



Northern Ireland
Assembly

Committee for Justice

OFFICIAL REPORT (Hansard)

Prison Service: Secretary of State's
Direction on National Security Functions

14 June 2012

NORTHERN IRELAND ASSEMBLY

Committee for Justice

Prison Service: Secretary of State's Direction on National Security Functions

14 June 2012

Members present for all or part of the proceedings:

Mr Paul Givan (Chairperson)
Mr Raymond McCartney (Deputy Chairperson)
Mr Sydney Anderson
Mr Tom Elliott
Mr Seán Lynch
Mr Peter Weir

Witnesses:

Mr Max Murray	Northern Ireland Prison Service
Mr Alan Smyth	Northern Ireland Prison Service

The Chairperson: I welcome Max Murray, the acting director general of the Northern Ireland Prison Service (NIPS) and Alan Smyth, head of licensing and legislation in the Prison Service. The session will be reported by Hansard and a transcript will be published on the Committee's web page. I invite you to give an outline of the key points in the direction. Members will then ask questions.

Mr Max Murray (Northern Ireland Prison Service): Thank you. When the Minister of Justice wrote to you on 28 September 2011 on this issue, he gave an undertaking to write to members again to set out the precise nature of the direction that the Secretary of State for Northern Ireland made at the point of devolution under section 1A(7) of the Prison Act (Northern Ireland) 1953. He also undertook to seek members' views in advance of the renewal of the direction in October 2012. The Minister provided the Committee with a paper, which was discussed at your meeting on 26 January. Following consideration of that paper, you asked for an oral briefing.

With your permission, I intend to set out the background to the direction and what affect it has on Prison Service staff, and then we will be happy to take questions and address any points that need further clarification.

As the paper provided to you in March pointed out, the need for a special national-security-related information handling arrangement in the Northern Ireland Prison Service was identified during early preparations for the devolution of justice. Although the Westminster Government undertook to devolve as much as possible, it was widely acknowledged that national security matters would have to remain the responsibility of the Secretary of State for Northern Ireland.

It was also recognised that, following devolution, NIPS was going to continue to have responsibility for offenders whose crimes were national security related or who were deemed to pose a threat to national security. In those cases, it was accepted that NIPS was going to have an operational need for access to national-security-related information or intelligence and, on occasions, was going to

generate such information itself. Therefore, it became apparent that a legal framework would have to be created that would allow the Secretary of State to retain responsibility for NIPS's national-security-related activities when the agency and all its other responsibilities had become part of the new Department of Justice under the authority of the new Justice Minister.

The means of achieving this were through a legislative instrument, known in legal parlance as a direction, which when put into effect would direct NIPS officials to exercise specified Secretary of State functions — that is, those engaging national security — and that when they were exercising such functions, those officials would be treated as officers of the Secretary of State. The alternative would have been to create a standing group of prison officials who reported exclusively to the Secretary of State.

Schedules 4, 5 and 8 to the Northern Ireland Act 1998 (Devolution of Policing and Justice Functions) Order 2010 cover the handling and use of national-security-related information. Schedule 4 sets out the limited numbers of prison-related functions that remain wholly the responsibility of the Secretary of State. The paper that the Minister of Justice submitted to the Committee in January details them.

In short, they are: first, activities regulated by the Regulation of Investigatory Powers Act 2000, including the handling of information obtained through the application of that Act, decision-taking on the basis of that information and access to and the holding of such information. Secondly, whether a prisoner is to be accommodated in separated conditions or ceases to be so accommodated, the Secretary of State also has continued responsibility for setting the criteria on which such decisions are based. Thirdly, there is the taking of decisions on the basis of protected information, the controlling of access to such information in the Prison Service, and the use of that information. Protected information in this context is defined as meaning information that, if disclosed, may, in the opinion of the Secretary of State, be against the interests of national security.

Schedule 4 also gives the Secretary of State a power to make the direction itself; to make separate prison rules covering his areas of responsibility, which, I should add, he has not used to date; and, crucially, it requires NIPS officials to exercise functions of the Secretary of State on his behalf.

Schedule 5, in transferring the Department of Justice functions relating to the review, release and recall of prisoners, also recognised that it would be necessary for the Secretary of State to retain such powers in circumstances in which protected information is used to inform that work. Therefore, if such information is engaged, the Secretary of State remains responsible for revoking licences, recalling individuals to prison, and for referring such cases to the Parole Commissioners for review. Where such information is engaged, the Secretary of State also retains responsibility for varying licence conditions, and he has the power to intervene to prevent the Department of Justice releasing a prisoner. I should make it clear, though, that to date, NIPS officials have had no role in the process of recalling prisoners when that recall is on the grounds of protected information.

Schedule 8, in transferring functions relating to the transfer of prisoners to and from Northern Ireland to the Department of Justice, also acknowledged that it was necessary for the Secretary of State to retain a limited power to effect or prevent the transfer of a person to or from Northern Ireland, but only if the decision to do so is based either wholly or partly on protected information.

Schedule 4 also gives the Secretary of State a power to renew the direction following consultation with the Department of Justice. The original direction, signed by Paul Goggins at the point of the devolution of justice matters on 12 April 2010, was designed to run for an initial six-month period, up to 11 October 2010. I understand that it was the Secretary of State's initial intention at that point to negotiate a further 12-month renewal, up to 11 October 2011, after which he hoped to sign the direction off on a long-term basis. However, the Minister of Justice has agreed with the Secretary of State that the direction should be renewed annually each October. Therefore, the current direction, as you mentioned, Chairperson, runs to 11 October 2012.

The March 2012 paper referred to earlier was designed to give members an insight into the rationale behind the direction, an account of what areas of prisons-related business it impacts on and an explanation of the legislation underpinning it.

In closing, I would like to say something about the direction's operational consequences for NIPS. We comply with the terms of the legislation. In practice, the vast majority of issues flowing from the direction relate to decisions about separated prisoners. In relation specifically to the Regulation of Investigatory Powers Act 2000, the use of powers under that Act is regulated by the Office of the Surveillance Commissioners and the Interception of Communications Commissioner's office. Both

offices regularly review and inspect NIPS activities and, to date, have been satisfied with the practices that have been and are in place.

Alan and I are now happy to take questions on any points of clarification.

The Chairperson: Thank you very much. It is a subject that I struggle a little bit with, as I try to get my head around exactly what we are dealing with. Can you tell me what the consequences would be of not agreeing the direction? What would happen in that scenario?

Mr Murray: I do not claim to have any particular expertise. In some ways, we are trying to discern what people had in their heads when they decided on having a direction originally. However, my understanding is that you have to have some sort of direction because national security remains the prerogative of the Westminster Government. Therefore, I do not think that there is any arrangement whereby national security can become a devolved matter.

Mr Alan Smyth (Northern Ireland Prison Service): If we did not have a direction, we would be unable to get access to any national security information. It would not be passed to us. Therefore, we could not use it in the operation of the Prison Service. We would be working in isolation and would not have access to it. The direction gives the security service the confidence that it can pass on information to us. If there were no direction, such information would stay within the Secretary of State's remit, rather than within that of the Department of Justice.

The Chairperson: Does that information primarily pertain to what goes on in the separated regime? Is it important to you in how you manage the prison?

Mr Murray: I think that it is necessary again to clarify that. Although the direction is in place, it really does not impinge on the day-to-day operation of the Prison Service. You become involved only very infrequently in national security issues. So, as regards the day-to-day management of the prison regime, the answer is no, but when it comes to issues such as, for example, admission to or exit from separation, such decisions rely on confidential information, because you need to know the background of the people that you are putting in or admitting. A decision will be made about whether someone has the relevant paramilitary — I cannot remember the exact word —

Mr Smyth: Trace.

Mr Murray: Yes. The relevant trace that allows you to admit him or her into separation.

The Chairperson: Therefore, the decision on whether someone is admitted to separation will remain the preserve of the Secretary of State. That will not change. If no direction is agreed, will the Secretary of State still make the call on who qualifies for separation?

Mr Murray: There might be a reluctance to provide that and other information that would allow us, in any way, to know about an individual's background. All that we would get would be a trace indication. We would not get the detail supporting that trace indication.

The Chairperson: OK. The Secretary of State would take a decision that an individual qualifies, but you would not know why.

Mr Murray: No.

The Chairperson: You would be completely oblivious to that.

Mr Murray: Yes.

Mr McCartney: Following on from that, day to day and operationally, there would be those who would not be permitted to enter the separated regime and who would be held in isolation or whatever other word you use for that. Prison staff would have no role in that decision nor would they have any insight into why it would be the case. Is the application of rule 32 imposed, so to speak?

Mr Murray: We need to be careful. I can think of one individual who applied to go into separation and who had the appropriate trace. However, there was other information that said that if he had entered

separation, he would be liable to be attacked or to be placed at risk. Therefore, another decision about what to do with that person had to be made on the back of the additional information. If such a person refuses to go into normal accommodation, you are left with issues about how to manage them. On one hand, you would be told that there would be major risks for a person going into separation, but you would not necessarily know the details. On the other hand, you would know that they cannot go into normal accommodation as they would not accept it. If that individual were housed in normal accommodation, you would run the risk of getting into protests and all the rest of it.

Mr McCartney: You said that you would not necessarily know. How does this operate? You are running a prison. Would someone tell you that you could not let A into B, and when you ask why, would they tell you that they are not telling you?

Mr Murray: Largely, yes. You certainly would not get the detail, but there are times when you would get something. For example, the use of rule 32 in a situation such as this is entirely undesirable. You would query and challenge, but there is a certain limit as to what you would learn.

Mr McCartney: During your presentation, you said that NIPS staff can become officers of the British Secretary of State. How is that defined? How does a person know who is responsible for discipline or who is accountable?

Mr Murray: It is defined by schedules 4, 5 and 8 to the Northern Ireland Act 1998 (Devolution of Policing and Justice Functions) Order 2010. If you are dealing with decisions that are affected by those schedules, you would do so as an officer of the Secretary of State.

Mr Smyth: If material comes into your possession that the Secretary of State defines as being "protected information" — the definition of that was set out earlier — you would be deemed to be working for the Secretary of State for the time that you have that information in your possession. When you do not, you would be working for the Department of Justice.

Mr McCartney: I understand the principle —

Mr Smyth: The Secretary of State defines when you work for him and when you do not.

Mr McCartney: How would you, as a member of staff, know that you were working for the Department of Justice or the British Secretary of State?

Mr Smyth: I have never been in possession —

Mr McCartney: I understand that. Perhaps it was wrong of me to personalise it to you.

Mr Smyth: I imagine that when you receive the information, the source you receive it from would tell you that it has been provided to you and that it is deemed to be "protected information". You would work under the terms and direction of the Secretary of State while you had that information in your possession.

The Chairperson: How do terms vary between working for the Department of Justice and for the Secretary of State?

Mr Smyth: That is for the Secretary of State to decide under the terms of his direction. If you come into the possession of information that he deems to be "protected information", you would work for him for the time that you have it in your possession.

Mr Murray: It is only on the matters that are defined in the schedules. Although it has not happened yet, if you had an issue with transferring a prisoner where, for whatever reason, the Secretary of State does not want the prisoner to be released because of confidential information, you would be dealing with that matter as a representative of the Secretary of State. It is to do with those areas defined in the schedule.

Mr McCartney: Could that be imposed on any prisoner at the point of release? If someone leaves Magilligan tomorrow and is about to go out the front gate, and you get a —

Mr Murray: No; my understanding again is that the release, in terms of the protected information, is particularly around issues such as, for example, the Life Sentences Order, which already defines that the Secretary of State —

Mr McCartney: I can understand the life-sentence thing because of the licence, but, say there was a sentenced prisoner who has legally served the time deemed by the courts; are you saying there is a scenario whereby you could be instructed to hold that person?

Mr Murray: No. Certainly not.

Mr McCartney: In what situation can the British Secretary of State alter prison rules?

Mr Murray: Again, it is in those matters that pertain specifically to the schedules defined in the devolution Order.

Mr Smyth: Schedule 4 sets out the Secretary of State's rules, and he has the power to amend those particular rules in relation to activities that he has the power to regulate.

Mr McCartney: It is only the rules that pertain —

Mr Smyth: Yes, they are set out in schedule 4 to the transfer order.

Mr McCartney: You said that this has never been used, and I accept that, but take, for example, the situation in which you have to give a direction to a member of staff and he says that he cannot do what you ask because he is being instructed by the Secretary of State to do something else. Where does the primacy of accountability and leadership come from?

Mr Murray: When I am dealing with that issue, I am dealing with it as a representative of the Secretary of State, so the member of staff will still be bound by my instructions.

Mr McCartney: What happens when you are dealing with someone and you issue an instruction, and a governor says that he cannot comply with it because he has been instructed not to do so by the Secretary of State?

Mr Murray: If I am dealing with an issue as a representative of the Secretary of State, then at the time that I am talking to that individual, I am also —

Mr McCartney: So, the chain of command would be aware? OK.

Mr Murray: I would also deal —

Mr McCartney: Is there any situation in which someone could say that he could not do something because he is not one of your men today, he is somebody else's?

Mr Murray: No. Definitely not.

Mr S Anderson: The Chairperson asked about what would happen if we did not accept that the direction was needed. At the outset, Paul Goggins initiated this matter in April 2010 for six months, and it was then renewed for 12 months. I think it was initially in the papers that it was to be a long-term arrangement but that it is now on a yearly renewal. If something is required, why is it on a 12 months rolling renewal? What is the need for that? I know that the Justice Minister requested it and it was granted that it would be renewed or looked at every 12 months.

Mr Murray: Again, it goes back to what I said: in some ways, you have to try to think about what was in place or what was happening when these Orders were discussed. I presume that at that time there was a hope on everybody's part, including that of the Prison Service, because it was on the periphery of those discussions, that this direction would be required for only a limited period and that we would not have the sensitivities or the issues around today that would require it to be in place. It is a reflection of the changing circumstances from 2009, when the architecture was put in place, to today. It reflects the impact of dissident activity, for example.

Mr S Anderson: On the back of that, Max, why not have it in place and not have to renew it every 12 months as was initially thought?

Mr Murray: Again, that is a matter for the Secretary of the State and the Minister. It is not one that I would comment on.

Mr S Anderson: OK.

The Chairperson: The point is valid; we could be having this discussion every year.

Mr S Anderson: Yes. It looks as if that is the way it is going to be.

The Chairperson: OK. Thank you very much.