinlivan KC and Andrew Moriarty (instructed by Madden & Finucane, Solicitors) for the Applicant
Tony McGleenan KC and Philip McAteer (instructed by the Departmental Solicitor's Office) for the Respondent

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SCOFFIELD J

Introduction

[1] By this application, the applicant, Gabriel Mackle, challenged new arrangements for the supervision of his licence by the Department of Justice in Northern Ireland ("the Department") under the Multi-Agency Review Arrangements (known as "MARA"). These are arrangements for cooperation between the Department, the Northern Ireland Prison Service (NIPS), the Probation Board for Northern Ireland (PBNI) and the Police Service for Northern Ireland (PSNI) in respect of the effective management of the risks posed by terrorist-related offenders (TROs); and the term 'MARA' is also colloquially used as a collective noun for those organisations when acting pursuant to those arrangements.

[2] In particular, the applicant sought to challenge the decisions on the part of the Department, corresponding on behalf of MARA, by which it determined that the following additional conditions were to be attached to his licence, namely:

(i) That travel into the Republic of Ireland within a 10 mile radius of Mr Mackle's approved address (which is in Forkhill, Co Armagh) would be for essential

domestic purposes only. In particular, this travel was limited to: conveying his child to and from school (and attending related school events such as parent-teacher meetings); shopping; refuelling at petrol stations in the Republic of Ireland; and dog walking for leisure purposes.

(ii) That, in respect of travel *further* than 10 miles from his approved address in the Republic of Ireland, or for non-essential or leisure purposes (for example, socialising with friends or attendance at GAA games) applications for permission to travel into the Republic of Ireland would require to be submitted on a case-by-case basis.

[3] The applicant sought declarations that the restrictions contained in the additional licence conditions to the effect mentioned above were unlawful; and an order of certiorari quashing them, as well as damages. The applicant's grounds of challenge are that the impugned conditions are in breach of his rights under article 8 ECHR; in breach of his rights under article 14 ECHR (taken together with his rights under article 8); and that they are irrational and/or so unfair as to be *Wednesbury* unreasonable. As appears from the discussion below, the applicant's licence has in fact now expired. This judgment on the application is nonetheless provided as it would be relevant to the claim for damages on the applicant's part but, in any event, raises some issues of principle which may well arise in future cases.

[4] Ms Quinlivan KC appeared with Mr Moriarty for the applicant; and Mr McGleenan KC appeared with Mr McAteer for the respondent. I am grateful to all counsel for their written and oral submissions.

Factual Background

[5] The applicant was sentenced in Antrim Crown Court on 5 June 2014 for the offences of possessing explosives with intent to endanger life or cause serious injury to property and possession of ammunition with intent to endanger life. These offences arose out of an incident on 7 August 2013, when the police stopped the applicant riding a motorcycle. As a result of a search, he was found to be in possession of 20 rounds of ammunition and a bottle of liquid suspected to be mercury.

[6] The applicant received a determinate custodial sentence which involved four years in custody, followed by a further period of four years on licence. The applicant was released from custody on 6 August 2017. His sentence licence expiry date was 6 August 2021. However, on 9 November 2017, he was recalled to custody. This arose after he attended a hunger strike commemoration event in Bundoran organised by Republican Sinn Féin on 26 August 2017, at which he was a guest of honour and was awarded a plaque as a recently released "prisoner of war." Photographs of the event showed a group of around ten masked men wearing what appeared to be military uniforms, dark glasses, and berets. On a further occasion, on

5 November 2017, Mr Mackle made a speech to a crowd at Edentubber which also included men in masks apparently wearing paramilitary uniforms.

[7] The applicant was on licence when he travelled to these events in the Republic of Ireland. He was recalled to prison because it was considered that his attendance at the events, or his participation in them, breached the terms of his licence in a number of respects. Mr Mackle contended that he had been given permission to travel to the Republic of Ireland on the date in question in relation to the first event in conversation with his probation officer. Then, before the second event, he had been advised that he need only seek permission for overnight trips outside the jurisdiction, so that a day trip did not require such permission. He was then later advised that all appointments with Probation had been postponed. He maintained that he had not breached his licence.

[8] The issue of the applicant's recall to prison was referred to the Parole Commissioners. A single commissioner directed that his case should be considered by a panel of commissioners. There was a key factual dispute in the recall documents as to whether the applicant had received permission from PBNI to cross the border and also to attend the event at Bundoran. The panel of Parole Commissioners proposed to hear oral evidence in relation to this; but the relevant probation officer was not available to attend the hearing, nor a later, reconvened hearing.

[9] On 8 March 2018, an update was provided from the PSNI in relation to the applicant's recall and possible future licence conditions. The police indicated that they were satisfied that they could safely manage the applicant with certain conditions which they proposed. At the Parole Commissioners' hearing on 12 March 2018, the relevant probation officer was again not in attendance. This was explained in an email by the PBNI Assistant Director as being "as a result of ongoing issues in respect of PBNI's working environment." Nonetheless, the Probation Board maintained its position that staff had not given the applicant permission to attend specific Republican commemorative events. The reference to PBNI's "working environment" appears to be a reference to what the respondent described in its submissions as PBNI having "stopped supervising individuals subject to licence for terrorist / politically motivated offences from in or about September 2017 as a matter of policy due to an increased security threat against PBNI staff."

[10] At the parole hearing, the Department indicated that it was not opposing the applicant's re-release on licence, subject to the addition of two new licence conditions to his existing licence which had been proposed by the PSNI. One of these involved a requirement to notify the Probation Board *and the police* if the applicant wished to cross the border. It was confirmed that the Department wished him to notify both of these bodies, which therefore went beyond the condition which would be contained in the standard licence (requiring notification of PBNI only, in order to be granted permission for cross-border travel). The Department maintained its view that the risk posed by the applicant had increased as a result of his having

breached his licence by crossing the border and attending the two events mentioned above. It highlighted the presence of masked men at the events, the role played by the applicant, the plaque which he had received and the speech which he had given. The Department acknowledged that the applicant had not done anything unlawful *per se* by means of participating in the events but contended that these were public events and that his participation amounted to "risky behaviour."

[11] Ultimately the Commissioners were satisfied that it was no longer necessary for the protection of the public that the applicant be confined in prison and they directed his release. The panel considered that the public nature of the applicant's participation in the events reflected a belief on his part that he had been granted permission to attend them. They were not convinced that the risk posed by him had increased significantly since the point of his release. The panel was also not persuaded that any additional reporting requirement to the police, if he was intending to cross the border, was either necessary or proportionate. The requirement to seek permission from PBNI, as included in the original licence, was sufficient in their view.

[12] The applicant contends that he was fully compliant with his licence conditions from the time of his further release in March 2018 onwards. On 15 March 2018 the Assistant Director in Probation emailed the applicant's legal representatives advising that the applicant did not need to seek permission for cross-border travel for day-to-day activities. The email also stated as follows:

> "As a result of the increased security threat against PBNI staff (September 2017), PBNI no longer supervise individuals subject to licence for terrorist/politically motivated offences. Your client will therefore <u>not</u> have a nominated point of contact within PBNI.
>
> If your client requires a variation to his licence conditions for the purpose of the change of approved address or to seek permission to travel outside the UK he should contact the local Area Manager on [contact details given] or write to PBNI Headquarters [contact details given]. Similarly the same contact arrangements apply if your client would like to avail of contact with a Probation Officer in respect of a support service, for example, with social welfare issues.
>
> In acknowledgement of the fact that your client's home address is in close proximity to the border with the Republic of Ireland, your client does not need to contact PBNI if he is crossing the border for ordinary activities connected with day-to-day family life (for example, taking his children to school)."

[13] The applicant's evidence also notes that the Assistant Director in Probation confirmed in September 2020 that, during the period from June 2018 to September 2019, the applicant had successfully applied for permission for five overnight stays in hotels across the Republic of Ireland. On the respondent's part, it emphasises that, in granting permission on these occasions, PBNI did not consider public safety implications, nor share information with the PSNI or other authorities, because of its policy of not supervising TROs as noted at paras [9] and [12] above.

The impugned decision

[14] The decision under challenge in these proceedings arises because, on 9 September 2020, the applicant was served on behalf of the Department with a copy of new arrangements for the supervision of his licence under the auspices of MARA. This included a requirement to seek approval from the PSNI if the applicant was seeking to travel outside Northern Ireland. Subsequent to this notification, there was correspondence between the applicant's solicitors and the Department about the effects of the new travel approval requirements upon him. On 15 October 2020, the Department, corresponding on behalf of MARA, determined that the additional licence conditions summarised in para [2] above would be added to the applicant's licence. Pre-action correspondence followed and these proceedings were commenced in early 2021 when no agreement between the parties could be found.

[15] The Department's evidence indicates that, until 8 September 2020, PBNI was the lead agency with responsibility for monitoring the applicant's adherence to licence conditions. On 8 September 2020, the Department issued guidance under Article 50 of the Criminal Justice (Northern Ireland) Order 2008 setting out new multi-agency review arrangements (the MARA arrangements) to manage the risk posed by individuals classified as TROs. This was in large measure because PBNI had stepped back from supervision of terrorist offenders, as outlined above. In Mr McGleenan KC's vivid phrase, by reason of the threat level against its staff it had been "intimidated from the field."

[16] The applicant's initial licence conditions included a standard requirement that he seek permission from the Probation Board for travel outside Northern Ireland (including trips into the Republic of Ireland) but, as noted above, this was not fully enforced and the applicant was told he was only required to seek permission when he intended to stay overnight outside the jurisdiction. The new licence conditions were imposed on 9 September 2020. The applicant contends that this meant that there was a radical change to what he was previously entitled to do. He considered there would be inevitable delays in receiving permission from the bodies involved in MARA and that he would be restricted from making ad hoc trips which he might wish to make on his own or with his family, particularly if these arose over a weekend. He has averred that he and his children are keen followers of gaelic games and that there were any number of matches, at both club and county level, attendance at which would now require an application to MARA. He also averred

that he enjoys going on day trips with his family and for walks with the dogs, particularly given financial pressures on the family and the relative inexpensiveness of this type of leisure activity.

[17] The Department's evidence provided some additional information in relation to how the new conditions came about. In preparation for the launch of the new MARA arrangements, partners reviewed the applicant's case in late August 2020. They unanimously agreed that he met the criteria for inclusion within the arrangements. Section 2.5 of the Article 50 guidance (discussed further below) sets out the range of licence conditions which would normally be included in a licence for an individual who has been classified by MARA partners as meeting the definitional criteria to be managed as a TRO under the arrangements. These reflect additional licence conditions requiring an individual to seek prior permission from the PSNI for a change of address and/or for travel outside the United Kingdom. The Department's evidence is that these licence conditions within the guidance "address the public safety gap identified within Probation's operational approach to supervision of TRO licences." This refers to the fact that, when PBNI was administering this aspect of licence conditions for TROs, it did not consider public safety implications when reviewing applications, nor indeed share information with the police or other authorities that the TRO had successfully applied for travel (including overnight stays) outside Northern Ireland.

[18] The MARA partner organisations considered what licence conditions should be contained in the applicant's revised licence once the new arrangements came into force. Following consideration, including confirmation from the PBNI representative that Probation agreed it was appropriate to include the additional licence conditions set out in the Article 50 guidance document, a decision was taken to include these conditions. The Department's affidavit indicates that the Probation representative involved in the decision-making was the same Assistant Director who had sent the email to the applicant's legal representatives in March 2018 upon which they rely.

[19] As set out above, the new conditions required the applicant to seek prior permission from PSNI for a change of address, for certain travel outside the UK and for permanent resettlement. The Department's deponent was present at the meeting in August 2020 and has confirmed on affidavit that he provided the meeting with the background to the applicant's recall to custody in November 2017 and the subsequent proceedings before the Parole Commissioners. The meeting was therefore aware of and took account of the recommendation of the Parole Commissioners' panel set out in its decision. The affidavit goes on to aver as follows:

> "MARA partners however considered that it was necessary for public protection to include the conditions requiring PSNI approval on the basis that Probation reaffirmed its operational approach to the supervision of

> TROs meant it would not take public safety considerations into account if it was solely responsible for approving/refusing such applications."

[20] The applicant was advised of his revised licence conditions by way of letter of 8 September 2020 on behalf of MARA, providing a copy of his revised licence (as provided by NIPS Licensing Unit). On 10 September the applicant's legal representatives emailed MARA raising concerns about the new requirements. This was treated as an application to travel and there was further correspondence between the parties leading to a further decision at the meeting on 7 October 2020, during which the MARA partner agencies reviewed the application again and considered an analysis of locations to which the applicant habitually travelled. The MARA agencies then unanimously agreed to approve daily travelling to the Republic of Ireland for essential domestic (and an element of recreational) purposes only. They also agreed that the applicant was not required to seek prior permission on a regular or frequent basis for such travel on the basis that the approval letter would set out the conditions in a way which enabled him to travel across the border on a daily basis without requiring further permission. This was considered to be consistent with the approach adopted by the Probation Board in March 2018. It is this position which forms the basis for the decisions under challenge.

[21] There was unanimous agreement that it was not appropriate to give the applicant 'blanket' approval to travel for non-essential reasons. It was agreed that it would be appropriate to require the applicant to apply for permission to travel outside Northern Ireland to any location, for any reason, further than a 10 mile radius from his permanent address. This distance was identified after consideration of the addresses which had been advised to MARA which the applicant regularly attended. This did not preclude the applicant making applications for specific travel outside the 10 mile radius.

[22] Details of how and when an application for approval for travel outside Northern Ireland should be made are set out in guidance. This indicates that, when submitting any application to travel, this should be done a minimum of seven days before the proposed start date of the travel. A fairly wide range of information is required to be provided, including the purpose of the travel, where the licensee is intending to stay, and details of anyone travelling and/or residing with the individual during the proposed trip. The same guidance also deals with those who have a need for regular travel outside Northern Ireland and provides as follows:

> "When you have commitments that require regular travel outside Northern Ireland (e.g. for the purpose of employment), you are still required to submit an application. As indicated above, your application should include details of the frequency of travel. If approved, you are likely to receive permission to travel on a frequent

basis to meet specific work or family commitments, subject to regular review of the arrangements."

Relevant statutory provisions

[23] There is a duty in Article 17(1) of the Criminal Justice (Northern Ireland) Order 2008 ("the 2008 Order") to release a fixed term prisoner (other than a prisoner serving an extended custodial sentence) on licence once he or she has served the requisite custodial period. The conditions to be imposed included in such a licence are dealt with in Article 24 of the 2008 Order. In particular, the Department has a discretion under that provision to add, vary or cancel offenders' licence conditions.

[24] Article 24 is in the following terms:

> "(1) In this Article—
>
> (a) "the standard conditions" means such conditions as may be prescribed for the purposes of this Article as standard conditions; and
>
> (b) "prescribed" means prescribed by the Department of Justice by rules.
>
> (2) Any licence under Article 17 or 19 in respect of any prisoner serving one or more determinate custodial sentences of less than 12 months and no determinate custodial sentence of 12 months or more shall include—
>
> (a) such conditions as may be required by the court in passing sentence; and
>
> (b) so far as not inconsistent with them, the standard conditions.
>
> (3) Any other licence under this Chapter -
>
> (a) shall include the standard conditions; and
>
> (b) may include such other conditions of a kind prescribed for the purposes of this paragraph as the Department of Justice may for the time being specify in the licence.

(4) The Department of Justice may vary or cancel any conditions specified in a licence under this Chapter and may subsequently include additional conditions.

(5) Where a prisoner is released on licence under Article 18 or 20A, the Department of Justice shall not—

(a) include a condition under paragraph (3)(b) on release, or

(b) subsequently insert, vary or cancel a condition under paragraph (4),

except after consultation with the Parole Commissioners.

(6) For the purposes of paragraph (5), the Department of Justice is to be treated as having consulted the Parole Commissioners about a proposal to include, insert, vary or cancel a condition in any case if they have been consulted by the Department of Justice about the implementation of proposals of that description generally or in that class of case.

…

(8) In exercising the powers to prescribe standard conditions or other conditions referred to in paragraph (3), the Department of Justice shall have regard to the following purposes of the supervision of offenders while on licence under this Chapter—

(a) the protection of the public;

(b) the prevention of re-offending;

(c) the rehabilitation of the offender."

[25] As appears from the above, there will be standard conditions in such licences, which are prescribed for that purpose by rules made by the Department. The relevant rules are the Criminal Justice (Sentencing) (Licence Conditions) (Northern Ireland) Rules 2009 (SR 2009/81). Rules 2 and 3 provide for a range of standard conditions. For present purposes, the relevant standard condition is that set out at rule 2(2)(e) in the following terms:

> "Not travel outside the United Kingdom, the Channel Islands or the Isle of Man without the prior permission of the probation officer, except where the prisoner is deported or removed from the United Kingdom in accordance with the Immigration Act 1971 or the Immigration and Asylum Act 1999."

[26] Article 50 of the 2008 Order, entitled 'Guidance to agencies on assessing and managing certain risks to the public' provides that the Secretary of State may issue guidance to agencies 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 (where the Secretary of State has reason to believe that persons of that description may cause serious harm to the public). The Secretary of State's functions under this provision have, however, now been transferred to the Department of Justice: see para 32 of Schedule 1 to the Northern Ireland Act 1998 (Devolution of Policing and Justice Functions) Order 2010. By virtue of Article 50(2), guidance given under that article may contain provisions for the purpose of facilitating cooperation between agencies, including provisions requiring agencies to maintain arrangements for that purpose and to draw up a memorandum of cooperation, and provisions regarding the exchange of information among them. Article 50(4) provides that agencies shall give effect to such guidance.

The Article 50 Guidance and the MARA arrangements

[27] The Fresh Start report and the subsequent Executive Action Plan on Tackling Paramilitary Activity, Criminality and Organised Crime had recommended that the Department work with law enforcement agencies and the Probation Board to improve the monitoring arrangements for paramilitary offenders when on licence. The Department of Justice took this work forward with criminal justice stakeholders in order to assess the previous management arrangements for offenders convicted of terrorism or terrorism-related offences. The Department's evidence is that the management of risk posed by this kind of offender is recognised globally as presenting a specific range of challenges, not least in identifying the level of risk presented by the individual and the key risk factors which need to be addressed and managed by relevant organisations. The Department concluded that a multi-agency arrangement was most appropriate for this purpose. It says that it was recognised that the operational management of TROs under the 2008 Order presented a complex series of issues which differ from those encountered with other individuals and it was therefore considered necessary to adapt their systems to take account of these differences. Part of the rationale behind the new arrangements was to address (what the respondent refers to as) "the lacuna in supervision" which arose by virtue of the PBNI position referred to at para [9] above.

[28] Interim guidance under Article 50 of the 2008 Order was issued on 8 September 2020 with the approval of the Minister of Justice, with a view to creating

a framework for the various organisations involved – PSNI, PBNI, NIPS and DOJ – to work collaboratively to enhance licence supervision of individuals classed as TROs. It was this guidance which has given rise to the arrangements for information-sharing and cooperation which are the backbone of the MARA scheme.

[29] A range of bodies therefore now work together to develop arrangements to address the specific operational challenges presented by managing TROs. The Department describes there as being "a collective and statutory responsibility to the public to ensure that there are effective and consistent arrangements to manage the risk of serious harm presented by TROs", particularly in light of the positive obligations on the State under article 2 ECHR.

[30] The arrangements are described as "statutory arrangements" because, albeit they are set out in guidance, Article 50(6) of the 2008 Order requires that guidance to be given effect by the various agencies involved. They are designed to involve organisations working together and sharing information to better protect the public in a coordinated manner. There is no new corporate body formed by the legislation to deliver these arrangements. The relevant criminal justice organisations deliver their own statutory responsibilities and obligations relating to public protection but now, it is intended, in a joined-up and cooperative way.

[31] A central provision of the Article 50 guidance is section 2.4, which sets out the definitional criteria for those who will be subject to the arrangements. An individual will be classified as a TRO where there is a consensus amongst the organisations within MARA that they meet the following criteria, namely that they have been convicted of an offence under terrorism legislation for which they are currently serving a sentence; or have been convicted of, and are currently serving a sentence for, offences where the sentencing judge has made explicit reference to, or indicated a connection to, terrorism or terrorist activity; or they have been convicted of, and are serving a current sentence for, an offence or offences where MARA is satisfied that the offending was committed in connection to terrorism or terrorist activity. Once so classified, all individuals designated as TROs will be managed under MARA for the duration of the relevant sentence.

[32] Licence conditions are dealt with in section 2.5 of the guidance. It is noted that there was no change to the then current licence-setting process. Pursuant to the arrangements, individuals classified as TROs will ordinarily be subject to the following licence conditions on release from custody:

(i) The standard licence conditions set out in Article 2 of the Criminal Justice (Sentencing) (Licence Conditions) (Northern Ireland) Rules 2009;

(ii) A condition that they must not engage in paramilitary activities, nor participate in any organisation that supports, directs, authorises or controls such activities, with compliance with this condition to be monitored by the PSNI.

(iii) A condition that they will permanently reside at an address approved by the probation officer and obtain the prior permission of the PSNI for any change of address.

(iv) A condition not to travel outside of Northern Ireland without the prior permission of the PSNI.

(v) Any additional licence condition considered appropriate to support the purpose of the licence or to address specific risk factors.

[33] The remainder of the Article 50 guidance need not be dealt with in detail for present purposes. It provides guidance on a range of matters including the roles and responsibilities of each of the relevant organisations comprising the MARA cooperative partnership; provisions in relation to governance, review and oversight; and arrangements for information sharing.

[34] The respondent submits that the MARA arrangements will be particularly relevant in considering issues such as applications from TROs on licence within the community to change address or resettle outside Northern Ireland and in providing input into the licence-setting process. Under the guidance, PBNI's role in supervising licence conditions surrounding travel outside Northern Ireland is limited to considering social welfare or resettlement issues only. Accordingly, the Department imposes additional licence conditions (such as are at issue in this case) to ensure that public protection matters are considered should the applicant wish to travel outside the jurisdiction. In accordance with the guidance, MARA partners are required to discuss all applications to travel outside the jurisdiction to inform final decisions on whether an application can be approved. The respondent's evidence is that a range of policies within the new framework were developed to inform consideration of applications by TROs to travel outside Northern Ireland, taking account of the terrorist notification requirements which are set out in counter-terrorism legislation and also how the PSNI supervise individuals' adherence to the requirements.

Summary of the parties' cases

[35] The applicant relies upon the fact that he lives in a border community and regularly travels across the border for social and leisure purposes and to visit family and friends. He is unhappy at (what he characterises as) the more stringent licence conditions imposed upon him which affect his ability to travel into the Republic of Ireland, which, in particular for someone who lives in a border area, diminishes his ability to enjoy social and leisure pursuits, either with or without his family, which he has been enjoying for a period of several years. He contends that the Department is unable to point to any change of circumstances which would justify the need to impose these more stringent licence conditions and in the absence of his having

previously breached his earlier conditions. He contends that the impugned licence conditions therefore breach his rights under article 8 ECHR. He understandably relies upon the decision of the Parole Commissioners that advance permission from the PSNI was not in their required for cross-border travel.

[36] As to the applicant's article 14 case, he contends that his licence conditions fall within the ambit of his rights under article 8 ECHR; and that his position can be juxtaposed with that of a terrorist offender who lives in Great Britain and who becomes the subject of similar licence notifications. Any limitations on extraterritorial travel post-release would still afford an offender in Great Britain "a vast area within which to travel for essential domestic social and leisure purposes." The applicant contends that, in his case, he is being discriminated against on the grounds of political or other opinion, national origin and/or other status. He relies upon the fact that he is an Irish national who was convicted of an offence which arose from his sympathies for Irish Republicanism; and on where he lives, which is close to the land border. He also says that the addition of such licence conditions has a significantly greater adverse impact on individuals like him, who have been convicted of offences connected with Irish Republicanism who are Irish nationals resident in Northern Ireland, particularly those who live near the border, than it would have on a convicted terrorist offender who resided in Great Britain. He submits that there is no justification for this distinction.

[37] Finally, as to irrationality and unfairness, the applicant contends that he demonstrated full compliance with the earlier terms of his licence and that it was unfair to 'move the goalposts' – requiring him to seek permission for cross-border travel from the PSNI rather than simply PBNI and in a greater number of instances – in the absence of any objective or material change in his circumstances.

[38] In response, the respondent contends that it is proportionate and reasonable to permit cross-border travel into the Republic of Ireland within a 10 mile radius from the applicant's approved address because this ensures that he is able to travel to and from his son's school, to shop, to use petrol stations, and to walk his dog for leisure purposes. At the same time, it ensures a level of control over travel outside the jurisdiction which is a standard part of supervision for prisoners serving the second part of their sentence subject to licence in the community. It is emphasised that the *standard* licence conditions have at all material times required offenders to seek prior approval from PBNI to leave the jurisdiction; and that this has not been challenged by the applicant in these proceedings. In this case, there was significant discussion by the MARA agencies about the extent to which approval should be given to travel into the Republic of Ireland; and the 10 mile radius within which travel was permitted was determined following a analysis of the addresses and locations to which the applicant himself had advised that he travelled on a regular basis (the majority of which, the respondent contends, fall within 7 to 8 miles of his approved residence).

[39] Accordingly, the respondent considers that the control placed upon the applicant is proportionate and has been specifically tailored so that it will not have a disproportionate effect on his everyday life. Other travel requirements can and will be dealt with on a case-by-case basis; including further requests for block approval of frequent travel where this is considered appropriate. The restrictions inherent in the impugned licence conditions are justified, the respondent argues, for legitimate reasons of public protection in light of the applicant's terrorist-related offending and the terrorist threat which remains in this jurisdiction.

[40] The Department also relies upon the fact that the Parole Commissioners' view on this case was given before the MARA guidance was devised or implemented and was thus given in a different context. It is, in any event, non-binding upon the Department (as the applicant accepts).

Article 8

[41] Any consideration of an alleged breach of the applicant's article 8 rights must acknowledge the context that TROs subject to licence conditions are sentenced prisoners who are still serving part of their sentence. In his submissions, the applicant drew a comparison between his position and that of persons subject to bail; but that ignores the fundamental point that the latter enjoy the presumption of innocence. In the applicant's case, he is a convicted terrorist-related offender and, at the time of the impugned decision in this case, was still subject to a determinate custodial sentence. This distinction finds expression in the case of *Gul v Secretary of State for Justice* [2014] EWHC 373 (Admin), a case which also concerned a challenge to licence conditions imposed upon a TRO, at para [72]:

> "It is important to recall the nature of release on licence. I have referred to the fact that the submissions on behalf of the claimant made no distinction between the position of an offender in whom the state has a legitimate interest in rehabilitation, and the position of a citizen without a blemish on his record exercising one of the fundamental freedoms of all citizens which are protected by the ECHR. There was also little recognition of the extensive experience built up by the defendants in managing extremist offenders following their release on licence. With one qualification, I respectfully agree with the observations of Moses J (as he then was) in *R (Carman) v Secretary of State for the Home Department* [2004] EWHC 2400 (Admin) at [33] that "the licence conditions and assessment of risk to the public, on which they are based, are matters of fine judgment for those in the prison and probation service experienced in such matters, not for the courts. The courts must be steadfastly astute not to interfere save in the most exceptional case." The

> qualification is that I would not describe the cases in which the court should intervene as "exceptional." I would emphasise the need to show a clear error of law or other public law flaw, and care not to give insufficient recognition to the expertise of the Probation Service."

[42] That is not to say, of course, that any licence conditions imposed upon such an offender, however strict, will be lawful provided that they fall short of conditions of imprisonment. Nonetheless, the facts that a TRO subject to such conditions is still serving a sentence, and that such licence conditions are imposed in order to address the risk of re-offending in the manner which gave rise to the sentence in the first place, is an important point of context for the necessary Convention analysis.

[43] The applicant's analogy with an individual on bail was designed to emphasise his point that it would be inconceivable that bail conditions would be tightened or amplified if the individual had been complying with his conditions up to that point. However, I accept the respondent's submission that that is a false comparison because it adopts the wrong starting point as its premise. It is significant that the applicant's earlier licence requirements included a requirement that he seek permission from the Probation Board to travel to the Republic of Ireland *on any occasion and for whatever purpose*, unless removed there pursuant to immigration law (see the standard condition at para [25] above). The applicant relies on the fact that, in practice, the arrangement had been that he was only obliged to contact the Probation Board if he was hoping to stay overnight in the Republic of Ireland; but that was (at least partly) because the Probation Board were simply not considering such applications through a public protection lens. The real issue which gave rise to the need for a change in conditions was that PBNI was not properly enforcing the earlier condition to which the applicant was subject. The respondent's evidence is that new requirements were required to fill this operational "gap." It arose because PBNI was not prepared to supervise terrorist offenders in a stance which, whether or not adopted by PBNI staff for understandable reasons, represented an undermining of the system of offender management intended under the statutory scheme.

[44] The applicant's heavy reliance upon the Parole Commissioners' decision in his case - that permission from the police for cross-border travel was unnecessary – also does not materially assist him, in my view, when viewed in its proper context. First, the Commissioners had the reassurance that permission for all cross-border travel was nonetheless required from the Probation Board. Indeed, the relevant portion of their decision is in the following terms:

> "In addition, the Panel was not convinced that any *additional* reporting requirement of the police, if he would across the border, was either necessary or proportionate. The apparent suggestion that this was necessary to ensure that the police were kept informed of all such crossings

> did not persuade us that this burden should fall to Mr Mackle. *The requirement to seek permission from PBNI is included in the original licence is sufficient in our view*."
>
> [italicised emphasis added]

[45] The Commissioners seem to have proceeded on the basis that permission would require to be sought from PBNI and that the 'burden of keeping the police informed' of Mr Mackle's actions should not fall on him but could be discharged by means of PBNI sharing this information.

[46] In any event, the Department has met the applicant's reliance on the Parole Commissioners' decision head-on in its evidence, by way of an averment that it simply does not agree with the Parole panel's assessment of, and recommendation surrounding, the appropriateness of PSNI being involved in licence supervision. For my own part, in light of the position adopted by PBNI, I can quite see why the Department was keen to involve other criminal justice agencies who would provide a more rigorous element of supervision and management of TROs in circumstances where PBNI had, by reason of potential risk to its staff, stepped back from this responsibility. As I have said above, this represented an undermining of the statutory purposes, of which such offenders should not be entitled to take advantage.

[47] It is also common case that the Parole Commissioners' view on licence conditions is not binding on the Department or its partners. The Department is required to give effect to the decision to release the prisoner; but any recommendations relating to licence conditions are of persuasive effect only. This point is underscored by the fact that, in exercising its functions under Article 24 of the 2008 Order, the Department is required only to *consult* the Commissioners (and to do so on occasions which do not include the present case): see Article 24(5).

[48] It is plain from the evidence in this case that the Department takes a different view from that of the panel of Commissioners who considered the applicant's release after recall. At the MARA meeting in August 2020 the Parole Commissioners' recommendations were considered but, in light of the fact that the new arrangements had been developed to address operational gaps around public safety and set out in guidance to which they were statutorily bound to give effect, the decision makers were entitled in my view to adopt a different approach from the panel's assessment in relation to the involvement of PSNI in licence supervision.

[49] The applicant's further comparison of himself with someone who lives in Lurgan who is precluded from travelling to Dungannon is also flawed for the simple reason that the travel for which the applicant requires approval is cross-border travel which would put him outside the jurisdiction of the MARA agencies and outside the jurisdiction in which he is serving his sentence. This is potentially problematic in itself, since it places the applicant beyond ready means of supervision and enforcement of his licence conditions. In addition, however, as noted in the

judgment in *Re Lancaster, Rafferty and McDonnell* [2023] NIKB 12, travel to and fro across the land border on the island has previously been exploited for terrorist purposes. In its submissions in this case, the respondent has relied upon the fact that there is a porous land frontier between the jurisdictions of Northern Ireland and the Republic of Ireland, with hundreds of crossing points, which gives rise to particular policing challenges where this feature is used by those pursuing terrorist purposes to further or to conceal their activities.

[50] I accept that the relevant licence conditions – requiring permission for cross-border travel over 10 miles from the applicant's home or even within that radius for certain purposes – represents a restriction on his article 8 rights. In the *Gul* case, the court accepted – "with a degree of doubt" (see paras [5] and [70]) – that article 8 was engaged. The respondent here relied on this, and upon the fact that travel is permitted for the applicant for everyday essential domestic purposes, as support for the submission that there was not even an interference with the applicant's article 8 rights in this case. I reject that submission. The applicant is required to seek approval to travel across the border for certain purposes; when he does so he is obliged to provide a range of information and generally to do so well in advance; and if he travels outside the jurisdiction without express approval (beyond the concessions of the prior approval already granted) he runs the risk of having his licence revoked and being recalled to prison.

[51] Ms Quinlivan relied upon the case of *Re Fox and Canning's Applications* [2013] NICA 19; [2014] NI 221 as authority for the proposition that the entitlement to free movement is an aspect of private life clearly protected by article 8 such that, where an individual has to account to the authorities for their movements, this is an interference with article 8 rights which requires to be justified (see paras [39]-[40]). That case arose in a different context: it involved stop and search powers on the part of the police and armed forces and did not involve a cross-border element. However, I am satisfied that the restrictions upon the applicant's movements imposed through his licence conditions do amount to an interference with his article 8 rights. The different context in the present case goes to the question of how readily such an interference will be justified, rather than whether any interference has been established. Moreover, in *Commissioner of Police of the Metropolis v Ahsan* [2016] 1 WLR 654, at para [50], Cranston J accepted that notification requirements under counter-terrorism legislation amounted to an interference with article 8 rights; as had the Supreme Court in relation to similar requirements after conviction for sexual offences in *R (F (A Child)) v Secretary of State for the Home Department* [2011] 1 AC 331, at para [41]. Albeit those requirements required attendance at a police station to make the relevant notification – which is absent in this case – the present regime is more intrusive to the extent that the applicant requires *approval* for travel, rather than merely notifying his intention to do so.

[52] This restriction is plainly in accordance with law in light of the provisions of the 2008 Order in relation to the supervision of offenders on licence who have served the requisite custodial period of their sentence but remain subject to that sentence. I

am also satisfied that it has been imposed for a legitimate aim specified in article 8(2), namely in the interests of national security, public safety, for the prevention of disorder or crime and/or the protection of the rights and freedoms of others. Article 24(8) of the 2008 Order and the terms of the 2009 Rules point towards such licence conditions being imposed for the protection of the public and the prevention of re-offending, as well as the rehabilitation of the offender himself, which would also be a legitimate purpose for the purpose of article 8(2). In the context of the MARA arrangements and the management of TROs, the Article 50 guidance makes clear that the over-arching concern is one of protection of the public.

[53] I conclude that the operation of the impugned conditions is proportionate. Although, unlike the *Lancaster* case, *approval* to travel is required (rather than merely *notification* of an intention to travel), the impact of that requirement has been significantly reduced by means of the concessions that the applicant can travel outside the jurisdiction for essential domestic and recreational purposes up to 10 miles away from his home. Other required travel, which is likely to be foreseeable, can be the subject of specific applications. I accept that the authorities have carefully considered the extent of flexibility which is appropriate in the operation of these conditions and that they are to be afforded a level of discretionary area of judgment in this regard. Indeed, authority suggests that, in the field of national security in which counter-terrorism measures fall, it is appropriate for the court to afford the authorities a broader degree of discretion in their judgment than in other areas. The balance they have struck might even be considered generous to the offender in this case, in light of the purpose which the impugned conditions are designed to pursue, the standard condition in relation to travel outside the UK contained in the 2009 Rules and the latitude afforded to the applicant to cross the border on a daily basis for a variety of purposes. I consider that the interference in this case does strike a fair balance between his rights and those of the community. The involvement of the PSNI in the approval process was in my view plainly necessary in light of the issues which had arisen with PBNI enforcement of the standard condition relating to approval for travel outside the jurisdiction.

[54] It follows that although, as in the *Lancaster* cases, the applicant in these proceedings will be subject to some inconvenience in respect of certain travel plans which involve travel outside the jurisdiction, and will correspondingly have his freedom of choice restricted to some degree in respect of spontaneous travel plans at short notice, I do not consider this to represent a breach of his Convention rights. Indeed, even the concern in relation to short-notice situations is reduced in this case in light of the respondent's confirmation that MARA operates on a 24 hours per day, 7 days per week basis so that "an application can be made and determined with whatever urgency is considered necessary in the circumstances." This caters for emergency situations.

[55] I accept the applicant's case that, in respect of family days out, there can be an ad hoc nature to these arrangements. However, I reject the applicant's suggestion that the additional licence conditions "completely stymie that type of normal

socialising and leisure time." There are a number of reasons for this. First, he is entitled to travel across the border up to 10 miles from his home for *some* recreational purposes (dog walking). Second, there are a wide range of activities and days out which can be undertaken without having to leave the jurisdiction. Third, the applicant retained the facility of asking the MARA organisations to approve additional recreational activities within the 10 mile radius they had already considered appropriate. Fourth, there is also the facility for pre-planning trips and providing the requisite notice to obtain approval. The inconvenience involved in this is not at all disproportionate, in my view, in light of the concerns as to public protection mentioned above and in the context of the applicant being an offender still subject to a sentence for terrorist-related offending.

Article 14

[56] Turning to the applicant's challenge based on article 14 ECHR, I adopt essentially the same analysis in relation to this issue as set out in the judgment in *Re Lancaster and Others*: see paras [167]-[188] of that judgment. The circumstances of this challenge fall within the ambit of the applicant's article 8 rights. The situation of the applicant is not, however, analogous to that of a TRO who resides in Great Britain. The general ease of cross-border travel on the island of Ireland, whilst resulting in greater interference with the applicant's everyday activities, calls for greater vigilance and additional controls than is the case for TROs in Great Britain leaving the United Kingdom. As the respondent submitted, the comparison drawn by the applicant fails to pay sufficient regard to the nature and extent of the terrorist threat in this jurisdiction and the fact of the land frontier with a different jurisdiction and the policing challenges thereby presented.

[57] Even assuming that there is differential treatment between persons in an analogous situation (or a disproportionate detrimental effect upon the applicant by virtue of a universally applied condition), that does not arise because of a status listed in article 14 ECHR. I accept the respondent's point that the applicant in the present case was unable to identify with the required precision the protected status upon which he relied. Indeed, Ms Quinlivan candidly accepted in her submissions that the article 14 comparison in this case was not as 'direct' or clear as that drawn in the *Lancaster* case simply on the basis of residence on the part of a registered terrorist offender in either Great Britain or Northern Ireland.

[58] In the present case, the differential treatment or disproportionate effect is not merely because he is an Irish national. Similar conditions apply to TROs, and indeed non-TROs on licence, whatever their nationality. Nor is he affected simply on the basis of his political opinion. The applicant's political views are beside the point – unless he sought to rely on views justifying his terrorist offending, which his counsel disavowed, and which are not in any event worthy of protection under the Convention as being inconsistent with Convention values. Again, similar conditions apply to all TROs and indeed all non-TRO offenders on Article 17 licence (with the condition being enforced by PBNI alone in the latter case). Nor does the impact arise

because of 'association with a national minority.' It arises because of his status as a TRO, along with his residence not simply in Northern Ireland but in a border community. The casual suggestion that those with an Irish passport who reside in Northern Ireland are much more likely to have links to people residing outside the jurisdiction of the UK than TROs residing in Great Britain was advanced without evidence but also significantly oversimplifies the confluence of circumstances which give rise to the treatment of which he complains. It also ignores that many terrorist offenders in Great Britain may well have many familial and other links to countries outside the UK. The real issue in this case is that the applicant lives close to the border and enjoys travelling across it for a variety of (largely social and recreational) purposes. But the precise location of the applicant's current home, in close proximity to the border, is not in my view a protected status for the purpose of article 14.

[59] Insofar as the *actual* status which gives rise to the disproportionate effect on the applicant is protected by the Convention's anti-discrimination provisions – namely his status as a TRO who lives in Northern Ireland (and/or who lives close to the border) with familial and other links in the Republic of Ireland – this is plainly a peripheral status towards the outer edge of the concentric circles described in Lord Walker's judgment in *R (RJM) v Secretary of State for Work and Pensions* [2009] 1 AC 311, at para [5]. Any differential treatment or disproportionate effect (as compared with others not sharing that status) is justified in my judgment. This is an area in which the authorities are provided with a wide margin of judgment. Here, the difference in treatment is justified on the basis set out above (at paras [49] and [56]) and in the *Lancaster* judgment at paras [105]-[107], [111]-[113] and [187]-[188].

Article 7

[60] In his pleaded and written case, the applicant contended that the impugned licence conditions were notably in excess of the standard condition contained in the 2009 Rules and set out at para [25] above; and that the imposition of these further conditions constituted a heavier penalty than the one which was envisaged at the time when his offences were committed. Accordingly, he contended that the introduction of the further conditions was in breach of the prohibition under article 7 ECHR that a heavier penalty shall not be imposed than the one which was applicable at the time of the criminal offence was committed.

[61] At hearing, Ms Quinlivan indicated that this ground of challenge was not being pursued. I consider that she was plainly right to take that course. In its argument, the respondent had drawn my attention to the case of *Re Pearce's Application* [2020] NIQB 23, which was a challenge to the legality of a violent offences prevention order (VOPO) along with a challenge to the Violent Offices Prevention Order (Notification Requirements) Regulations (Northern Ireland) 2016. The logic of that decision, which applies equally in the present case in my view, is that the licence conditions here are not punitive but forward-looking and preventative in nature. Even if that were not correct, it is difficult to see how they could be considered a

'heavier' penalty for the applicant than previously pertained. An obvious point to make is that the statutory scheme, both at the time of Mr Mackle's offending and subsequent sentencing, provided for variation and amendment of the licence conditions to which he was subject. Article 24 of the 2008 Order was in force at all material times. The lawful tightening of licence conditions by means of the exercise of the discretion conferred in Article 24 was always envisaged by the statutory scheme governing the applicant's sentence at the time when it was passed (unlike, for instance, the change in statutorily prescribed notification requirements which was at issue in *Lancaster and Others*).

[62] In addition, the change in the particular state agency from whom permission for cross-border travel was required to be sought would not, in my view, amount to the imposition of a 'heavier' penalty. In truth, the applicant's real complaint in this case was that the standard condition to which he was supposed to be subject was, from September 2008, actually going to be enforced by a criminal justice agency which was prepared to do so. At the same time, the condition was in fact relaxed to permit daily cross-border travel for several purposes within a certain radius. In all of these circumstances, the applicant's case that a heavier penalty was imposed in law was not viable. His counsel is to be commended for taking a responsible approach to that element of the challenge. I have included the short observations on this point above to perhaps deter a less responsible approach being taken to the same point in a future case.

Irrationality

[63] Finally, I do not accept the applicant's essential submission that some change in *his* circumstances is necessarily required before his licence conditions were amended. External factors may give rise to a rational decision on the part of the Department under Article 24 of the 2008 Order to amend licence conditions. An increase in the terrorist threat level may, for instance, be one reason why increased vigilance is appropriate. However, the introduction of a new system of management of TROs – such as occurred with the introduction of the MARA system – is another basis upon which it may be rational to adjust an offender's licence conditions, in order to improve the system of offender management generally or to ensure consistency. In any event, as discussed above, the new arrangements for supervision of cross-border travel in this case were designed to ensure that the previous standard licence condition was meaningfully enforced, rather than being applied in the highly diluted fashion which pertained when PBNI were responsible for this area of offender management. It follows from all of the above that I do not consider the applicant to have made out his case that the new licence conditions are liable to be set aside for irrationality or *Wednesbury* unreasonableness.

Conclusion

[64] By reason of the foregoing, I do not consider the applicant to have made out any of his grounds for judicial review and, accordingly, I dismiss the application.