Court Report (Court of Appeal Northern Ireland)

Nash, Re Judicial Review [2015] NICA 18 (21 April 2015)[1]

Paul Doran[2]

On 21 April 2015, at the Northern Ireland Court of Appeal, the Lord Chief Justice Morgan, sitting with two senior judges, delivered a significant and important judgment in respect of the work of the Probation Board for Northern Ireland (PBNI) and application of risk assessment.

The case was an appeal from a decision by Judge Treacy refusing the appellant's application for leave to apply for judicial review of a decision by the PBNI whereby it refused, inter alia, to provide the Crown Court and the Parole Commissioners with a risk assessment of the appellant. PBNI policy and practice are that it does not provide a risk assessment in the cases of terrorist/politically motivated offending.

The appellant had been convicted by a non-jury ('Diplock') Court in 2011 on firearms offences and PBNI were asked to provide a pre-sentence report, which it did. However, in keeping with practice since the 1970s, PBNI did not provide a risk assessment and restricted the report to a social history and current circumstances report, even though the appellant had indicated he was content to co-operate with such an assessment.

The Judge had found the appellant to be a dangerous offender under the 2008 Criminal Justice Order and imposed an extended custodial sentence (seven years' custody, five years' licence).

While serving his sentence, the appellant renewed his request for PBNI to carry out a risk assessment so that he could show a reduction in

[1] http://www.bailii.org/nie/cases/NICA/2015/18.html

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risk when he came before the Parole Commissioners to be considered for release. PBNI maintained its position in offering the appellant services in relation to resettlement but stated that it could not provide a risk assessment for the Parole Commissioners. The Parole Commissioners decided to release the appellant at the earliest possible Parole Eligibility Date, and he has complied with licence requirements.

The appellant argued that the PBNI policy, by not providing a risk assessment in cases involving perceived terrorism or political motivation, was unlawful. The appellant also argued that there was a duty of enquiry on PBNI to ascertain some method of ensuring that an appropriate assessment tool could be devised.

PBNI submitted that there was no statutory obligation to provide a risk assessment unless such an assessment instrument was available. PBNI had consistently stated that risk assessments would not be provided in relation to such prisoners and provided correspondence dating back to 2006, noting that a validated assessment instrument was not available for such cases. PBNI highlighted that the criminal justice system dealt with such offenders in a particular way and that the assessment tool employed by PBNI – ACE (Assessment, Case management and Evaluation) – was not validated for terrorist/politically motivated offences.

In a comprehensive ruling the Court of Appeal accepted that the assessment of risk lies at the core of PBNI's work and that 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 most appropriate method of dealing with the offender. However, critically, the Court of Appeal accepted that such assessments must be valid and quoted from the PBNI Best Practice Framework ('accurate and defensible').

The Court of Appeal accepted 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 which might assist in explaining how he got involved and what protective factors might be put in place to prevent further involvement. It also accepted that even where no intelligence information is available, background factors in relation to the offender, his upbringing, his family and his place in the community give little or no assistance in relation to the risk of reoffending in these cases.

The Court provided reasons why the three case examples put forward by the appellant to challenge this reasoning were actually consistent with the PBNI view or of no assistance to the appellant and concluded that there are no accurate or defensible mechanisms available to PBNI which would enable it to carry out an assessment of risk in relation to the appellant.

This Northern Ireland Court of Appeal judgment has highlighted how risk assessment of politically motivated offenders presents a unique challenge for criminal justice bodies. It confirms that risk assessment is central to and underpins all probation work with offenders from pre-sentence to sentence completion stage in regard to all other types of offences.

In appropriate cases a validated risk assessment instrument applied by experienced and trained personnel can provide a proper basis for evaluation. This is an important and reassuring message for probation services and assists in clarifying the role of probation in the criminal justice system.