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IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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ON APPEAL FROM BELFAST CROWN COURT

_____

THE KING

-v-

NIALL LEHD

_____

Before: McCloskey LJ, Maguire LJ and Scoffield J

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Representation

Prosecution: **Mr Ciaran Murphy KC and Mr David Russell, of counsel (instructed by the Public Prosecution Service)**
Appellant: **Mr Tim Moloney KC and Mr Conor O'Kane, of counsel (instructed by Carlin Solicitors)**

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McCLOSKEY LJ (*delivering the judgment of the court*)

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Introduction

[1] This appeal against sentence by Niall Lehd (the "appellant"), in respect whereof leave to proceed has been granted by the single judge, challenges an extended custodial sentence ("ECS") of 24 years imprisonment, augmented by an extension period of five years, imposed on him having pleaded guilty to a single offence of preparation of acts of terrorism contrary to section 5(1) of the Terrorism Act 2006 (the "2006 Act").

Prosecution and Trial

[2] The prosecution of the appellant was based on an indictment comprising five counts. In addition to the count noted in para [1] above, there were four counts of possessing explosives with intent to endanger life or cause serious injury to property contrary to section 3(1)(b) of the Explosive Substances Act 1883 (the "1883 Act"). These were "left on the books." As appears from para [1] above, the distinctive feature of the first count, to which the appellant's plea of guilty was confined, was its breadth (verbatim per the indictment): manufacturing explosive substances, constructing explosive devices, creating and maintaining hides to store explosive substances, explosive devices, components for explosive devices, imitation firearm and ammunition, tools and resources used during the construction of explosive devices and other assorted items linked to the preparation of an act of terrorism, purchasing or otherwise obtaining chemicals and components to be used in the manufacture of explosive substances and the construction of explosive devices, and conducting research resulting in the creation of a library of documents providing specified information. The second stand out feature of this count is that all of its elements concerned preparatory acts and conduct. This count was designed to encompass the totality of the appellant's offending.

[3] The timeline of the prosecution as agreed between the parties was this:

- 28 February 2013 – appellant arrested in Larne after presenting himself to police
- 2 March 2013 – appellant charged with Possession of Explosives
- 1 July 2014 – appellant received 6 year sentence (3 years in custody and 3 years on licence)
- 2 March 2016 – appellant released on licence

- 29 August 2016 – appellant arrested on suspicion of section 41 of Terrorism Act
- 5 September 2016 – appellant released unconditionally
- 8 March 2018 – appellant's licence suspended by the Secretary of State
- 18 December 2018 – appellant re-arrested following SOCPA statements by CM
- 14 February 2019 – PCNI recommended appellant's re-release on licence
- 2 March 2019 – appellant released on High Court Bail to await trial
- 6 August 2020 – PE at Ballymena Magistrates' court
- 5 November 2020 – No Bill application
- 23 November 2020 – ruling on No Bill application and Not Guilty Arraignment
- 30 November 2020 – defence statement
- 27 January 2021 trial date set for 19 May 2021
- 24 February 2021 mention for disclosure update
- 15 March 2021 CM SOCPA interviews disclosed
- 26 March 2021 case mentioned trial date confirmed
- 16 April 2021 case mentioned
- 30 April 2021 disclosure of Central Criminal court papers
- 7 May 2021 section 8 disclosure application
- 13 May 2021 section 8 disclosure application
- 18 May 2021 trial date vacated provisionally listed 26 May
- 25 May counsel to counsel discussions commenced
- 1 June 2021 Trial date – agreed Basis of Plea followed by Re-Arraignment on Count 1 (amended). Counts 2 - 5 left on the Books

- 16 June 2021 – plea and mitigation

- 28 June –sentencing

[4] Summarising, upon arraignment on 23 November 2020, the appellant pleaded not guilty to all five counts. The provisional scheduled date of trial commencement was 26 May 2021. Shortly beforehand, a delay materialised, prompted by the temporary unavailability of leading counsel for the prosecution and the parties' professed willingness to engage in discussions designed to identify an agreed basis of plea. One week later, an agreed basis of plea having been concluded, the appellant was rearraigned and pleaded guilty to the first count. The remaining four counts were "left on the books." As a result, no trial ensued.

Leave to Appeal

[5] Rooney J formulated the basis of his order granting leave to appeal in commendably clear terms. He considered it arguable that the sentencing judge had erred in principle by basing his approach:

> "... on the guidelines as stated in *R v Kahar* [2016] EWCA Crim 568 as opposed to the Terrorist Offences Guideline (2018) with regard to the preparation of terrorist acts …… under the Terrorism Act 2016."

Elaborating, the judge continued:

> "There are no sentencing guidelines for section 5 offences in Northern Ireland. It is my view that it is a relevant case in which guidance should be sought from the Court of Appeal as to the approach to be taken when sentencing section 5 offences under the Terrorism Act 2006."

The judge's ruling was based on a notice of appeal containing five grounds. He found nothing arguable in the remaining four grounds. At this juncture, it is appropriate to juxtapose his ruling with the statement in the skeleton argument of counsel for the appellant that the appeal is proceeding on two grounds, namely:

(i) The sentence was manifestly excessive.

(ii) The judge erred (in law) in deciding that the appellant is "dangerous" (within the meaning of the relevant statutory provisions, viz Articles 11 – 15 of the Criminal Justice (NI) Order 2008).

Pausing, the limited grant of leave to appeal does not expressly embrace (i) and clearly does not extend to (ii). Procedurally, the court will approach this appeal on the basis that it is advanced on the sole ground permitted by the single judge, supplemented

by a renewed application for leave to appeal in respect of (i) and (ii). In this way the appellant will have the opportunity to advance his case in full.

Basis of Plea

[6] The basis of plea document is, self-evidently, one of central importance. The text is:

> "1. The defendant pleaded guilty to count 1 (second date amended to 28 February 2013)
>
> 2. The defendant entered custody on 28 February 2013 and was released on 1 March 2016.
>
> 3. Particulars in relation to count 1 are set out in the indictment. The particulars include all of the recovered materials from the hides as disclosed in the papers, with the exception of the specific items referred to below and in Appendix [ ] hereto.
>
> 4. Count 1 includes the making and possession of those items referred to by [M] in his second statement (re 1 April 2016) and the three pipe bombs subsequently used in NI. The prosecution cannot assert to the criminal standard that those three pipe bombs were taken and passed on to others by the defendant.
>
> 5. The prosecution will open [M]'s account to the court.
>
> 6. A piece of paper with details of the use of a TOR Browser were found in the defendant's home in August 2016.
>
> 7. Counts 2, 3, 4 and 5 will be left on the court books not to be proceeded with without further order of the Crown Court or the Court of Appeal."

The Appendix which follows details mainly certain items of clothing, together with a miscellany of physical items: a blue barrel, two rizzla plates, a rucksack, a mini tripod, a bag containing badges, a bag containing sundry electronic devices and a bag containing a flag and clothing and, finally, specified plastic explosive and military detonators.

("M is the cipher devised by this court to describe another male person whose name appears in full in the basis of plea document and in other places: and see paras [46]-[48] infra.)

[7] The materials before the sentencing court (and this court) included the co-called "Quantities Report." This details everything recovered from hides and caches in Northern Ireland with which the appellant was connected. It was compiled by the investigating police in conjunction with forensic scientists. It operates as inter alia a guide to relevant parts of the committal papers. This report consists of a series of schedules containing an individual description, seriatim, of everything recovered from a series of locations – country parks, woods and a convent – and subjected to forensic examination. These items consisted of inter alia pipe bombs, explosives powders, detonators, ammonium nitrate bags, other bags containing nitrates and potassium chloride, safety fuses, timer power units and ammunition. None of the items listed in the appendix to the basis of plea document appears in the Report, it being common case that these cannot be connected to the appellant.

[8] As appears from the foregoing there was a related prosecution, that of Mr M (see paras [46] – [48] infra*).* As the grounds of appeal indicate, one of the issues which this court must consider is that of any material distinctions between the offending and culpability of Mr M and that of the appellant. The court gave certain directions designed to clarify this. In response, the following clarification was helpfully provided:

> "The Quantities Report relates to the quantities of explosives relevant to the counts in the indictment ….
>
> All the materials within the Quantities Report relate to the hides that are the subject of the count 1 preparation charge except for two items at the bottom of page 19. For clarity, the list of items in the Appendix to the basis of plea were materials which were the sole responsibility of [M]. The items in that list are not explosives."

The clarification continues:

> "For the avoidance of any doubt, it was accepted on behalf of the Appellant that the materials emanating from the hides in this case were the joint responsibility of [M and him] ie [the Appellant] is liable in respect of all items. Those items all come within the broad headings referenced in the preparation charge [i.e., count 1]."

[9] Mr M was at the material time a serving Royal Marine. His arrest preceded that of the appellant. During interviews he admitted to sourcing explosives items and making explosives. He also provided an account of the appellant's involvement in the

relevant activities. He made two statements under caution implicating the appellant. The two men, in essence, constituted an independent engineering team supplying explosives devices to dissident republicans.

[10] Mr M was prepared to give evidence against the appellant as a so-called "assisting offender" and, to this end, entered into an agreement under the Serious Organised Crime and Police Act 2005. We shall address infra his sentencing.

[11] The impetus for the appellant's plea of guilty to the first of the five counts was an amendment of this count following discussions between the parties. In its original form the period of offending specified in this count was 1 January 2011 to 5 September 2016. By the amendment this period was reduced, being altered to 1 January 2011 to 28 February 2013.

[12] In summary, the prosecution of the appellant was founded on an extensive series of items of an explosive nature recovered during various police searches conducted between January and September 2016. The appellant was arrested on 29 August 2016 and said nothing during the police interviews which followed.

The Sentencing Equation

[13] At this juncture it is necessary to consider certain earlier convictions of the appellant in respect of comparable types of offending. On 1 July 2014 the appellant was convicted upon his plea of guilty of three explosives offences, namely two counts of possessing explosives with intent to endanger life or cause serious injury to property and one count of possession of firearms or ammunition in suspicious circumstances. The date relating to these three offences is 27 February 2013. On that date police discovered a rucksack containing extensive explosives paraphernalia. At the scene they were approached by the appellant who informed them that the rucksack was his and it contained high explosives. This gave rise to his arrest. Other explosives were recovered from a search of his home. It is accepted that this offending related to his partnership with Mr M. The appellant was punished by a determinate custodial sentence of six years imprisonment divided equally between custody and licenced release. He was released on licence on 1 March 2016. His arrest in respect of the offences underlying this appeal occurred some six months later.

[14] In order to understand the sentencing of the appellant and the issues raised by this appeal it is necessary to consider in particular the following:

(i) The decision of the English Court of Appeal in *R v Kahar* [2016] EWCA Crim 568.

(ii) The Terrorist Offences Guideline (2018) published by the Sentencing Guidelines Council of England and Wales (the "SGC").

(iii) Certain decisions of this court.

(iv) The sentencing of Mr M.

We shall examine each in turn.

R v Kahar [2016] EWCA CRIM 568

[15] The avowed purpose of this decision of the English Court of Appeal, in which there were six appellants, was to provide guidance on sentencing for offences under section 5 of the 2006 Act. First, the court formulated a series of "broad principles" applicable in every case, at para [15]:

> "The combined effect of the decisions in *R v Martin*, *R v Barot*, *R v Khan (Usman)* [2013] EWCA Crim 468 and *R v Dart* [2014] EWCA Crim 2158, is that the following broad principles are applicable in the consideration of sentence for a section 5 offence:
>
> (i) Conduct threatening democratic government and the security of the state has a seriousness all of its own.
>
> (ii) The purpose of sentence in section 5 cases is to punish, deter and incapacitate (albeit that care must be taken to ensure that the sentence is not disproportionate to the facts of the particular offence) and, save possibly at the very bottom end of the scale, rehabilitation is unlikely to play a part.
>
> (iii) In accordance with section 143(1) of the CJA 2003, the sentencer must consider the offender's culpability (which, in most cases, will be extremely high), and any harm which the offence caused, was intended to cause, or might foreseeably have caused.
>
> (iv) The starting point is the sentence that would have been imposed if the intended act(s) had been carried out—with the offence generally being more serious the closer the offender was to the completion of the intended act(s).
>
> (v) When relevant, it is necessary to distinguish between a primary intention to endanger life and a primary intention to cause serious damage to property—with the most serious offences generally being those involving an intended threat to human life."

[16] Next, at para [16], the court identified "two broad factual categories" into which section 5 offences have fallen in recent years:

> "It is clear that, in recent years, section 5 cases have fallen into two broad factual categories (in each of which the ultimately intended act has, more often than not, been murder), namely:
>
> (i) Those in which the conduct in preparation for the intended terrorist act(s) and the intended terrorist act(s) take place, or are intended to take place, wholly or mainly within the UK.
>
> (ii) Those in which the act(s) of terrorism (often involving providing, or intending to provide, violent support to non-international armed conflict) are intended to take place abroad—encompassing variously, for example, offenders who reach the intended country, offenders who engage in preparation to travel but who do not reach the relevant country, and those who provide assistance to others who are intending to, or do, travel with the requisite intention."

The court further observed that there may conceivably be cases belonging to both categories.

[17] At para [19] the court appears to suggest that the "number, nature and gravity of the intended terrorist act(s)" will count as aggravating factors, in tandem with any "aggravating factors of general application." Having done so, it suggests that, subject to the fact sensitive matrix of every case, the following factors are likely to require consideration:

> "In addition to the number, nature and gravity of the intended terrorist acts(s), and to aggravating factors of general application, and depending on the facts of the particular case, the following are also likely to require consideration:
>
> (i) The degree of planning, research, complexity and sophistication involved, together with the extent of the offender's commitment to carry out the act(s) of terrorism.

(ii) The period of time involved—including the duration of the involvement of the particular offender.

(iii) The depth and extent of the radicalisation of the offender (which will, in any event, be a significant feature when considering dangerousness—see below) as demonstrated, for example, by way of the possession of extremist material, and/or the communication of such views to others.

(iv) The extent to which the offender has been responsible, by whatever means, for indoctrinating, or attempting to indoctrinate others, and the vulnerability or otherwise of the target(s) of the indoctrination (actual or intended)."

[18] Having addressed the specific case of acts of terrorism intended to take place abroad (not this case), at paras [20] – [21], the court, having cautioned that every case will depend upon its particular facts, identified two types of commonly encountered offenders, at para [22], namely those who provide finance and those who assist others who travel abroad. At para [23] the court addressed the issue of mitigation:

> "As to mitigation generally, and in addition to mitigating factors of general application, the particular vulnerability of the offender and, if particularly vulnerable, the extent to which they were groomed, and any voluntary disengagement, may be amongst the factors to be considered. That said, the extent to which, if at all, any such factors do mitigate sentence will be highly fact sensitive."

[19] The recurring theme of the fact sensitive nature of every case emerges again at para [24]. At para [25] the court emphasised the breadth of the notional scale: ranging from offending which may merit a life sentence with a very long minimum term to offending which may properly attract a relatively short determinate sentence. The court then identified five separate levels of offending. It prefaced their definition with the explanation that the levels are differentiated by two principal factors, namely:

(i) The culpability of the offender principally by reference to proximity to carrying out the intended act(s) measured by reference to a wide range of circumstances including commitment to carry out the intended act(s); and

(ii) The harm which might have been caused measured in terms of the impact of the intended act (or series of acts) or the intended number of acts including not only the direct impact intended on the immediate victims, but also the wider intended impact on the public in general if the act had been successful.

[20] The five categories, or "levels" of offending formulated by the court are set out at paras [30]–[35]. It is suggested that the first step which the sentencing judge should take is to determine whether the offender is "dangerous" so that either a life sentence or an extended sentence may be imposed (we shall elaborate on this infra). Having done so, the next step is to identify:

> "… where on the scale the offending falls, taking into account the six levels which we set out below."

The following prefatory observations must be noted, at para [29]:

> "In each instance the range that we have identified relates to the sentence (actual or notional) after trial, and the cases are cited as illustrations, on their particular facts, of conduct which we regard as coming within the relevant level, rather than as expressing our necessary agreement with the sentence actually imposed, particularly (though we have included some of them) in relation to those decided before, or without reference to, the general increase in sentence consequent upon *R v Barot*. Whilst a number of the examples involve multiple offenders, a lone wolf offender's offence may be just as serious. Equally, in the usual way, there is a degree of overlap between the levels, and aggravating and mitigating features may move the ultimate sentence up or down within a level, or may move it to another level."

[21] The six levels then follow. Each of these is defined in considerable detail. In any case where these levels fall to be considered it will be necessary for the court to study the definitions and we have done so. For present purposes it suffices to provide the following digest of each level, bearing in mind that the first is the most serious and the sixth the least serious:

(i) Level 1 is engaged where the offender has taken steps which amount to attempted multiple murder or something proximate thereto or a conspiracy to commit multiple murder where this is likely to lead to an attempt, with probable success, but no physical harm has actually been caused. Cases belonging to this level will attract a sentence of life imprisonment with a minimum term of 30 – 40 years or more.

(ii) Next in the scale are "those who might not get quite so near in preparation or where the harm which might have been caused was not quite as serious": see para [31]. In these cases, a life sentence will generally be appropriate, with a minimum term in the range of 21 – 30 years, or a very long determinate sentence and an extension period of 5 years.

(iii) The third level, described by the court as "a little further down the scale", comprises cases examples whereof include the reported cases identified in para [32] of the judgment. In these cases, the offender will invariably be dangerous, and the appropriate sentence will be a life sentence with a minimum term of 15 to 20 years or a long determinate sentence of 20 to 30 years or more with an extension period of 5 years.

(iv) This level (the fourth) involves cases with overseas characteristics, involving more peripheral terrorist conduct or training, illustrated by the reported cases noted in para [33]. Offenders belonging to this category are likely to be dangerous and the suggested sentence is a determinate period in the range of 10 to 20 years or more with an extension period of 5 years.

(v) The typical case belonging to the level 5 category involves an offender who sets out to join a terrorist organisation engaged in a conflict overseas but does not complete his journey or an offender who makes extensive preparations with a real commitment, but does not get very far, or who does not get very far in his preparation for an intended act, which will usually be in the lower realms of seriousness, in the UK. As regards non-dangerous offenders, the suggested punishment is a determinate sentence of between 5 and 10 years.

(vi) Offences belonging to level 6 essentially mirror those belonging to level 5, with the difference that the gravity of the conduct belongs to a lower scale. For such offenders sentences in the range of 21 months to 5 years are likely to be appropriate.

[22] Finally, the Court of Appeal made clear that the guidance provided by its judgment was designed to prevail until publication of the Sentencing Council Guideline on Terrorist Offences.

The Sentencing Guidelines Council Guideline

[23] On 27 April 2018 the Sentencing Council of England and Wales published its guideline entitled "Preparation of Terrorist Acts" (the "SGC Guideline"). It addresses only offences under section 5 of the 2006 Act. In general terms, and without embarking upon a minute forensic comparison, one can readily identify certain parallels with the guidance in *R v Kahar*.

[24] The Guideline, firstly, identifies four levels of culpability, which in substance represent a simplification of the six levels formulated in *Kahar*, with little variation in their specification. Identification of which of these four levels applies represents the first step which the sentencing judge must undertake. The second step for the judge is to assess "harm" by reference to three specified categories. The sentencing ranges which follow will be dependent upon the outcome of these two steps. Having completed steps 1 and 2 there are three categories which the judge must next consider.

Within each category there is (a) a specified starting point and (b) a "category range." Thus, for example, in the first and most serious category – that of "multiple deaths risked and very likely to be caused" – the starting point is life imprisonment with a minimum term of 35 years and the category range is life imprisonment with a minimum term of 30 to 40 years in cases of the most serious culpability. At the opposite end of the spectrum, cases belonging to category 3 involving the least serious culpability attract imprisonment of 3 to 6 years duration. Next the Guideline, in the usual way, specifies a series of aggravating factors and mitigating factors.

[25] It is convenient at this point to note the parties' respective positions on the decision in *Kahar* and the Guideline. The prosecution case has consistently been that the offending of the appellant belongs to *Kahar* level 2, thus qualifying for either (a) a life sentence with a minimum term in the range of 21 – 30 years or (b) a very long determinate sentence augmented by an extension period of 5 years. As will become apparent infra, the judge agreed that this was a *Kahar* level 2 case.

[26] The appellant's contention is that he should have been sentenced in accordance with the Guideline, a course which would have resulted in a lighter sentence. The appellant's contention is that the appropriate starting point in his case is that of 15 years' imprisonment, with a downwards adjustment to be applied to reflect credit for his guilty plea. It is convenient to note here that the sentencing of Mr M predated that of the appellant by some four years and the introduction of the Guideline by around one year, with the result that he was sentenced on the basis of *Kahar*, being punished by a basic sentence of 18 years' imprisonment, augmented by an extension period of 5 years, the judge having adopted a starting point of 42 years which he reduced very significantly to 27 years to reflect the "assisting offender" factor.

Previous Decisions of This Court

[27] Arising out of the terms in which leave to appeal has been granted, one of the central issues to be determined by this court is whether the appellant should have been sentenced as if the SGC Guideline had applied to this jurisdiction. It did not, of course, apply and the reason for this is as follows.

[28] In the field of sentencing in England and Wales among the most important statutes are the Criminal Justice Act 1991, the Powers of Criminal Courts (Sentencing) Act 2000 and the Criminal Justice Act 2003. These had to be considered and applied in tandem with sentencing guidelines and guidelines judgments of the Court of Appeal. This, inevitably, gave rise to myriad complexities for courts, practitioners and criminal justice agencies alike.

[29] In its report published in November 2018 the Law Commission for England and Wales promulgated a new Sentencing Code in draft. This instrument is designed to minimise the complexities in sentencing procedure and does so by attempting to consolidate all relevant laws. Crucially, both practitioners and the judiciary favoured its adoption. It was given statutory effect by the Sentencing Act 2020 which came into

operation on 1 December 2021. In its long title, the purpose of this measure is expressed to be "to consolidate certain enactments relating to sentencing." The architecture of the Act is daunting: it has 420 sections, 14 Parts, discrete Chapters within each Part and 29 Schedules. This bulk reflects the intense legislative sentencing activity during the three decades.

[30] There are just two provisions in Part 1, sections 1 and 2. Section 1(1) provides:

> "Parts 2 to 13 of this Act together make up a code called the 'Sentencing Code.'"

Notably, section 1(4) makes clear that the new Sentencing Code will co-exist with (a) criminal procedural rules and (b) sentencing guidelines. Section 2 is concerned with temporal effect. It prescribes a general rule that the new Code applies only to convictions postdating its commencement.

[31] The 2020 Act represents the most comprehensive instance of statutory intervention in sentencing in England and Wales ever. It has virtually no application to Northern Ireland: however, courts and practitioners should be aware of its minimal application, specified in section 414. Standing back, the 2020 Act and its almost complete non-application to Northern Ireland combine to illustrate the significant differences in sentencing practice in the two jurisdictions. One example of this, which is ventilated in the public arena from time to time, is the differing approaches to sentencing for murder. This was noted in *R v Ward (No 2: Tariff)* [2019] NICA 18 at paras 18–27. In that case the sentencing judge, having adopted the so-called "higher starting point" in the Practice Statement which, by judicial choice, had been imported from England and Wales into this jurisdiction some years previously, imposed a minimum term of 16 years' imprisonment.

[32] This was upheld by the Court of Appeal which was at pains to point out that in this jurisdiction there is no equivalent to Schedule 21 to the Criminal Justice Act 2003 and certain related measures. It noted what had been said in the recent judicial review case of *Re McGuinness's Application* [2019] NIQB 10 namely that, as a result, the determination of the minimum term in England and Wales is "more prescriptive" and "more mechanical": see para 30. In short, the heavier tariffs prevailing in the other jurisdiction are a direct result of its different sentencing regime. A review of the life sentence in Northern Ireland in 2005 did not give rise to any reform. Thus, *R v McCandless and Others* [2004] NI 269 and the Practice Statement continue to apply in this jurisdiction.

[33] The critical statutory provision is section 59 of the 2020 Act:

> "**Sentencing guidelines: general duty of court**
>
> (1) Every court—

(a) must, in sentencing an offender, follow any sentencing guidelines which are relevant to the offender's case, and

(b) must, in exercising any other function relating to the sentencing of offenders, follow any sentencing guidelines which are relevant to the exercise of the function,

unless the court is satisfied that it would be contrary to the interests of justice to do so.

(2) The duty imposed by subsection (1) is subject to—

(a) section 125(1) (fine must reflect seriousness of offence);
(b) section 179(2) (restriction on youth rehabilitation order);
(c) section 186(3) and (6) (restrictions on choice of requirements of youth rehabilitation order);
(d) section 204(2) (restriction on community order);
(e) section 208(3) and (6) (restrictions on choice of requirements of community order);
(f) section 230 (threshold for imposing discretionary custodial sentence);
(g) section 231 (custodial sentence must be for shortest term commensurate with seriousness of offence);
(h) sections 273 and 283 (life sentence for second listed offence for certain dangerous offenders);
(i) section 321 and Schedule 21 (determination of minimum term in relation to mandatory life sentence);
(j) the provisions mentioned in section 399(c) (mandatory minimum sentences).

(3) Nothing in this section or section 60 or 61 is to be taken as restricting any power (whether under the Mental Health Act 1983 or otherwise) which enables a court to deal with an offender suffering from a mental disorder in the manner it considers to be most appropriate in all the circumstances."

Further, section 57 of the Sentencing Act 2020 Act provides:

> "(1) This section applies where—
>
> (a) a court is dealing with an offender for an offence, and
>
> (b) the offender is aged 18 or over when convicted.
>
> (2) The court must have regard to the following purposes of sentencing—
>
> (a) the punishment of offenders,
>
> (b) the reduction of crime (including its reduction by deterrence),
>
> (c) the reform and rehabilitation of offenders,
>
> (d) the protection of the public, and
>
> (e) the making of reparation by offenders to persons affected by their offences.
>
> (3) Subsection (1) does not apply—
>
> (a) to an offence in relation to which a mandatory sentence requirement applies (see section 399), or
>
> (c) in relation to making any of the following under Part 3 of the Mental Health Act 1983—
>
> (i) a hospital order (with or without a restriction order),
> (ii) an interim hospital order,
> (iii) a hospital direction, or
> (iv) a limitation direction. "

This is an exact replica of section 142 of the 2003 Act. Importantly, some 20 years having elapsed, Northern Ireland has not followed the same path.

[34] In short, the sentencing guidelines published by the SGC and kindred organisations in England and Wales are confined to that jurisdiction. Thus, the sentencing regime in Northern Ireland differs in this important respect.

Notwithstanding this difference, this court has from time to time pronounced upon and given certain effect to guidance of this kind.

[35] It is against the foregoing background that certain previous decisions of this court must be considered. The purpose of this exercise is to ascertain the approach which this court has adopted to the published sentencing guidelines of the SGC and kindred organisations. This we consider essential to our determination of the contention that this appellant should have been sentenced at first instance in accordance with the relevant SGC Guideline.

[36] In *Attorney General's Reference (No. 2 of 2004) (Daniel John O'Connell) (AG Ref 1 of 2004)* [2004] NICA 15 the sentences imposed upon the appellant for offences of rape, attempted rape and indecent assault were referred to this court by the Attorney General under the unduly lenient sentence statutory provisions. One of the issues addressed was whether the starting points determined by the Sentencing Advisory Panel (a predecessor, or relative, of SGC) should be applied in this jurisdiction. This question was answered in the affirmative. See para [18]:

> "[18] It is opportune for this court now to confirm that sentencers in this jurisdiction should apply the starting points recommended by the Sentencing Advisory Panel. We have therefore concluded that the sentences imposed in this case were unduly lenient. Since the offender had engaged in a campaign of rape the starting point ought to have been 15 years, but clearly a greater sentence was required not only because of the aggravating features such as the grooming of the victims and abuse of trust but also because there was more than one victim. In our judgment a sentence of 17 years or even higher would have been appropriate."

[37] In *Attorney General's Reference (No. 1 of 2008) (Damien Gibbons, Stephen Gibbons, Declan Styles and David Martin Crone)* [2008] NICA 41 this court confronted squarely the general approach to be applied by the courts of this jurisdiction to publications of the English sentencing organisations. The Lord Chief Justice stated in uncompromising language, at para [44]:

> "[44] As we have repeatedly made clear, the guidance provided by the Sentencing Guidelines Council must always be regarded as secondary to the guidelines provided by the Court of Appeal in this jurisdiction. There will be occasions where the guidelines accord with local experience in which case, they may be followed but there will also be occasions where they should not be applied. In any event, it is perhaps unsurprising that the judge remarked that the robbery in this case came closest to what

> is described by the Sentencing Guidelines Council "a less sophisticated commercial robbery" and sentenced the offenders accordingly. The judge did not activate the suspended sentences to which the offenders were subject and did not advert to these in his sentencing remarks."

[38] This theme re-emerged in *R v Conrad Trafford Doole* [2010] NICA 11, a case of causing death by careless driving. This court, firstly, described its function in the following terms, a paras [4]–[5]:

> "[4] An important function of this Court is to provide guidance to lower courts in the field of sentencing. In appropriate cases the Court may indicate appropriate guidelines for sentencers. This can be particularly helpful in relation to new offences in respect of which there is little previous guidance to be found in the sentencing decisions of the Crown Court or of this Court. It may also become necessary for this Court to revisit previous levels of sentencing where trends in society or new statistical evidence points to the conclusion that previous guidance is no longer appropriate and requires adjustment.
>
> [5] The formulation by this Court of guidance or guidelines also helps to inform the Court itself on its proper approach to the actual appeal before it since the disposal of the appeal must be set in its proper context taking account of the factors and range of sentence appropriate to the appeal itself. Guidance and guidelines, accordingly, are not issued in an abstract context."

This court then reiterated the correct approach in this jurisdiction to publications of the English sentencing organisations, at paras [7]–[8]:

> "[7] In determining proper guidelines or guidance this Court takes account of <u>but is not bound by</u> the recommendations of the Sentencing Guidelines Council of England and Wales. Their Guidelines usefully identify relevant considerations in determining the seriousness of offences, aggravating and mitigating circumstances and factors relevant to personal mitigation. They usually put forward the starting point for sentences in carrying out the sentencing exercise. On occasion this Court recommends the adoption of a similar approach though in other cases it may recommend a different approach because of special factors in this jurisdiction.

> [8] The English Council has produced Guidelines in relation to offences relating to causing death by driving. They usefully identify the issues relating to determining the seriousness of the relevant offence, the aggravating and mitigating circumstances and relevant factors that relate to personal mitigation. In particular in the present context, it contains a section which deals with causing death by careless driving. We consider that the English Guidelines represent a fair and accurate assessment of the relevant factors which a sentence in this jurisdiction should take into account in reaching his or her decision."

[39] *R v SG* [2010] NICA 32 provides another illustration of this court's approval of the SGC Guidelines in a given sentencing context, in that case for the offence of sexual activity with a child:

> "[16] We consider that there is assistance to be derived from the final report of the Sentencing Guidelines Council in England and Wales on similar offences under the Sexual Offences Act 2003. The recommended starting point after a contest in a case of sexual activity with a child involving penile penetration is 4 years imprisonment with a range of 3 to 7 years depending on the circumstances."

In *R v DM* [2012] NICA 36 this court restated the position which it had formulated in *R v SG*, while adding the following qualification at para [11]:

> "It is clear, however, that the circumstances in which this offence can be committed vary widely and it will often be necessary to consider a sentencing range outside the parameters suggested."

> "[11] In R v SG [2010] NICA 32 we indicated that the final report of the Sentencing Guideline Council on offences under the Sexual Offences Act 2003 is of assistance in selecting the appropriate sentencing range for this offence. That was a case in which the offender had been detected by the victim's father and agreed to stop the sexual activity. In fact, he renewed his association with the victim as a result of which she became pregnant. It was, therefore, a case in which consecutive sentences were appropriate and the total sentence of 4 years imprisonment was one within the range of 3 to 7 years proposed in the report. It is clear, however, that the circumstances in which this offence can be committed vary widely and it will often be necessary to consider a sentencing range outside the parameters suggested."

This, the court noted, was consistent with the recognition by the SGC of the need for flexibility.

[40] In *R v McKeown* and *R v Han Lin* [2013] NICA 28 one finds an illustration of this court deciding that SGC Guidelines may properly be deployed in this jurisdiction for some purposes but not others. The context was that of sentencing for possession of a commercial quantity of Class A drugs with intent to supply and the production by cultivation of a large quantity of cannabis, a Class B drug. Notably, this court took as its point of departure the relevant guideline decision in this jurisdiction, namely *R v Hogg and Others* [1994] NI 258. It then noted that there is no guideline case in this jurisdiction concerning the second of the offences under consideration, production of drugs. It then considered certain decisions of the English Court of Appeal before turning its attention to the SGC "Definitive Guideline" on sentencing for drugs offences. This was published in February 2012, thus postdating the Court of Appeal decisions. It received a mixed welcome, as paras [24]–[25] make clear:

> "[24] We have examined the Definitive Guideline of the Sentencing Guideline Council on drugs offences published in February 2012. We are satisfied that the factors related to culpability are of assistance in the assessment of culpability in this jurisdiction as are the quantities in respect of the category of harm. We wish to make it clear, however, that where very large quantities are involved a different approach may be taken for the reasons set out in *R v McIlwaine* [1998] NICA (11 March 1998). We also consider that the factors influencing seriousness are appropriate factors to take into account in the sentencing process.
>
> [25] The Definitive Guideline suggests starting points and ranges depending upon the category of harm and the nature of the role into which the offender falls. There are, however, dangers with that approach. In many instances there will be competing considerations affecting the offender's role and inevitably considerable variation even within each category of harm. We consider that in attempting to categorise each case in the way suggested in the Guidelines the judge may be distracted from finding the right sentence for each individual case. Guidelines and guidance in this jurisdiction are intended to assist the sentencing judge without 11 trammelling the proper level of discretion vested in the sentencer. This is not to say that the Definitive Guideline does not provide useful assistance in identifying aggravating and mitigating factors and indicating appropriate ranges of sentencing worthy of

consideration depending on the precise circumstances of the individual case."

[41] The correct approach in this jurisdiction to the guidelines published by English sentencing organisations was a central theme of another decision of this court, promulgated soon afterwards, namely *R v McCaughey and Smyth* [2014] NICA 61. At para [23] the enduring authority of what was stated in *R v McKeown* at para [25] was emphasised. This court also took the opportunity to dilate on the rationale underpinning the differing approaches in the two jurisdictions, at paras [19] – [22]:

> "[19] Consistency in the sentencing process is an important aspect of fairness. Fairness also requires that the particular circumstances of individual cases are taken into account in determining the appropriate outcome. Occasionally there can be a tension in seeking to satisfy these requirements. Sentencing guidelines seek to resolve that tension by encouraging uniformity of approach while at the same time recognising the flexibility that is necessary in the individual case.
>
> [20] The approach to be taken to the promulgation and content of guidelines needs to take into account the particular characteristics of the jurisdiction. In England and Wales the Sentencing Council can issue definitive guidelines in relation to various categories of offences. Where it does so, by virtue of section 125 (1) of the Coroners and Justice Act 2009 every court must follow any sentencing guideline which is relevant to the offender's case unless the court is satisfied that it would be contrary to the interests of justice to do so.
>
> [21] There is, therefore, a very strong legislative steer towards uniformity. That reflects the fact that the jurisdiction is very large, that the opportunity for discussion between experienced judges about sentencing issues is consequently limited and that, although sentencing is often carried out by some of the most experienced criminal judges in the United Kingdom, there is also a long tradition of sentencing being carried out by Recorders and Deputy Judges who have had no or limited experience in the criminal law.
>
> [22] In Northern Ireland we have a small Crown Court judiciary who have the benefit of regular meetings with colleagues where sentencing issues can be discussed both formally and informally. Sentencing is carried out

> exclusively by full-time judges most of whom have had considerable experience of criminal law before going on the Bench. We recognise the assistance to be derived from the aggravating and mitigating features identified by the Sentencing Council in its guidance, but we have discouraged judges and practitioners from being constrained by the brackets of sentencing set out within the guidance."

We would observe that these passages will repay careful reading by practitioners and sentencing judges alike. This is prompted by the observations in para [24] of the judgment of the Lord Chief Justice:

> "[24] Despite this clear statement of principle we note that the submissions in the court below and in this court have sought to place considerable emphasis on the bracket into which these cases fall. We have also noted in other appeals that there has been some tendency to interpret the remarks of this court at paragraph 16 of *R v SG* [2010] NICA 32 that assistance may be derived from the final report of the Sentencing Guidelines Council as somehow indicating a different approach in sexual offences. We wish to make it clear that the approach set out at paragraphs 22 and 23 above applies in those cases also."

The "tendency" identified in this passage continues to feature in appeals to this court.

[42] To like effect is *R v Gerard McCormick* [2015] NICA 14*:*

> "[7] It is clear from the sentencing remarks of the learned trial judge that the submissions made to him focussed to a large extent on the application of the Sentencing Council Guidelines. As we have recently sought to explain in *R v McCaughey and Smith* [2014] NICA 61 the danger with this approach is that the court is encouraged to identify specific aggravating or mitigating factors which may alter the position of the sentence in a particular sentencing box. At paragraph 11 of *R v DM* [2012] NICA 36 we pointed out that the circumstances in which this offence can be committed vary widely and the court is required to balance those particular circumstances. We indicated in *R v DM* that *R v Corran, R v Barrass* and *R v Frew* were likely to be of more assistance than the Sentencing Council Guidelines in arriving at the appropriate sentence."

[43] Subsequent decisions of this court are to similar effect. See *R v TH* [2015] NICA 48; *R v MH* [2015] NICA 67; *R v Kubik* [2016] NICA 3; *R v Braniff* [2016] NICA 9; *R v Mahoney* [2016] NICA 27; and *R v Loughlin/DPP Reference No 5 of 2018* [2019] NICA 10. These decisions highlight in particular the dangers in slavish application of the SGC Guidelines and the corresponding need for caution:

[44] Most recently, *R v Richard George Byrne/R v Simon Cash (DPP Appeal)* [2020] NICA 16 gives expression to the same theme:

> "[20] The next matter we wish to consider is the use of the Sentencing Council Guidelines. This court has made clear that assistance can be derived from the aggravating and mitigating factors identified in the guidance but sentencers are discouraged from being constrained by the brackets of sentences set out within the 6 guidelines. These cases raise an issue about the use of some of the aggravating factors. …
>
> [22] The only reference to vulnerability as an aspect of aggravation in the Sentencing Council Guidelines for this offence is "Victim is particularly vulnerable due to personal circumstances." That is a factor which alone brings a case from category 3 to category 2. It is important to understand the effect of such a finding under the scheme of the guideline. Where there is no additional culpability, the starting point is six years custody where the factor is present and two years custody where it is not. The trial judge in *Byrne* properly recognised that the victim was vulnerable. It appears that he was persuaded that the vulnerability did not reach the level required to bring the case into the second category under the English and Welsh guidelines and did not consider the vulnerability he found as an aggravating factor.
>
> [23] <u>This example makes clear that one needs to be cautious about the way in which aggravating and mitigating factors are used under the Sentencing Council Guidelines</u>. Where their impact is designed to establish the brackets within which the sentence is supposed to operate the aggravating factor may be set at a significant level. That does not mean that vulnerability at a lower level ought not to be taken into account as an aggravating circumstance in passing sentence in this jurisdiction.
>
> [24] The same issue arises in relation to the question of persistence. In *Cash* the offender digitally penetrated the

> victim while she sat waiting for the taxi, digitally penetrated her again when she was in the taxi slumped across the seat and then committed a further offence using her hand to masturbate himself. In order to fall into category 2 within the Sentencing Council Guidelines one of the factors is the occurrence of a sustained incident. The presence of that factor would alter the starting point from 2 years to 6 years under the guidelines. This attack might well not fall within the description of a sustained incident, but persistence is plainly an aggravating factor in this case."

[45] The considerations identified in the paragraphs above provide much of the rationale for the principle of review, or restraint, which this court applies on appeal against a sentence said to be manifestly excessive. This principle was considered most recently in *R v Ferris* [2020] NICA 60 at [36]–[43]: see para [60] infra.

The Sentencing of Mr M

[46] Mr M was sentenced at the Central Criminal Court of England and Wales on 31 July 2017. The headline offence in his case also was that of preparation of terrorist acts contrary to section 5(1) of the 2006 Act. As noted above, Mr M had the status of assisting offender, and he was a serving member of the Royal Marine Commando during the relevant period. As recorded in the sentencing decision of Sweeney J, the particulars of his section 5 offending were that he had taken part in the preparation of the following terrorist acts, namely specified research activities, the purchase of chemicals and components to be used in the manufacture of explosive substances and the construction of explosive devices, the manufacture of explosive substances, the construction of explosive devices and the creation of explosive substances et al "hides", some 43 altogether, in England and Northern Ireland. The judge noted that Mr M and the appellant were known to each other in the Larne area of Northern Ireland, that the appellant was associated with the dissident republican group "Continuity IRA" and that together they formed a terrorist activities partnership. His assessment was that following the appellant's earlier convictions (noted above) Mr M's terrorist activities continued. The discovery of these activities dated from March 2016 when one of the "hides" was found in the vicinity of Larne. Following this an attempt to deploy one of the pipe bombs constructed by him failed. He was then arrested. There was DNA evidence against him. In interviews, initially he said nothing. However, he then made a series of admissions which inter alia facilitated the discovery of 43 "hides" some of which would not have been located otherwise. Two further pipe bombs constructed by him were deployed without consequence.

[47] Sweeney J sentenced Mr M on the basis of the *Kahar* guidance. He considered that Mr M had engaged in "sophisticated offending on a substantial scale which took place over a period of more than 5 years." He continued:

> "There was clearly the potential for the deployment of many bombs of varying types and sizes … against multiple targets, with the ultimate intent of those planting the devices being to kill; there was considerable planning (including attack planning), research and the acquiring of large amounts of materials including police items for use in disguise, and you were strongly committed to the cause …"

[48] The mitigating factors assessed by Sweeney J were Mr M's previous good character, his eventual full co-operation with the investigation, the fact that only a small number of the devices and a small quantity of the explosives concerned were ready for immediate use and his plea of guilty for which credit of 30% would be accorded. The judge then concluded, without hesitation, that Mr M was a dangerous offender. He then made the following assessments: Mr M had engaged in offending entailing high culpability; he both intended and foreseeability high levels of harm; his ultimate intention was that others would kill; the absence of actual injury or death would be reckoned; and he posed a high level of danger in the immediately foreseeable future. These assessments impelled the judge to conclude, albeit by a narrow margin, that an extended sentence (rather than one of life imprisonment) comprising a custodial element of 18 years' imprisonment and an extended licence period of five years was appropriate. Concurrent sentences of 18 months and two years' imprisonment in respect of two further counts were added.

First Ground of Appeal: Manifestly Excessive Sentence

[49] This ground has four main components:

(i) The sentencing judge failed to give sufficient credit for the appellant's plea of guilty.

(ii) The judge failed to make sufficient distinction between the seriousness of the appellant's offending and that of his co-offender, Mr M.

(iii) The judge erred in concluding that the appellant's offending involved the intent to cause multiple deaths.

(iv) The judge gave inadequate weight to the mitigating factors applicable to the appellant's offending.

[50] The particularised outworkings of the foregoing are the following:

(i) The appellant was given insufficient credit for his guilty plea.

(ii) The offending of Mr M was trans-jurisdictional, with the result that it was more serious that the appellant's offending.

(iii) The offending of Mr M constituted a very serious breach of trust.

(iv) The duration of Mr M's offending was considerably longer than that of the appellant.

(v) Mr M's offending extended beyond the (mere) planning of attacks on military, police and other state personnel.

(vi) Mr M's offending extended beyond terrorism.

(vii) The judge's assessment that the appellant's offending involved the intent to cause multiple deaths was erroneous.

(viii) Inadequate weight was given to mitigating factors.

(ix) The appellant's offending occurred during a limited time period.

(x) The offending for which the appellant fell to be sentenced pre-dated his last prison sentence.

(xi) Insufficient weight was given to the appellant's age.

(xii) Insufficient weight was given to the fact that the deployment of any devices created was not proximate to the appellant's involvement.

(xiii) Insufficient weight was given to the lack of injury resulting from the use of pipe bombs.

(xiv) The judge's assessment that the appellant should be sentenced on the basis of "*Kahar* Level 2" was erroneous.

[51] Summarising, it is contended that the impugned sentence was manifestly excessive because insufficient weight was given to the appellant's guilty plea; the sentence failed to reflect the respective gravity of the offending of Mr M and that of the appellant; the judge's assessment that the appellant's offending involved the intent to cause multiple deaths was erroneous; insufficient weight was given by the judge to mitigating factors; and the application of the "*Kahar* Level 2" guidance was erroneous. We shall address each of these components of the first ground of appeal in turn.

[52] The sentencing judge was in receipt of, inter alia, an impressively detailed written submission of the appellant's counsel. The correlation between this submission and the grounds of appeal to this court is unmistakable. Furthermore, the

requisite adversarial element was satisfied as this was prepared in response to the corresponding prosecution submission. The contention of prosecuting counsel was that the appellant should be sentenced by reference to *R v Kahar* and that this was a *Kahar* level 2 case. Further, the judge was alerted to, but not invited to give effect to, the SGC Guideline. The riposte in the written submission of Mr Moloney KC and Mr O'Kane (of counsel), while mentioning both *Kahar* and the SGC Guideline, did not formulate any specific contention regarding level, bracket or category. It is agreed however that this submission was made orally at the later sentencing hearing.

[53] Further to the immediately preceding preface we turn to consider the sentencing decision at first instance. This is a reserved, written decision, provided just under two weeks following the aforementioned hearing. In brief compass, the judge sentenced the appellant on the basis of the *Kahar* decision, his assessment being that this was a "level 2" case. At para [32] the judge identified the necessity of assessing the number, nature and gravity of the intended terrorist acts; the degree of planning, research, complexity and sophistication involved; the level of commitment on the part of the appellant; and the time span of the offending. In this context he highlighted the appellant's "commitment to violent Republicanism." The decision continues, at [2021] NICC 4, para [33]:

> "The terrorist acts contemplated were explosions with murderous intent. There was careful planning and sophistication in the development, making and storing for later distribution of a significant cache of munitions. These munitions were well stored and ready to deploy. The clear intended harm in this case was multiple deaths, serious personal injury and damage on a substantial scale. This defendant's involvement was over a period of a year and only cut short by virtue of his arrest and imprisonment in 2013."

[54] The judge considered the following to be the aggravating features: careful planning, research and sophistication in the manufacture of "explosives never seen in Northern Ireland before" and the design and construction of improvised explosives; the quantity and lethal nature of the munitions made and stored ready for use; the intention to share these munitions with dissident republicans for use in their campaign of violence; and the potential for multiple deaths. The judge then turned his attention to the issue of dangerousness and, in doing so, rehearsed exhaustively all of the facts and factors put forward against the making of such assessment in the written submission of the appellant's counsel. The judge concluded that the dangerousness test was satisfied. His reasons for doing so are set forth at para [48], which merits reproducing in full:

> "In assessing the issue of dangerousness in this case I consider the nature of the harm intended was directed towards promoting violent republicanism. The intention

> and foresight behind the manufacture of high explosives and bombs was a clear and unequivocal intention to cause or enable others to cause multiple deaths, injury and serious damage to property. The offending was only detected after it had reached an advanced stage with unique high explosives having been manufactured and various types of bombs and improvised devices having been developed and manufactured. The only thing to stop the defendant's continued participation was his arrest in 2013. The planning and preparation required to make high explosives, claymores and other IEDs required sophistication. The defendant played a leading role in carrying out the offence and was the conduit between the bomb maker, the cache of munitions and dissidents ready and able to deploy them. These terrorists in Northern Ireland have carried out repeated attacks on the security forces. I am sure the accused supports a violent political philosophy and has established connections and sympathies with violent republican terrorism. The defendant's committed and pivotal role in the preparation and storage of these munitions demonstrates his high level of commitment to a dissident republican cause and a willingness to provide the means to cause multiple murders to further its ends without remorse. I am sure he continues to hold these views and is unlikely to change. This is particularly so in light of his possession of information on how to access the TOR browser and the dark web in 2016 proximate to the discovery of the hides and after his release from prison. His continued association with dissidents whilst in prison and after his release is concerning."

[55] The judge then turned his attention to the consequences of his finding of dangerousness. He reasoned as follows. While the offending to which the appellant had pleaded guilty was indubitably "very grave … involving high culpability together with both intended and foreseeable high harm" and the appellant had evinced an intention "… to facilitate others to kill", given the last resort character of a life sentence, the appellant's comparative youth at the time of offending and the duration thereof, an ECS was considered appropriate. The judge continued, at para [59]:

> "In terms of sentence the appropriate tariff in your case for the preparation of acts of terrorism after a contested hearing would have a sentencing range of between 30 – 40 years with a starting point of in or about 33 years in the

> circumstances of the present case. Taking into account the aggravating and mitigating factors already identified, I am of the view that on conviction after a trial I would have imposed a sentence of 35 years' imprisonment."

[56] The judge then turned to consider the credit to be afforded for the appellant's plea of guilty. He highlighted two facts, namely the appellant's "no comment" interview and his failure to plead guilty at an earlier stage. He concluded that credit of 20% was appropriate, highlighting in this context the deterrent nature of the sentence to be imposed. Thus, a sentence of 28 years imprisonment was considered appropriate.

[57] This was not the end of the exercise. The judge continued, at para [61]:

> "However, I will take into account the earlier sentence you received in 2014 and reflect that in a downward adjustment of your sentence given that the material the subject matter of those earlier charges was part of the munitions that you and [Mr M] had jointly produced. I will reduce your sentence by 4 years resulting in a sentence of 24 years' imprisonment with an extension period of 5 years."

The final aspect of his sentencing was a determination that the notification requirements under section 53 of the Counter Terrorism Act 2008 would apply to the appellant for a period of 30 years.

Ground One Determined

[58] While this observation may be otiose, it is nonetheless appropriate to emphasise that there is no suggestion in this appeal that the sentencing judge erred in principle. The first of the two grounds of appeal belongs firmly to the territory of manifestly excessive sentence. We would add the observation that the judge's self-direction in law was in all material respects unimpeachable.

[59] The centrepiece of counsels' argument in support of this ground of appeal is that the appellant should have been sentenced on the basis of the SGC Guideline rather than the decision in *R v Kahar*. The correct approach, it is contended, "… would have resulted in a much lower sentence being imposed …"

This argument highlights the absence of so-called "attack planning" and continues:

> "The correct application of the [SGC Guideline] would place the Appellant in Culpability C at the highest, but arguably in Culpability D. The 'harm' is at most Category 2, but is arguably Category 3."

The appellant's skeleton argument adds:

> "As the Appellant's previous conviction was in reality part of the offending for which he was sentenced …. it is strongly arguable that none of the statutory aggravating factors in the guideline applied to him. Equally, none of the other aggravating factors mentioned in the [SGC Guideline] applied to him."

The next ingredient in this argument is that within the terms of the SGC Guideline:

> "… the appellant could rely on lack of maturity as affecting his responsibility, as well as the fact that (until his incarceration) he was the primary carer for depending relatives."

All of the foregoing gives rise to the omnibus contention that under the SGC Guideline the highest sentence which could have been imposed on the appellant was one of 15 years' imprisonment, subject to downwards adjustment for his guilty plea.

[60] The framework of sentencing principle by reference to which this ground of appeal falls to be determined was expounded in the decision of this court in In *R v Ferris* [2020] NICA 60 at [36]–[43]:

> "***Deciding the appeal: the correct approach***
>
> [36] Having determined to receive the new material this court, mindful that it is an appellate court and not a court of first instance, must define and delimit its function. This exercise entails consideration of the governing statutory provisions and certain related legal principles.
>
> > '[50] Section 11(3) of the Criminal Appeal Act 1968 provides that, inter alia, the Court of Appeal can quash a sentence if they consider that the appellant should be sentenced differently for an offence for which he was dealt with by the court below and in place of it pass such sentence or make such order as the court below had power to pass or make when dealing with him for the offence.
> >
> > [51] Plainly the subsection is sufficiently wide to permit the court to re-sentence the appellant on information placed before it which was not put before the sentencing judge. As

> Beldam LJ pointed out in *R v Sawyer* (16 December 1993, unreported), the subsection gives the court an opportunity to review the sentence, its effect on the appellant, and to consider whether having regard to the circumstances which were then before the court and which have happened since, it is necessary in the interests of justice for the court to confirm a sentence of the length imposed.

He continued:

> "Without regarding the judge's sentence as wrong we believe that in the interests of justice we can review the sentence in the light of the circumstances as they now are. Such an approach clearly allows the Court of Appeal to substitute a sentence on the basis of psychiatric and other evidence coming to light after the sentence was passed."

[38] The starting point must be the statute. Section 10(3) of the 1980 Act, reproduced in [18] above, formulates the test of whether this court "… thinks that a different sentence should have been passed …" at first instance. In every case where this court concludes that the statutory test is satisfied it "shall" - notably, not "may" - quash the sentence of the Crown Court and impose "… such other sentence authorised by law (whether more or less severe) in substitution there for as it thinks ought to have been passed …"

[39] In the jurisdiction of England and Wales, the Criminal Appeal Act 1968 ("the 1968 Act") is the equivalent of the Northern Irish 1980 statute. Section 11(3) of the 1968 Act is the analogue of section 10(3) of the 1980 Act. It provides:

> '(3) On an appeal against sentence the Court of Appeal, if they consider that the appellant **should be sentenced differently** for an offence for which he was dealt with by the court below may—
>
> (a) quash any sentence or order which is the subject of the appeal; and

(b) in place of it pass such sentence or make such order as they think appropriate for the case and as the court below had power to pass or make when dealing with him for the offence;

but the Court shall so exercise their powers under this subsection that, taking the case as a whole, the appellant is not more severely dealt with on appeal than he was dealt with by the court below.' [Emphasis added]

The most notable difference in the wording of the legislation operating in the two jurisdictions is that the Northern Irish provision empowers the appellate court to intervene "… if it thinks that a different sentence should have been passed …", whereas the language of the English provision is "… if they consider that the appellant should be sentenced differently …" How significant is the difference in wording? In *McDonald and Others* (ante) Kerr LCJ observed at [35], that section 10(3) of the 1980 Act is "in similar terms" to section 11 of the 1968 Act. While the two provisions are not identically phrased, we need not explore any of the subtle or nuanced differences, beyond noting that the English statutory provision was considered to have brought about a "significant change": *R v Cleland* [2020] EWCA Crim 906 at [46] especially. We consider this to be of no moment in the context of this appeal.

[40] While section 10(3) is couched in superficially broad terms in practice it has been neither interpreted nor applied liberally by this court. The jurisprudence of this court has, rather, inclined in favour of a restrained approach. This is apparent in one of the leading pronouncements of this court, that of Carswell LCJ in *R v Molloy [1997]* NIJB 241 at 245C/D:

'Mr Lavery drew to our attention a number of cases involving sentences for sexual offences which, though substantial, were lower than those imposed in the present case. He did not attempt, however, to compare these in minute detail. We think that he was correct in this approach, since such comparisons are not a profitable exercise, for the reasons which we set

> out in *R v Williamson* (1995, unreported) at page 6 of the judgment. It is of rather more assistance first to examine the judge's reasons for deciding on the sentences, as expressed in his sentencing remarks, to see if there is any visible imbalance, and secondly, to stand back and consider whether the sentence is appropriate in all the circumstances of the case, when set against any trend discernible from other cases.'

This observation was made in the context of an appeal against sentence advanced on the ground that it was manifestly excessive. The court refused leave to appeal. Notably, in passing, the two familiar sentencing principles of retribution and deterrence were highlighted, at 245I - 246E, a theme to which we shall revert infra.

[41] The restraint of this court in sentence appeals noted immediately above is manifest in the long-established principle that this court will interfere with a sentence only where of the opinion that it is either manifestly excessive or wrong in principle. Thus section 10(3) of the 1980 Act does not pave the way for a rehearing on the merits. This is expressed with particular clarity in the following passage from the judgment of McGonigal LJ in *R v Newell [1975*] 4 NIJB at p, referring to successful appeals against sentence:

> 'In most cases the court substitutes a less severe sentence … the court does not substitute a sentence because the members of the court would have imposed a different sentence. It should only exercise its powers to substitute a lesser sentence if satisfied that the sentence imposed at the trial was manifestly excessive, or that the court imposing the sentence applied a wrong principle.'

Pausing, this approach has withstood the passage of almost 50 years in this jurisdiction. The restraint principle is also evident in a range of post-1980 decisions of this court, including *R v Carroll* [unreported, 15 December 1992] and *R v Glennon* and others [unreported, 3 March 1995].

[42] The restraint principle operates in essentially the same way in both this jurisdiction and that of England and Wales, where it has perhaps been articulated more fully. In

R v Docherty [2017] 1 WLR 181 Lord Hughes, delivering the unanimous judgment of the Supreme Court, stated at [44](e):

'Appeals against sentencing to the Court of Appeal are not conducted as exercises in re-hearing ab initio, as is the rule in some other countries; on appeal a sentence is examined to see whether it erred in law or principle or was manifestly excessive …'

In *R v Chin-Charles* [2019] EWCA Crim 1140, Lord Burnett CJ stated at [8]:

> 'The task of the Court of Appeal is not to review the reasons of the sentencing judge as the Administrative Court would a public law decision. Its task is to determine whether the sentence imposed was manifestly excessive or wrong in principle. Arguments advanced on behalf of appellants that this or that point was not mentioned in sentencing remarks, with an invitation to infer that the judge ignored it, rarely prosper. Judges take into account all that has been placed before them and advanced in open court and, in many instances, have presided over a trial. The Court of Appeal is well aware of that.'

This approach was reiterated more recently in *R v Cleland* [2020] EWCA Crim 906 at [49]. Also, to like effect are *R v A* [1999] 1 Cr App (S) 52, at 56; and *Rogers* (ante) at [2]. To summarise, through the decided cases in both jurisdictions the function of the Court of Appeal in appeals against sentence has been described, in shorthand, as one more akin to **review**, rather than appeal, in the typical case. This is the essence of the restraint principle.

[43] It is also instructive to note the contrast provided by appeals against sentence from Magistrates' Courts to the County Court in this jurisdiction. By virtue of the applicable statutory provisions these take the form of full re-hearings: see Article 140 of the Magistrates' Courts (NI) Order 1981; Article 28 of The County Courts (Northern Ireland) Order 1980; and Order 32 Rule 1(2) of the County Court Rules (Northern Ireland) 1979."

[61] Elaborating, the judgment continues at paras [56]–[58]:

> "[56] The history and evolution outlined above belong to the following context of sentencing principle and practice. As already noted, it is well settled that in an appeal against sentence this court will interfere only if of the opinion that the sentence under challenge is manifestly excessive or wrong in principle. Cases belonging to the latter category include, inexhaustively, those in which a sentencing court has failed to give effect to a guidelines decision of this court or has acted in breach of a relevant statutory provision or has misinterpreted the law.
>
> [57] Cases belonging to the former category frequently, but not invariably, raise issues relating to guideline decisions of this court. Such decisions do not prescribe a tariff to be applied mechanistically. Rather they establish an avenue along which the sentencing court should proceed, having regard to the infinite variety of circumstances in each case. Guideline decisions are not set in stone but are designed to achieve uniformity of approach in similar cases, particularly in determining the starting point to be adopted by the judge: *Attorney General's Reference (No 5 of 1996) (D*) [1997] NIJB 45. And, as previous decisions of this court make clear, there is scope for departing from appellate guidelines in an appropriate case: see *Attorney General's Reference No 8 of 2009, McCartney* [2009] NICA 52, at [13].
>
> [58] A sentence which, in the opinion of the appellate court, is merely excessive and one which is manifestly excessive are not one and the same thing. This simple statement highlights the review (or restraint) principle considered above and simultaneously draws attention to the margin of appreciation of the sentencing court. Thus, it has been frequently stated that an appeal against sentence will not succeed on this ground if the sentence under challenge falls within the range of disposals which the sentencing court could reasonably choose to adopt. The "manifestly excessive" ground of challenge applies most readily in those cases where the issue is essentially quantitative, ie, where the imposition of a custodial sentence is indisputable in principle and the challenge focuses on the duration of the custodial term."

The applicable framework of sentencing principle also includes what this court stated in *R v GM* [2020] NICA 49 at [36]:

> "It is an entrenched sentencing principle that in every case the court should consider the degree of harm to the victim, the level of culpability of the offender and the risk posed by the offender to society. These three considerations encompass the generally recognised sentencing touchstones of retribution and deterrence. They are their out-workings. This has been emphasised by this court in inter alia *Attorney General's Reference, No 3 of 2006 (Gilbert)* [2006] NICA 36 and, most recently, in QD at [39]."

In a case such as the present, where the essence of the offence is planning and preparation, as in cases of attempts, the focus of the court will of course be on possible, rather than actual, harm.

[62] This brings us to an argument lying at the heart of this appeal. Mr Moloney KC, developing his submission that the appellant should have been sentenced on the basis of the SGC Guideline rather than *R v Kahar*, suggested that this would have brought about a more lenient outcome for his client. This argument has two principal components. First, (per counsel's skeleton argument), the "stage of preparation for the terrorist act which it was planned would be perpetrated" is a very important consideration in every case where the Guideline is applied. Second, since the appellant's offending ended in February 2013, at which stage there had been no "attack planning", his culpability was not "high." It followed, Mr Moloney submitted, that this is a case of "Culpability C" at worst and, arguably "Culpability D" with the "harm" belonging to "Category 2" at worst and arguably, "Category 3."

[63] We are unable to accept this argument. Our first reason for rejecting it is that the sentencing judge was not obliged to apply the SGC Guideline. Thus, he committed no error of law in failing to do so. As the consistent jurisprudence of this court, considered above, makes clear the judge could at his election have considered the Guideline with a view to determining whether it provided him with any assistance. This, however, was a matter of choice and not obligation. Furthermore, in the absence of a guidelines decision of this court in relation to section 5 offences, the judge, though not bound by the decision *R v Kahar*, was entitled to base his sentencing thereon. In the final analysis, we are satisfied that this approach did not give rise to a manifestly excessive sentence.

[64] Our second reason for rejecting this argument is based on the language of the SGC Guideline. This states that the offender's culpability will be at the highest (Category "A") where:

> "Acting alone, or in a leading role, in terrorist activity where preparations were complete or were so close to

> completion that, but for apprehension, the activity was very likely to have been carried out."

The first of the three components in culpability "Category B" is identical to the foregoing, save for the substitution of "advanced" for "complete or … close to completion …" We consider a twofold assessment appropriate. First, having regard to the open-textured nature of this language and the absence of any tools of a scientific or forensic nature to be applied, these will in every case be matters of evaluative judgement – and frequent borderline assessment - for the sentencing judge. Second, having regard to the factual framework within which the appellant was sentenced, outlined in paras [6]-[12] above, we consider that the evaluative assessments made by the judge fell comfortably within the margin of appreciation available to him.

[65] The appellant challenges particularly, though not exclusively, the following passage in the sentencing decision, at para [33]:

> "The terrorist acts contemplated were explosions with murderous intent. There was careful planning and sophistication in the development, making and storing for later distribution of a significant cache of munitions. These munitions were well stored and ready to deploy. The clear intended harm in this case was multiple deaths, serious personal injury and damage on a substantial scale. This defendant's involvement was over a period of a year and only cut short by virtue of his arrest and imprisonment in 2013."

This passage contains a mixture of the evaluative and the factual. In its entirety it is in our view unimpeachable. It contains the kind of assessment of an experienced sentencing judge which this court will rarely question.

[66] Finally, the "stage of preparation" forms an integral part of the *Kahar* sentencing framework which the judge chose to apply. Given all of the foregoing, it is in the highest degree unlikely that if the appellant had been sentenced on the basis of the SGC Guideline this would have resulted in a more lenient sentence. In our view it cannot be plausibly contended that the application of the criterion of "culpability" would have allocated the offending of the appellant to a category other than one of the two highest categories. Nor can it be seriously argued that this was other than a borderline category 1/2 case in the application of the separate criterion of "harm."

[67] The SGC Guideline under consideration in this appeal provides a useful illustration of the reasons why this court has consistently exhorted caution in considering publications of this kind. Two observations are appropriate. First, it purports to prescribe a mechanistic, step by step sentencing exercise. Thus, for example, the determination of the appropriate sentencing category is to be undertaken by reference to "only" the various factors listed in the "Culpability" and "Harm"

sections which follow. Second, the document attempts to make a series of distinctions between different types of conduct which can only be described as marginal, or borderline. This is particularly clear in the contents of "Culpability A" and "Culpability B." As this court has previously observed, the exercise of applying this kind of guideline is more likely to distract, than assist, a sentencing judge. Guidelines of this kind tend to encourage the widely divergent submissions made by prosecution and defence in this case, with the Appellant's counsel contending that the case was a 'C2' case at worst and a 'D3' case at best; and the prosecution contending that the case was either an 'A1' or 'A2' case. Such technical arguments over the precise categorisation in circumstances where the relevant distinctions are far from clear-cut may well divert the sentencing judge from taking a more holistic view of the nature of the offending. This is self–evidently undesirable

[68] Next, we turn to Mr Moloney's challenge to the judge's approach to mitigating and aggravating factors. In our judgement this also has no merit for the following reasons.

[69] We agree with Mr Moloney that Mr M's offending belonged to a more elevated plane of gravity. Having regard to the "assisting offender" dimension of Mr M's sentencing, the appropriate comparison is between the two starting points determined in each case: 42 years in the case of Mr M and 35 years in the case of this appellant. The argument that the appellant's starting point failed to properly reflect their different levels of gravity is based mainly on considerations of a quantitative nature, in particular the larger quantity of explosives materials involved in Mr M's offending arising out of certain hides in England with which this appellant had no connection and the longer period of his offending. Two observations are apposite. First, there will be cases where differences of this kind may not justify <u>any</u> distinction in starting points. Second, linked to the foregoing, a sentencing judge is entitled to form a broad, evaluative judgement in matters of this kind. There is no obligation to undertake a minute, forensic examination of comparable and contrasting facts and features, much less some form of arithmetically informed comparison. By virtue of the principle of restraint highlighted above there is a clear margin of appreciation in play in this respect. Given these considerations, we can identify no merit in the challenge to the starting point determined by the judge, which undeniably reflected a significant difference in the gravity of offending as between Mr M and the appellant.

[70] A further reason for rejecting this aspect of the appellant's case is the undesirability of a later sentencing court reviewing in depth an earlier sentencing exercise undertaken by a different court. This is not an appropriate function for the second court. Absent a suggested error of principle, this court's focus will invariably be on whether the ultimate sentencing disposal was manifestly excessive. Thus, returning to the individual ingredients of this challenge, it was neither appropriate nor necessary for the judge in this case to consider whether and, if so, to what extent the factor of breach of trust had influenced the sentencing of Mr M. Ditto the purchase of police uniforms by Mr M.

[71] The further element of this ground of appeal involves the contention that the judge should made a more generous assessment of certain factors which are said to be mitigating in nature. We can identify no merit in this discrete challenge. Inexhaustively, and, in particular:

(i) The period of the appellant's offending could not on any showing be said to mitigate its gravity or his culpability. Furthermore, this was a matter belonging to the initial part of the sentencing exercise, namely determination of the appropriate starting point.

(ii) The fact that the index offending predated the sentencing of the appellant for other terrorist offences similarly could not on any showing be considered to have mitigated either the gravity of his offending or his culpability. The judge, in any event, made a generous allowance of four years for this factor at a later stage of his sentencing exercise.

(iii) The fact that the appellant did not commit any further offences when released on licence in the context of his earlier sentencing cannot be considered a mitigating factor. It is neutral at best. Furthermore, the judge was under no obligation to reckon to the appellant's advantage the period of his recall to prison following suspension of the licence in March 2018, which had a duration of approximately one year. It was not incumbent upon the judge to entertain some kind of collateral challenge to the decision making of the Parole Commissioners and, further, the appellant had remedies at his disposal following the suspension.

(iv) The appellant was aged 21-23 years during the period of his offending. He was a mature adult. Furthermore, his initial offending unfolded during this period. The judge did not consider his age to be a mitigating factor and this court can identify no flaw in this.

(v) Next it is highlighted that the appellant's offending did not result in anyone being injured. The riposte to this is, firstly, that he was charged with an offence of planning and preparation. The infliction of injuries would have entailed a different charge. The judge dealt with this issue in terms which we consider unassailable, in his statement that in a context of constructing and concealing the pipe bombs it was "simply fortuitous that no one was injured or killed." We consider that this could not on any reasonable assessment be considered a mitigating factor.

(vi) The appellant's clear criminal record since his earlier prosecution and sentencing manifestly did not constitute a mitigating factor.

(vii) While there was formally a challenge to the allocation of 20% (only) credit for the appellant's guilty plea, given its belated timing we consider this to be unassailable. Although the Crown case altered in one material respect

(reduction in the period of offending – see above) the appellant could have made admissions consistent with the extent of offending he belatedly accepted from the earliest stage; his failure to do so had no discernible justification.

[72] The judge's assessment of aggravating facts and features is set out at para [35] of his sentencing decision:

> "In terms of aggravating features I identify the following: careful planning, research and sophistication was involved in the manufacture of explosives never seen in Northern Ireland before and the design and construction of improvised explosives; the quantity and lethal nature of the munitions made and stored ready for use; the intention to share these munitions with dissident Republicans for use in their campaign of violence; in this context the potential for multiple deaths; the ultimate deployment of some of the contents of the hides."

Viewed objectively and bearing in mind once again that the function of this court in determining this ground of appeal is as set out in paras [60]–[61] above, we consider the several assessments in this paragraph to be beyond reproach. To this we would add that the extensive submissions on behalf of the appellant did not clearly formulate any discrete challenge to this aspect of the sentencing.

[73] For the reasons given the first ground of appeal must fail.

Second Ground of Appeal: Dangerousness

[74] "Dangerous" offenders form a discrete cohort governed by a tailor-made statutory regime contained in Article 12 of the Criminal Justice (NI) Order 2008 (the "2008 Order"). This regime is constructed around the concepts of specified violent offence, specified sexual offence and specified terrorism offence. Each of these discrete classes is the subject of statutory definition. In the present case, the relevant class is that of "specified terrorism offence." This means an offence specified in Part 3 of Schedule 2. Offences contrary to section 5 of the 2003 Act belong to this class. Article 13A and Schedule 2A (neither of which was applicable to the appellant's sentencing) also form part of this discrete compartment of the regime.

[75] By virtue of the aforementioned classification the provisions of Article 14 of the 2008 Order had to be considered by the court in sentencing the appellant. Article 14(1) provides insofar as material:

> "This Article applies where—
>
> (a) a person is convicted—

(i) convicted on indictment of a specified offence; or

(ii) convicted after the commencement of section 20 of the Counter-Terrorism and Sentencing Act 2021 of any other offence that is a serious terrorism offence;

(aa) the offence was committed after the commencement of this Article [15th May 2008]; and

(b) the court is of the opinion—

(i) 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 or serious terrorism offences.

(ii) where the specified offence or serious terrorism offence is a serious offence, that the case is not one in which the court is required by Article 13 to impose a life sentence or an indeterminate custodial sentence; and

(iii) where the offence, or an offence associated with it, is a serious terrorism offence, that the case is not one in which the court is required by Article 13A to pass a serious terrorism sentence."

"Serious harm" means, per Article 3(1), "Death or serious personal injury, whether physical or psychological."

[76] In any case where it falls to the court to apply the test enshrined in Article 14(ii)(b)(i), the requirements of Article 15(2) apply. These stipulate that the court:

"(a) Shall take into account all such information as is available to it about the nature and circumstances of the offence;

(b) May take into account any information which is before it about any pattern of behaviour of which the offence forms part; and

(c) May take into account any information about the offender which is before it."

In every case where the court concludes that the test is satisfied the offender is categorised a "dangerous" offender. The effect of this assessment is to trigger Article 14(3) and Article 18.

[77] Article 14(3) provides:

> "(3) Where the offender is aged 21 or over, an extended custodial sentence is a sentence of imprisonment the term of which is equal to the aggregate of:
>
> (a) The appropriate custodial term; and
>
> (b) A further period ('the extension period') for which the offender is to be subject to a licence and which is to be of such length as the court considers necessary for the purpose of protecting members of the public from serious harm occasioned by the commission by the offender of further specified offences or serious terrorism offences."

By Article 14(4), the "appropriate custodial term" –

> "(a) Is the term that would (apart from this article and Article 15(a)) be imposed in compliance with Article 7 or ….
>
> (b) Where the term that would be so imposed is a term of less than 12 months, is a term of 12 months."

By Article 14(8):

> "The extension period shall not exceed:
>
> (a) Five years in the case of a specified violent offence …"

By Article 14(9)

> "The term of an extended custodial sentence in respect of an offence shall not exceed the maximum term."

There are two further consequences of an assessment of dangerousness. First, per Article 14(11), the court is prohibited from imposing a suspended sentence. Second, by Article 14(12), remission of sentence under prison rules is not available.

[78] Next, the effect of Article 18 must be considered. This is, in summary: where an offender the subject of an ECS has served one half of the appropriate custodial term and the Parole Commissioners have directed his release the Department of Justice ("DOJ") must release him. The Commissioners are empowered to make a release direction only where "… they are satisfied that it is no longer necessary for the protection of the public from serious harm that [the offender] should be confined", per Article 18(4)(b). Article 18(8) provides:

> "Where P is serving an extended custodial sentence, the Department of Justice shall release P on licence under this Article as soon as the period determined by the court as the appropriate custodial term under Article 14 ends unless P has previously been recalled under Article 28."

[79] The dangerous offenders regime of the 2008 Order has been considered by the Court of Appeal in a number of cases. From these certain themes emerge. First, the sentencing court is strongly exhorted to focus intensively on the statutory test rather than any other test which may have been applied by the Probation Service in its pre-sentence report: *DPP's Reference (No 6 of 2019) (Price)* [2020] NICA 8 and *R v Allen* [2020] NICA 25.

[80] Second, the future risk which lies at the heart of the statutory regime must be significant; thus, a mere possibility, a remote prospect, of future harm will not suffice. This court has further emphasised in, for example, *R v Kelly* [2015] NICA 29 that the sentencing court should take account of every item of available information bearing on the predictive evaluative judgement to be formed. Inexhaustively, factors to be taken into account include the nature and circumstances of the index offence, the history and circumstances of previous offending, any ascertainable pattern of offending, the offender's attitude, any indications of a capacity to change and any positive indications emerging from the offender's pre-sentencing incarceration.

[81] Third, in *R v Brownlee* [2015] NICA 58 this court held that the impact of the apprehended future conduct must be serious harm; the conduct must be likely to occur; and while imminence is a relevant consideration it is not a pre-condition of an assessment of dangerousness. The use of violence in a domestic setting will always be considered a significant aggravating factor. Where there is a risk of multiple superficial injuries this will not normally satisfy the definition of serious personal injury. However, where serious injury has not been inflicted in the past it does not follow that there is no significant risk of such harm in the future. In this context it has been observed frequently that the absence of more serious injury on previous occasions may be attributable to good fortune. See, for example, *R v Tate* [2012] NICC 29.

[82] In his determination of this issue the sentencing judge rehearsed exhaustively all of the facts and factors put forward on behalf of the appellant. Some of these overlap with the suggested mitigating factors and considerations addressed above. The others were good behaviour in prison, family circumstances and his release by the Parole Commissioners some time following his licence recall. In enunciating his conclusion that the statutory dangerousness provisions were satisfied, the judge reasoned, at para [48]:

> "In assessing the issue of dangerousness in this case I consider the nature of the harm intended was directed towards promoting violent republicanism. The intention and foresight behind the manufacture of high explosives and bombs was a clear and unequivocal intention to cause or enable others to cause multiple deaths, injury and serious damage to property. The offending was only detected after it had reached an advanced stage with unique high explosives having been manufactured and various types of bombs and improvised devices having been developed and manufactured. The only thing to stop the defendant's continued participation was his arrest in 2013. The planning and preparation required to make high explosives, claymores and other IEDs required sophistication. The defendant played a leading role in carrying out the offence and was the conduit between the bomb maker, the cache of munitions and dissidents ready and able to deploy them. These terrorists in Northern Ireland have carried out repeated attacks on the security forces. I am sure the accused supports a violent political philosophy and has established connections and sympathies with violent republican terrorism. The defendant's committed and pivotal role in the preparation and storage of these munitions demonstrates his high level of commitment to a Dissident Republican cause and a willingness to provide the means to cause multiple murders to further its ends without remorse. I am sure he continues to hold these views and is unlikely to change. This is particularly so in light of his possession of information on how to access the TOR browser and the dark wed in 2016 proximate to the discovery of the hides and after his release from prison. His continued association with dissidents whilst in prison and after his release is concerning."

[83] Mr Moloney, correctly, submits that the judge's reasoning was focused primarily on the nature of the appellant's offending. He repeats his challenge to this

assessment in support of the first ground of appeal. We have already concluded that this is without merit.

[84] Next, Mr Moloney confirmed that the judge's statement relating to the appellant's continued association with dissident Republicans is not disputed. Furthermore, the appellant's account of how he came to be in possession of information concerning how to access the TOR browser and the Dark Web was before the judge. The most important consideration here, as submitted by Mr Murphy KC and Mr Russell, is the fact that he possessed this information. It is not suggested, wisely, that the judge should have disregarded this. Finally, the Parole Board's final assessment of the appellant was also before the judge. As already explained, this assessment was not binding on the judge and he presumptively took it into account (see in particular para [3] of his decision). Furthermore, the Parole Board's assessment of the appellant pre-dated his committal for trial and, hence, was not based on any of the committal papers, his later plea of guilty or the various materials generated for the purpose of his sentencing.

[85] Giving effect to the foregoing analysis, evaluating the judge's sentencing decision in its entirety and having regard to the evidential basis upon which it was made (see especially paras [6]–[12] above) this court harbours no reservations about the judge's assessment of dangerousness.

[86] In thus concluding it is appropriate to reproduce para [55] (h) of the skeleton argument of Mr Murphy and Mr Russell on behalf of the prosecution:

> "In the instant case the following factors are in play when considering if there is a significant risk to members of the public of serious harm occasioned by the commission by an accused of further specified offences:
>
> (i) The nature of the harm to which the offence was directed is particularly serious. The harm which could have been caused by the offending included multiple deaths, injury and damage to property;
>
> (ii) the intention or foresight of the offender in relation to that offence:
>
> The accused undertook his role knowingly and intentionally. His intent and foresight included multiple deaths, injury and damage to property
>
> (iii) the stage at which the offending was detected:
>
> The offending was at an advanced stage. Substantial quantities of munitions had been made ready for

deployment. The detection of the accused in 2013 frustrated at that time the accused's plans.

(iv) the sophistication and planning involved in the commission of the offence:

There was clearly a high degree of planning and premeditation

(v) the extent to which the conduct of the offender demonstrates a significant role in the carrying out of the offence:

Lehd played a leading role in the carrying out of the offence.

(vi) the previous conduct of the offender:

The accused has a deep seated and long-established sympathy with violent republican terrorism

(vii) the danger posed:

The court can take judicial notice of the fact that the threat posed by terrorists in Northern Ireland is a serious one and has in recent years produced a substantial volume of attacks on persons and property, particularly attacks on members of the security forces.

(viii) An assessment of the extent to which the defendant is committed to or influenced by the objectives of that terrorist organisation:

Those involved in dissident groups will be likely to have strong motivations of a political character which drives them towards seeking to realise their goals by violent means. They are likely to be impervious to change. It is not on the information before the court unreasonable to infer that the accused is so motivated. The express intention of the accused displays a strong commitment to violent dissident republican activity. It is deep rooted. His possession of the instructions in 2016 to access the TOR browser is a disturbing manifestation of an intent to continue to engage in clandestine criminal activity after his release from prison. Whilst in prison and after his release

> he continued to associate with those who espouse the same violent republican dogma that he adheres to."

The court accepts this submission in full.

[87] It follows that the second ground of appeal is dismissed.

Section 5 Offences: NI Guidelines?

[88] We are mindful that in granting leave to appeal, as noted in para [5] above, the single judge raised the question of whether this court should formulate guidelines for sentencing for offences under section 5(1) of the Terrorism Act 2006. Following careful consideration, we do not consider it appropriate to do so. Our reasons are these. First, there is no indication that sentencing judges are encountering challenges or difficulties which might be ameliorated by guidelines from this court. Second, there is no indication of marked variations in the approach of sentencing judges. Indeed, no other section 5 sentencing case has been brought to our attention. Third, as we have highlighted in our consideration of the terms of the indictment – see para [2] above – offences under section 5 potentially encompass a very broad spectrum of criminal conduct. A correspondingly broad judicial discretion in the selection of the appropriate sentence is desirable. Fourth, the terms of the sentencing decision under challenge in this appeal provide a further indication that there is no demonstrated need for guidelines from this court.

[89] For the avoidance of any doubt, we make clear that sentencing judges will be at liberty in section 5 cases to consider *R v Kahar* and the SGC Guideline with a view to determining whether these sources assist them in their task. In particular, they may find this a useful exercise in identifying aggravating and mitigating facts and features. They may also find that the suggested sentencing ranges are an aid to orientation. However, as we have made clear in para [67] above, it will not be appropriate to give effect to the sentencing mechanism in the SGC Guideline.

Conclusion

[90] This court affirms the sentence imposed, namely an extended custodial sentence ("ECS") of 24 years' imprisonment, augmented by an extension period of five years, and dismisses the appeal for the reasons given.