Easter Term
[2023] UKSC 14
On appeal from: [2021] NICA 67

JUDGMENT

Morgan and others (Respondents) *v* Ministry of Justice (Appellant) (Northern Ireland)

before

Lord Reed, President
Lord Sales
Lord Hamblen
Lord Burrows
Lord Stephens

JUDGMENT GIVEN ON
19 April 2023

Heard on 22 February 2023

Appellant
Sir James Eadie KC
Tony McGleenan KC
Philip McAteer BL
Jason Pobjoy
(Instructed by the Crown Solicitor's Office (Belfast))

Respondents – Seamus Morgan, Terrence Marks
John Larkin KC
Terence McCleave BL
(Instructed by McNamee McDonnell Solicitors (Newry))

Respondent – Kevin Heaney
Ronan Lavery KC
Bobbie Rea BL
(Instructed by ML White Solicitors (Newry))

Respondent – Joseph Lynch
Barry MacDonald KC
Joseph O'Keeffe BL
(Instructed by Phoenix Law (Belfast))

Respondent – Public Prosecution Service of Northern Ireland
Ciaran Murphy KC
Samuel Magee KC
David Russell BL
(Instructed by Public Prosecution Service of Northern Ireland (Belfast))

LORD STEPHENS (with whom Lord Reed, Lord Sales, Lord Hamblen and Lord Burrows agree):

Introduction

1. Article 7(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the ECHR") provides:

> "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed."

The second sentence of article 7(1) concentrates on a comparison between *the penalty imposed* and the penalty that was applicable *at "the time the criminal offence was committed"*. However, as the Grand Chamber of the European Court of Human Rights ("the ECtHR") stated at paras 88 – 89 of its judgment in *Del Río Prada v Spain* (Application No 42750/09) (2014) 58 EHRR 37, the term "imposed" used in the second sentence of article 7(1) cannot be interpreted as excluding from its scope "all measures introduced after the pronouncement of the sentence". A wider interpretation and application of article 7(1) is required to render the rights practical and effective, not theoretical and illusory. Accordingly, measures taken by the legislature, the administrative authorities or the courts after the final sentence has been imposed or while the sentence is being served may fall within the scope of the prohibition of the retroactive application of penalties enshrined in article 7(1) of the ECHR.

2. This appeal raises an issue as to whether the enactment of section 30 of the Counter-Terrorism and Sentencing Act 2021 ("the 2021 Act"), which inserted article 20A into the Criminal Justice (Northern Ireland) Order 2008 ("the 2008 Order"), is a measure which falls within the scope of the prohibition of the retroactive application of penalties in article 7(1) of the ECHR.

3. Under article 7 of the 2008 Order, Seamus Morgan, Terence Marks, Joseph Matthew Lynch, and Kevin John Paul Heaney ("the respondents") had each been sentenced by Colton J to determinate custodial sentences for terrorist offences. Under article 8 of the 2008 Order, Colton J specified custodial periods in respect of each of the respondents as being one half of the term of their sentences with the effect that as

soon as the respondents had served the custodial period the Department of Justice was required to release the respondents on licence. However, the new article 20A of the 2008 Order restricted early release for prisoners serving fixed-term sentences for certain terrorist offences, known as "terrorist prisoners". The effect of article 20A as it applied to the respondents, who were all then serving their determinate custodial sentences for terrorist offences, was that instead of being automatically released on licence without reference to the Parole Commissioners at the halfway points of their sentences, their cases would be referred at the two-thirds point of their sentences to the Parole Commissioners, which would not direct their release on licence unless satisfied that it was no longer necessary for the protection of the public that the respondents should be confined.

4. To the extent that the provisions in article 20A of the 2008 Order apply to terrorist prisoners, such as the respondents, who were already serving a fixed term sentence for a terrorist offence, they can be described as "retroactive". However, whether the legislation is a measure which falls within the scope of the prohibition of the retroactive application of penalties in article 7(1) of the ECHR depends on whether (a) the legislature had redefined or modified the scope of the penalty imposed by the trial court on the respondents; or (b) whether the changes made by article 20A of the 2008 Order were changes to the manner of execution of the sentences imposed on them.

5. This appeal raises a further issue as to whether the enactment of section 30 of the 2021 Act, which inserted article 20A into the 2008 Order, breached the quality of law requirement in article 5(1) of the ECHR under which a national law authorising deprivation of liberty must be sufficiently accessible, precise, and foreseeable in its application to avoid all risk of arbitrariness.

6. On an appeal against their sentences to the Court of Appeal, the respondents contended that the measure taken by the legislature in enacting section 30 of the 2021 Act, inserting article 20A into the 2008 Order, retroactively redefined or modified the scope of the penalty imposed on them whilst they were serving their sentences so as to fall within the scope of the prohibition of the retroactive application of penalties in article 7(1) of the ECHR. As an issue arose as to the compatibility of section 30 of the 2021 Act and article 20A of the 2008 Order with the ECHR, the Ministry of Justice was joined as a party to the appeal. It was contended on behalf of the Ministry of Justice that the changes made by article 20A of the 2008 Order were changes to the manner of execution of the sentences imposed on the respondents so that the changes did not fall within the scope of the prohibition contained in article 7(1) of the ECHR.

7. On appeal to the Court of Appeal, the respondents also contended that according to the law in force at the time that they were sentenced, they would have been entitled to automatic early release on licence at the halfway point of their sentences. They also contended that it could not have been foreseen that the law would be changed to prevent their automatic release, nor could it have been foreseen that their release on licence prior to the expiry of their determinate custodial sentences would depend on the approval of the Parole Commissioners. Accordingly, it was submitted that the legislature, by enacting section 30 of the 2021 Act which inserted article 20A into the 2008 Order, breached the quality of law requirement contained in article 5(1) of the ECHR.

8. On 22 December 2021, Maguire LJ delivered the judgment of the Court of Appeal with which judgment Treacy LJ and Horner J agreed; [2021] NICA 67. The Court of Appeal determined that there was a breach of article 7(1) of the ECHR as the penalty imposed by the trial judge had been subject to redefinition or modification of its scope. The breach related to both the increase in the length of the custodial period and to the role to be played by the Parole Commissioners in determining whether actual release on licence could occur. As the Court of Appeal considered that this conclusion was sufficient for the purposes of determining human rights compliance, it left to one side the question of whether there was also a breach of article 5 of the ECHR.

9. In relation to the appropriate remedy, the Court of Appeal concluded that, in accordance with section 3 of the Human Rights Act 1998 ("the HRA 1998"), section 30 of the 2021 Act could not be read and given effect in a way which was compatible with article 7(1) of the ECHR. The Court of Appeal determined that the appropriate remedy was to grant a declaration under section 4 of the HRA 1998 "to the effect that [section 30 of] the 2021 Act is in breach of article 7 in the ways described in the text of the judgment". The declaration did not affect the validity, continued operation or enforcement of section 30 of the 2021 Act, and article 20A of the 2008 Order continued to apply to the respondents.

10. Pursuant to section 5(4) of the HRA 1998, the Ministry of Justice applied for leave to appeal to the Supreme Court against the declarations of incompatibility made by the Court of Appeal. The respondents sought leave to cross-appeal on several grounds including whether the legislative provisions were incompatible with articles 5 or 6 of the ECHR and in relation to the Court of Appeal's approach to remedy.

11. On 12 May 2022, the Supreme Court granted permission to appeal to the Ministry of Justice and granted permission to cross-appeal to the respondents but confined to the ground in relation to article 5 of the ECHR.

The relevant statutory provisions in Northern Ireland prior to the 2021 Act in relation to the imposition of a determinate custodial sentence

12. In relation to the imposition of a determinate custodial sentence, I will set out the relevant statutory provisions which were in force in Northern Ireland prior to the enactment of the 2021 Act and which were followed by Colton J when imposing sentence on each of the respondents.

13. Article 7 of the 2008 Order, under the heading "Length of custodial sentences" and in so far as relevant, provided:

> "(1) This Article applies where a court passes a sentence—
>
> (a) of imprisonment for a determinate term; ...
>
> (2) … the sentence shall be for such term (not exceeding the permitted maximum) as in the opinion of the court is commensurate with the seriousness of the offence, or the combination of the offence and one or more offences associated with it.
>
> (3) …."

14. In forming any opinion under article 7(2) as to the term of the sentence, article 9(1) of the 2008 Order provides that "a court shall take into account all such information as is available to it about the circumstances of the offence or (as the case may be) of the offence and the offence or offences associated with it (including any aggravating or mitigating factors)". Furthermore, in forming such opinion, a court is obliged to disregard the release provisions in articles 8 and 17 of the 2008 Order; see *R v Bright* [2008] EWCA Crim 462; [2008] 2 Cr App R(S) 102, at para 41; *R v Round* [2009] EWCA Crim 2667; [2010] 2 Cr App R (S) 45, at para 44; and *R (Abedin) v Secretary of State for Justice* [2015] EWHC 782 (Admin), at para 24.

15. In *R (Whiston) v Secretary of State for Justice* [2014] UKSC 39; [2015] AC 176 this court held that if a custodial sentence has been imposed, for the duration of the term of the sentence the lawfulness of the prisoner's detention has been decided by a court in accordance with article 5(1) of the ECHR. Lord Neuberger of Abbotsbury, with whom

Lord Kerr of Tonaghmore, Lord Carnwath and Lord Hughes agreed, stated, at paras 38–39, that:

> "38. … Where a person is lawfully sentenced to a determinate term of imprisonment by a competent court, there is (at least in the absence of unusual circumstances) no question of his being able to challenge his loss of liberty during that term on the ground that it infringes article 5.4 . This is because, for the duration of the sentence period, 'the lawfulness of his detention' has been 'decided … by a court', namely the court which sentenced him to the term of imprisonment .
>
> 39. That does not appear to me to be a surprising result. Once a person has been lawfully sentenced by a competent court for a determinate term, he has been 'deprived of his liberty' in a way permitted by article 5.1(a) for the sentence term, and one can see how it follows that there can be no need for 'the lawfulness of his detention' during the sentence period to be 'decided speedily by a court', as it has already been decided by the sentencing court. If that is the law, it would follow that Mr Whiston's appeal in this case must fail."

16. After imposing a determinate custodial sentence under article 7, a court is then required to address the separate matter raised in article 8 of the 2008 Order of specifying the custodial period. That article under the heading of "Length of custodial period" and in so far as relevant, provided:

> "(1) This Article applies where a court passes—
>
> (a) a sentence of imprisonment for a determinate term, …, or
>
> (b) …
>
> in respect of an offence committed after the commencement of this Article.

(2) The court shall specify a period (in this Article referred to as 'the custodial period') at the end of which the offender is to be released on licence under Article 17.

(3) The custodial period shall not exceed one half of the term of the sentence.

(4) Subject to paragraph (3), the custodial period shall be the term of the sentence less the licence period.

(5) In paragraph (4) 'the licence period' means such period as the court thinks appropriate to take account of the effect of the offender's supervision by a probation officer on release from custody—

(a) in protecting the public from harm from the offender; and

(b) in preventing the commission by the offender of further offences.

(6) Remission shall not be granted under prison rules to the offender in respect of the sentence."

17. It is appropriate at this stage to make several points about article 8 of the 2008 Order.

18. First, the court's task under article 8 is to specify the custodial period thereby determining the date of the offender's release on licence. The court in performing that task does not amend the term of the sentence of imprisonment which has been fixed by the court under article 7 of the 2008 Order. Rather, the court's task is part of a regime by which prisoners are to be released on licence before serving the full term of the sentence imposed. Accordingly, the court's task is as to the manner of execution of the sentence which it has imposed.

19. Second, the only order which the court is required to make under article 8 is to specify the custodial period; see article 8(2).

20. Third, setting the licence period determines the length of the custodial period as the custodial period is the term of the sentence less the licence period; see article 8(4).

21. Fourth, the legislature has provided that the custodial period shall not exceed one half of the term of the sentence with the effect that the legislature requires the licence period to be at least half of the term of the sentence; see article 8(3). In that way, the court is not entirely free to specify the length of either the custodial period, which cannot exceed half of the term of the sentence, or the length of the licence period, which must be at least half of the term of the sentence. In that sense, the task to be performed under article 8 of the 2008 Order, of determining the date upon which the offender is to be released on licence, is shared with the legislature which has set the parameters within which the court can operate when specifying the custodial period.

22. Fifth, the court is also not entirely free to extend the licence period. It can only be extended if the effect of the offender's supervision by a probation officer will protect the public from harm from the offender and prevent the commission by the offender of further offences; see article 8(5) and *R v McKeown, R v Han Lin* [2013] NICA 28; [2014] NIJB 368 at para 31; *R v Somers* [2015] NICA 17 at para 25; and *R v KT* [2019] NICA 42 at para 64.

23. Sixth, the decision whether to extend the licence period depends on an assessment made at the date sentence is imposed as to the risk posed by the offender at the date when the offender is to be released on licence. In that way, the assessment of risk is not made proximate to the date of release.

24. Seventh, the purpose of enabling the court to extend the licence period is, for instance, to allow for a community treatment programme of longer duration than half of the term of the sentence or to reduce re-offending by steering and monitoring the behaviour and resettlement of an offender following release on licence; see for example *R v KT* at para 65.

25. Eighth, there is a difference in the regimes by which prisoners are to be released on licence as between Northern Ireland on the one hand and England and Wales on the other. In Northern Ireland, the court specifies the custodial period at the end of which the offender is to be released on licence. The position in England and Wales is that if the court imposes a sentence of imprisonment for a term of 12 months or more then pursuant to section 244(1) of the Criminal Justice Act 2003, "[as] soon as [the] prisoner, …, has served the requisite custodial period, it is the duty of the Secretary of State to release him on licence under this section". Section 244(3), in so far as relevant,

provides that in relation to a person serving a sentence of imprisonment for a term of 12 months or more the requisite custodial period means one-half of his sentence. Accordingly, in England and Wales, when imposing a sentence of imprisonment for a term of 12 months or more, the court has no role to play in determining "the custodial period" or "the licence period". The release on licence is automatic at the halfway point.

26. Ninth, article 8(6) of the 2008 Order provides that remission shall not be granted to the offender in respect of the sentence under prison rules.

27. Tenth, at the end of the custodial period and as set out below, the offender is to be released on licence under article 17 of the 2008 Order; see article 8(2) and para 30 below.

28. Eleventh, there is a change in terminology in the 2008 Order. In article 8(2), the person to be released on licence is termed "the offender" whilst in article 17 of the 2008 Order, they are termed "the prisoner". Article 28 is headed "Recall of prisoners while on licence" and refers to the person subject to potential recall as including "a prisoner who has been released on licence under article 17…". Accordingly, even if the custodial period has ended and the person has been released on licence, they are still referred to as "the prisoner" in the 2008 Order. This change in terminology accurately reflects the legal position that the determinate custodial sentence determines the lawfulness of the person's detention throughout the term of the sentence; see para 15 above.

29. Article 16(1) in so far as relevant provided that a "'fixed-term prisoner' means a person serving a determinate custodial sentence" and a "'determinate custodial sentence' means a custodial sentence for a determinate term". It also provides, in so far as relevant, that a "'custodial sentence' means (a) a sentence of imprisonment; (b) …; (c) …".

30. Article 17, under the heading "Duty to release certain fixed-term prisoners" in so far as relevant provided:

> "(1) As soon as a fixed-term prisoner, …, has served the requisite custodial period, the Department of Justice shall release the prisoner on licence under this Article.

> (2) In this Article 'the requisite custodial period' means—(a) …, the custodial period specified by the court under Article 8;"

31. Article 21, under the heading "Duration of licences: fixed-term prisoners" and in so far as relevant, provided:

> "(1) Where a fixed-term prisoner is released on licence under this Chapter, the licence shall, subject to any revocation under Article 28 …, remain in force for the remainder of the sentence.
>
> (2) …."

32. Since devolution of criminal justice to the Northern Ireland Assembly in 2010, the licence conditions are set by the Department of Justice; see article 24. However, under article 23, a court which sentences an offender to a determinate custodial sentence of 12 months or more in respect of any offence, when passing sentence, may recommend to the Department of Justice particular conditions which in its view should be included in any licence granted to the offender under article 17 on release from prison. In exercising the powers under article 24 in respect of an offender, the Department of Justice shall have regard to any such recommendation.

33. Article 27 imposes a duty on a person subject to a licence to comply with such conditions as may for the time being be included in the licence.

34. Article 28 makes provision for the revocation of a licence and for the recall of a prisoner released on licence to prison. Under article 28(2), the Department of Justice or the Secretary of State may revoke a prisoner's licence and recall a prisoner to prison (a) if recommended to do so by the Parole Commissioners; or (b) without such a recommendation if it appears to the Department of Justice or (as the case may be) the Secretary of State that it is expedient in the public interest to recall a prisoner before such a recommendation is practicable. On revocation of the prisoner's licence, they shall be liable to be detained in pursuance of the prisoner's sentence; see article 28(7). On returning to prison, the prisoner shall be informed of the reasons for the recall and of the right to make representations in writing with respect to recall; see article 28(3). The Department of Justice or (as the case may be) the Secretary of State has an obligation to refer the prisoner's recall to the Parole Commissioners; see article 28(4). The Parole Commissioners may direct the prisoner's immediate release on licence; see

article 28(5). However, the Parole Commissioners shall not direct the immediate release on licence of a prisoner serving a determinate custodial sentence unless they are satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined; see article 28(6)(b). If the Parole Commissioners do not direct immediate release on licence, then article 29 of the 2008 Order contains provisions which enable the Parole Commissioners to recommend a date for the prisoner's release on licence or to fix a date as the date for the next review of the prisoner's case by them.

35. If a prisoner is recalled to prison then they are lawfully detained pursuant to their original sentence; see para 15 above.

The amendments made by the 2021 Act to the statutory provisions in Northern Ireland in relation to the release on licence of a terrorist prisoner serving a determinate custodial sentence

36. Section 50 and Schedule 13 of the 2021 Act made several amendments to the process under the 2008 Order of imposing sentence on terrorist offenders. However, this appeal is concerned with amendments which affected those, such as the respondents, who were serving sentences of imprisonment which had already been imposed on them. Accordingly, the amendments relevant to this appeal are those which amended article 17 of the 2008 Order, so that the duty to release under that article did not apply to the respondents, and those made by section 30 of the 2021 Act, which inserted article 20A into the 2008 Order to restrict eligibility for release on licence of terrorist prisoners.

37. Those amendments were as follows:

(a) Section 50(1)(i) and Schedule 13 paragraph 74(3) amended article 17 of the 2008 Order so that the duty under article 17 to release certain fixed-term prisoners did not apply to prisoners to whom article 20A applied.

(b) Section 30 of the 2021 Act under the heading "Restricted eligibility for early release of terrorist prisoners: Northern Ireland" in subsection (1) provided for the insertion of article 20A into the 2008 Order.

38. Article 20A under the heading "Restricted eligibility for release on licence of terrorist prisoners" and in so far as relevant, provides:

"(1) This Article applies to a fixed-term prisoner (a 'terrorist prisoner') who—

(a) is serving a sentence imposed (whether before or after the commencement date) in respect of an offence within paragraph (2); and

(b) has not been released on licence before the commencement date.

(2) An offence is within this paragraph (whenever it was committed) if—

(a) it is specified in Part 2, 4, 5 or 7 of Schedule 2A (terrorism offences punishable with imprisonment for life or more than two years);

(b) it is a service offence as respects which the corresponding civil offence is so specified; or

(c) it was determined to have a terrorist connection.

(3) The Department of Justice shall release the terrorist prisoner on licence under this Article as soon as—

(a) the prisoner has served the relevant part of the sentence; and

(b) the Parole Commissioners have directed the release of the prisoner under this Article.

(4) The Parole Commissioners shall not give a direction under paragraph (3) with respect to the terrorist prisoner unless—

(a) the Department of Justice has referred the prisoner's case to them; and

(b) they are satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined.

(5) The terrorist prisoner may require the Department of Justice to refer the prisoner's case to the Parole Commissioners at any time—

(a) after the prisoner has served the relevant part of the sentence; and

(b) where there has been a previous reference of the prisoner's case to the Parole Commissioners, after the expiration of the period of 2 years beginning with the disposal of that reference or such shorter period as the Parole Commissioners may on the disposal of that reference determine; and in this paragraph 'previous reference' means a reference under paragraph (4) or Article 28(4).

(6) Where the Parole Commissioners do not direct the prisoner's release under paragraph (3)(b), the Department of Justice shall refer the case to them again not later than the expiration of the period of 2 years beginning with the disposal of that reference.

(7) ….

(8) ….

(9) For the purposes of this Article—

…;

'commencement date' means the date on which section 30 of the Counter-Terrorism and Sentencing Act 2021 comes into force;

'relevant part of the sentence' means—

(a) in relation to an extended custodial sentence or an Article 15A terrorism sentence, two-thirds of the appropriate custodial term;

(b) in relation to any other sentence, two-thirds of the term of the sentence.

(10) …."

39. Several points can be made about article 20A of the 2008 Order.

40. First, the definition of a terrorist prisoner includes a prisoner who has been convicted of an offence within article 20A(2) *whenever the offence was committed*. It is common ground that all the respondents were terrorist prisoners within that definition.

41. Second, the terrorist prisoners to whom article 20A applies include a prisoner who is serving a sentence of imprisonment imposed before 30 April 2021, which was the date on which section 30 of the 2021 Act came into force (the commencement date) and who had not been released on licence before that date. It is common ground that article 20A applied to all the respondents as they were serving a sentence of imprisonment imposed before 30 April 2021 and they had not been released on licence before that date.

42. Third, rather than being released on licence at the end of the custodial period, which cannot exceed one half of the term of the sentence, the prisoner can only be released on licence after having served the relevant part of the sentence. For those, such as the respondents, serving a determinate custodial sentence, the relevant part is two-thirds of the term of the sentence. Accordingly, prior to the 2021 Act each of the respondents would have been released on licence at the halfway point of the term of their sentence, but under the provisions now contained in article 20A of the 2008 Order they must serve two thirds of their sentence before being released on licence. In this way, the application of article 20A to the respondents can be described as "retroactive".

43. Fourth, release on licence is no longer automatic at the end of the custodial period. Rather, the prisoner not only has to have served the relevant part of the sentence but also the Parole Commissioners must direct his release. The Parole Commissioners cannot give a direction unless the Department of Justice has referred the prisoner's case to them, and they are satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined. This is another way in which the application of article 20A to the respondents can be described as "retroactive".

44. Fifth, the function of assessing risk in relation to the release of a terrorist prisoner on licence is assigned by article 20A of the 2008 Order to the Parole Commissioners. Previously, the function of assessing risk in relation to a terrorist offender sentenced to a determinate custodial sentence was assigned to the court in determining whether it was appropriate to extend the licence period under article 8(5) of the 2008 Order.

45. Sixth, the date on which the assessment of risk is undertaken in relation to terrorist prisoners in now proximate to the potential date of release on licence rather than being assessed as at the date the sentence was imposed by the court when considering whether to extend the licence period under article 8(5) of the 2008 Order.

The facts

46. During the period between 12 August 2014 and 10 November 2014, a property at 15 Ardcarn Park in Newry was under surveillance, and recordings were made of conversations between the respondents, although not all the respondents participated in all the conversations. The recordings of those conversations revealed that the respondents belonged to a proscribed organisation, namely the Irish Republican Army. At their most serious, the conversations related to potential strategies for their organisation including how to deal with other "dissident" Republican organisations, the size and structure of their organisation, the identification of possible targets, training and sourcing of weapons and materials for pipe bombs and sources of funding for criminal activities including robbery. The contents of the recordings formed the evidential basis for the prosecution of each of the respondents.

47. On 10 January 2020, in Belfast Crown Court, all the respondents were convicted, on their guilty pleas, of various terrorist offences.

48. Seamus Morgan was convicted of one count of belonging to or professing to belong to a proscribed organisation contrary to section 11(1) of the Terrorism Act 2000.

49. Terence Marks was convicted of (a) one count of belonging to or professing to belong to a proscribed organisation contrary to section 11(1) of the Terrorism Act 2000; and (b) one count of receiving weapons, training or instruction contrary to section 54(2) of the Terrorism Act 2000.

50. Joseph Matthew Lynch was convicted of (a) one count of conspiracy to possess explosives with intent to endanger life or cause serious injury to property, contrary to article 9(1) of the Criminal Attempts and Conspiracy (Northern Ireland) Order 1983 and section 3(1)(b) of the Explosive Substances Act 1883; (b) one count of conspiracy to possess firearms and/or ammunition with intent, contrary to article 9(1) of the Criminal Attempts and Conspiracy (Northern Ireland) Order 1983 and article 58(1) of the Firearms (Northern Ireland) Order 2004; (c) five counts of preparation of terrorist acts, contrary to section 5(1) of the Terrorism Act 2006; (d) one count of belonging to or professing to belong to a proscribed organisation contrary to section 11(1) of the Terrorism Act 2000; (e) two counts of receiving training or instruction in the making or use of weapons for terrorism, contrary to section 54(2) of the Terrorism Act 2000; and (f) two counts of attending at a place used for terrorist training, contrary to section 8 of the Terrorism Act 2006.

51. Kevin John Paul Heaney was convicted of one count of belonging to or professing to belong to a proscribed organisation contrary to section 11(1) of the Terrorism Act 2000.

52. On 13 November 2020, prior to the enactment of the 2021 Act, Colton J imposed determinate custodial sentences on each of the respondents. Seamus Morgan was sentenced to a three-year determinate custodial sentence. Terence Marks was sentenced to a four-year determinate custodial sentence. Joseph Matthew Lynch was sentenced to a six years and six months' determinate custodial sentence. Kevin John Paul Heaney was sentenced to a three year and six months' determinate custodial sentence.

53. In sentencing each of the respondents, Colton J faithfully followed article 7(2) and article 9(1) of the 2008 Order; see paras 13 and 14 above. He formed an opinion as to the terms of the sentences being commensurate with the seriousness of the offence or the offences. The sentences were calculated and imposed without account being taken of the possibility of early release on licence. He informed the respondents in

open court as to the term of the determinate custodial sentences which he was imposing on each of them. Also, he complied with article 5(4) of the 2008 Order by explaining to each of them in open court and in ordinary language why he was imposing a custodial sentence.

54. The sentencing exercise also included several other offenders including Patrick Joseph Blair. During the sentencing of that offender, Colton J made observations that applied generally to all of the offenders. He stated:

> "47. …. It is the overwhelming wish and the expectation of all right-thinking law abiding citizens in this jurisdiction that the days of shootings, killings and explosions should be confined to the past. It is clear from the contents of the discussions of those who were present at the meetings described (to varying degrees) that they were willing to return us to the days which so disfigured our society.
>
> 48. Those who seek to do so represent a grave danger to the community …."

55. After imposing determinate custodial sentences on each of the respondents, Colton J then faithfully followed article 8 of the 2008 Order. He was constrained by the legislature to specify a custodial period not exceeding one half of the term of the sentence; see article 8(3). Under article 8(5) he could exercise discretion to extend the licence period. If he did so, this would shorten the custodial period. However, in the exercise of discretion in relation to each of the respondents, he declined to extend the licence period. Accordingly, having declined to do so the custodial period in respect of each of the respondents was specified as being one half of the term of the sentence.

56. Colton J informed each of the respondents in open court that the length of the licence period was one half of the term of each of the sentences which he imposed with the consequence that the custodial period was also one half of the term of each of the sentences. Accordingly, as at the date the sentences were imposed by Colton J, each of the respondents would have anticipated being automatically released on licence at the halfway point of their sentence by virtue of article 17 of the 2008 Order.

57. On 13 November 2020, committal warrants were issued by the Northern Ireland Courts and Tribunals Service in respect of each of the respondents. The committal warrant in relation to Seamus Morgan stated:

> "The Court ordered on 13 November 2020 that the said defendant be committed to custody for the period of DCS 3 YRS BEING 18 MTHS IMP AND 18 MTHS ON LICENCE."

The committal warrants in relation to the other respondents followed the same formulation in that the court ordered on 13 November 2020 each defendant named in the warrant "be committed to custody for the period of [the determinate custodial sentence that applied to that defendant] BEING [half that period] IMP AND [half that period] ON LICENCE".

58. I consider that the committal warrants accurately record that the court had ordered the respondents to be committed to custody for the period of the determinate custodial sentences imposed on them. However, thereafter, the only order required to be made by the court was to specify the custodial period. The legal obligation to release arises under article 17 of the 2008 Order which requires the Department of Justice to release the prisoner once they have served the custodial period. The warrants should simply have stated that the court had specified the custodial period as one half of the term of the sentence. Indeed, the period spent in prison and the period spent on licence would depend on whether the prisoner was recalled to prison and if so for how long.

59. On 29 April 2021, some five months after the imposition of those sentences, the 2021 Act was passed. Section 30 entered into force on 30 April 2021 and thereby inserted article 20A into the 2008 Order on that date; see section 50 of the 2021 Act.

60. It is common ground that the effect of the insertion of article 20A into the 2008 Order, in respect of Seamus Morgan, was that instead of being automatically released on licence without reference to the Parole Commissioners on 24 June 2021, the first date for his release on licence was 25 December 2021, provided the Parole Commissioners directed his release being satisfied that it was no longer necessary for the protection of the public that he should remain confined. It is also common ground that there was no impact on the end date of his determinate custodial sentence which remained as 24 December 2022.

61. The relevant dates for the effect on the other respondents and the end dates of their determinate custodial sentences were as follows: (a) Terence Marks – the date for automatic release on licence had been 13 February 2022 and the first date for release on licence subject to the Parole Commissioners directing his release became 13 October 2022. The end date of his determinate custodial sentence remained as 14 February 2024; (b) Joseph Matthew Lynch – the date for automatic release on licence

had been 28 March 2023 and the first date for release on licence subject to the Parole Commissioners directing his release became 28 April 2024. The end date of his determinate custodial sentence remained as 25 June 2026; and (c) Kevin John Paul Heaney – the date for automatic release on licence had been 31 October 2021 and the first date for release on licence subject to the Parole Commissioners directing his release became 31 May 2022. The end date of his determinate custodial sentence remained as 31 July 2023.

62. At the date of the hearing of the appeal before this court on 22 February 2023, the only respondent who remained in prison was Joseph Matthew Lynch.

63. Following the passing of the 2021 Act, David Kennedy, the Director of Prisons in the Northern Ireland Prison Service, by letter dated 21 May 2021 to Mark Goodfellow, Chief Operating Officer of the Northern Ireland Courts and Tribunals Service, raised concerns as to whether the committal warrants were "commensurate" with the 2021 Act. He requested that the Northern Ireland Courts and Tribunals Service commence a process in consultation with the sentencing judges to complete a review of all sentences in respect of 12 prisoners to whom the 2021 Act might apply to ensure that "the relevant sentencing warrants are commensurate with the Act". A copy of the letter was sent to amongst others, the private secretary to the Lord Chief Justice.

64. A comprehensive five-page note dated 15 June 2021 sent to the Lord Chief Justice by a member of his office analysed the statutory provisions and sought his agreement to an approach which involved amendment of the warrants without involving the sentencing judges. The note stated that "[the] legislative provisions are mandatory and it should simply be an exercise in identifying those terrorist prisoners who are currently serving sentences for relevant offences and [for the Northern Ireland Courts and Tribunals Service to amend] their warrants to reflect the new custodial period of two thirds of the custodial term". The Lord Chief Justice agreed with that approach and thereafter the Northern Ireland Courts and Tribunals Service amended the warrants to reflect the new custodial period without judicial input. For instance, the warrant in respect of Seamus Morgan was amended to state:

> "WHEREAS at Belfast Crown Court on 13 November 2020 the above named defendant having been convicted of crime.
>
> The Court ordered on 13 November 2020 that the said defendant be committed to custody for the period of DCS 3 YRS: BEING 18 MTHS IMPRISONMENT AND 18 MTHS LICENCE.

> Following the commencement of Article 30 of the Counter Terrorism and Sentencing Act 2021 the above sentence was amended to reflect the revised mandatory custodial period set out in the statute. Accordingly on the 17 June 2021 the sentence passed on 13 November 2020 was amended to:
>
> The Court ordered on 13 November 2020 that the said defendant be committed to custody for the period of DCS 3 YEARS: 2 YEARS IMPRISONMENT AND 1 YEAR ON LICENCE."

65. I consider that it was not necessary to amend the warrant because lawful authority for the detention of Seamus Morgan was contained in the three-year determinate custodial sentence imposed by Colton J, read with section 30 of the 2021 Act which inserted article 20A into the 2008 Order making new provisions for the manner of implementation of that sentence. Furthermore, I consider that the amended warrant is inaccurate in several respects. First, it states that "the sentence" was amended. I consider that the amendment brought about by article 20A of the 2008 Order was to the method of implementation of the sentence. Second, it states that the amendment was made on 17 June 2021. I consider that the amendment to the method of implementation of the sentence took place on 30 April 2021 when section 30 of the 2021 Act inserted article 20A into the 2008 Order. Third, the amended warrant stated: "2 YEARS IMPRISONMENT AND 1 YEAR ON LICENCE". However, under the provisions of article 20A of the 2008 Order, in relation to the implementation of the determinate custodial sentence of three years, the date on which a terrorist prisoner was to be released on licence was not fixed at the two-thirds point of the term of the sentence, but rather after that point his release depended on whether the Parole Commissioners directed his release being satisfied that it was no longer necessary for the protection of the public that he should be confined. Ordering 2 years' imprisonment and 1 year on licence did not accord with article 20A of the 2008 Order. Finally, the period actually spent in prison depended on whether the prisoner was recalled to prison once they had been released on licence.

Background to the 2021 Act and to the Terrorist Offenders (Restriction of Early Release) Act 2020

66. The background to the 2021 Act involved two terrorist incidents which occurred on the streets of London: the first on 29 November 2019 and the second on 2 February 2020. The Government considered both incidents demonstrated very compelling policy reasons supporting a change to the method of implementation of sentences imposed on terrorist offenders, and that the policy reasons applied with equal force in England and Wales and in Northern Ireland. On this appeal there was no challenge to those

policy reasons or to their equal application in Northern Ireland. The direct response for England and Wales and for Scotland was the enactment of the Terrorist Offenders (Restriction of Early Release) Act 2020 ("the 2020 Act"), which amended the provisions for the release on licence of those convicted of terrorism offences by inserting section 247A into the Criminal Justice Act 2003 in England and Wales, and by inserting section 1AB into the Prisoners and Criminal Proceedings (Scotland) Act 1993. However, whilst section 1 (and Schedule 1) and sections 2, 5, 6 and 7 of the 2020 Act extended to England and Wales, and section 3 (and Schedule 2), and sections 4, 8 and 9 extended to Scotland, none of the provisions of the 2020 Act extended to Northern Ireland. The direct response for Northern Ireland came later with the enactment of section 30 of the 2021 Act, which made amendments in Northern Ireland to the provisions for the release on licence of those convicted of terrorism offences by inserting article 20A into the 2008 Order.

67. The first of the two terrorist incidents on the streets of London involved Usman Khan. He had been convicted in 2012 of plotting a terrorist attack and ultimately sentenced to a fixed term 16-year sentence of imprisonment which required his automatic release after serving eight years. During his time in custody and following his release, he participated in rehabilitation schemes for terrorist offenders. He gave the appearance of successful rehabilitation. The incident in which he was involved occurred on 29 November 2019, when after attending an offender rehabilitation event at Fishmongers' Hall he stabbed five people, two fatally. He was then shot dead by the police on London Bridge. The Government considered that the incident demonstrated compelling reasons to protect the public for a longer period by requiring an offender convicted of terrorism offences to spend two-thirds rather than one half of their sentence in custody. Moreover, the Government considered it demonstrated compelling reasons that there should not be automatic release on licence at the two-thirds point of the sentence without any assessment of the risk posed by the terrorist offender to the public. Rather, prior to release on licence, there should be an assessment of risk to the public to be conducted by the Parole Board. As the assessment would be proximate to the date of release on licence, it would form a more accurate assessment as to whether a terrorist offender, who appeared to have reformed, nonetheless remained motivated to commit further terrorist offences.

68. The second of the two terrorist incidents on the streets of London involved Sudesh Amman. He had been sentenced in 2018 to three years and four months in prison for disseminating terrorist material and collecting information that could be useful to a terrorist. He was required to be released after serving half the sentence. On 2 February 2020, in Streatham High Road, he attacked two passers-by with a knife and was then shot dead by police.

69. On 3 February 2020, the Secretary of State for Justice made a statement to the House of Commons announcing proposed new legislation which would extend to England and Wales and to Scotland. He said:

> "Yesterday's appalling incident plainly makes the case for immediate action. We cannot have the situation, as we saw tragically yesterday, in which an offender—a known risk to innocent members of the public—is released early by automatic process of law without any oversight by the Parole Board.
>
> We will be doing everything we can to protect the public. That is our primary duty. We will therefore introduce emergency legislation to ensure an end to terrorist offenders getting released automatically with no check or review having served half their sentence. The underlying principle must be that offenders will no longer be released early automatically and that anyone released before the end of their sentence will be dependent on risk assessment by the Parole Board.
>
> We face an unprecedented situation of severe gravity and, as such, it demands that the Government respond immediately, and that this legislation will therefore also apply to serving prisoners.
>
> The earliest point at which these offenders will now be considered for release will be once they have served two-thirds of their sentence. Crucially, we will introduce a requirement that no terrorist offender will be released before the end of the full custodial term unless the Parole Board agrees."

70. The Secretary of State considered, as did Parliament in passing the 2020 Act, that in relation to the implementation of sentences of imprisonment in respect of terrorist offenders, the two terrorist incidents demonstrated that there was no fair balance between the demands of the general interests of the community and the interests of the individual terrorist prisoners. The balance required to be shifted to protect the public.

71. The 2020 Act received Royal Assent, and came into force, on 26 February 2020.

Summary of the changes made by the 2020 Act

72. The position in England and Wales prior to the enactment of the 2020 Act for prisoners serving a sentence of imprisonment for a term of 12 months or more was that release on licence was automatic at the halfway point; see section 244 of the Criminal Justice Act 2003 and para 25 above. The 2020 Act amended section 244 of the Criminal Justice Act 2003 so that release on licence for terrorist prisoners was no longer to be governed by that section. Sections 1(2) and 10(4) of the 2020 Act inserted into the Criminal Justice Act 2003 a new section 247A which restricted the eligibility for release on licence of terrorist prisoners. The effect of section 247A as it applied to a terrorist prisoner serving a determinate sentence of 12 months or more was that instead of being automatically released without reference to the Parole Board at the halfway point of his sentence, their case would be referred to the Parole Board at the two-thirds point of their sentence, which would not direct their release unless satisfied that it was no longer necessary for the protection of the public that they should be confined.

73. In England and Wales, a person affected by these amendments was Mohammed Zahir Khan ("Mr Khan"). On the date section 30 of the 2021 Act came into force, Mr Khan was serving a prison sentence for offences of encouraging terrorism. Due to the disapplication of section 244 of the Criminal Justice Act 2003 to him, together with the insertion of and application of section 247A of the Criminal Justice Act 2003, Mr Khan was no longer entitled to automatic release on licence at the halfway point of the term of his sentence. Rather, he was to be confined for at least two-thirds of the term of his sentence and his release on licence was then to be subject to a direction from the Parole Board, upon it being satisfied that it was no longer necessary for the protection of the public that he should be confined.

74. On 5 May 2020, Mr Khan brought a claim for judicial review challenging the lawfulness of section 247A of the Criminal Justice Act 2003, as inserted by the 2020 Act. He brought this claim on the ground, amongst others, that section 247A of the Criminal Justice Act 2003 was incompatible with article 7(1) of the ECHR as it had retroactively applied a heavier penalty on him whilst he was serving his sentence by extending the period during which he was to be confined and in making his release on licence subject to a direction by the Parole Board. The essential issue for determination in relation to that ground of challenge was whether section 247A imposed a heavier penalty or whether it was a measure in relation to the execution or enforcement of a penalty. If it was the latter, then it did not fall within the scope of article 7(1) of the ECHR. In respect of this ground of challenge, the Divisional Court (Fulford LJ and

Garnham J) stated at para 105 of its judgment (*R (Khan) v Secretary of State for Justice* [2020] EWHC 2084 (Admin); [2020] 1 WLR 3932):

> "In the present case the changes wrought by the 2020 Act were changes in the arrangements for early release; they were not changes to the sentence imposed by the sentencing judge. In the absence of a fundamental change of the sort described in *Del Río Prada* …, a redefinition of the penalty itself, the principle is clear; an amendment by the legislature to the arrangements for early release raises no issue under article 7. A change to those arrangements does not amount to the imposition of a heavier penalty than that applicable at the time the offence was committed."

Accordingly, the Divisional Court dismissed this ground of challenge.

75. In the present case the respondents do not contend that the decision of the Divisional Court in *R (Khan) v Secretary of State for Justice* was incorrect in relation to a sentence imposed in England and Wales. Rather, they seek to distinguish the decision on the basis that in Northern Ireland the court was involved in specifying the custodial period under article 8 of the 2008 Order whilst in England and Wales the court played, and still plays, no role in relation to release on licence. Accordingly, the respondents contend that any legislative measure changing the custodial period was an amendment to the penalty imposed by the court rather than being an amendment to the execution or enforcement of the penalty.

Legal principles: article 7 of the ECHR

(a) The guarantees enshrined in article 7 of the ECHR

76. The guarantees enshrined in article 7 of the ECHR are essential elements of the rule of law. No derogation from article 7 of the ECHR is permissible under article 15 of the ECHR even in time of war or other public emergency threatening the life of the nation.

77. Amongst the guarantees enshrined in article 7 of the ECHR is that measures taken by the legislature after the pronouncement of a sentence may not lead to a heavier penalty being imposed on a person while he is serving his sentence; see para 1 above.

(b) The concept of a "penalty" and its scope

78. The concept of a penalty in article 7(1) of the ECHR is an autonomous Convention concept; see *Welch v United Kingdom*, (Application No 17440/90) (1995) 20 EHRR 247, para 27; *Uttley v United Kingdom* (Application No 36946/03) (unreported) 29 November 2005, p 7; *Del Río Prada v Spain* at para 81.

79. In assessing whether a measure is a penalty, a court must remain free to go behind appearances and assess for itself whether a particular measure amounts in substance to a "penalty" in the meaning of article 7(1) of the ECHR.

80. The ECtHR has acknowledged that in practice the distinction between a measure that constitutes a "penalty" and a measure that concerns the "execution" or "enforcement" of the "penalty" may not always be clear cut; see *Kafkaris v Cyprus* (Application No 21906/04) (2009) 49 EHRR 35 at para 142, *Del Río Prada v Spain* at para 85, and *Kupinskyy v Ukraine* (Application No 5084/18) (unreported) 10 November 2022 at para 49.

81. At para 82 of *Del Río Prada v Spain*, the ECtHR stated that "the starting-point in any assessment of the existence of a penalty is whether the measure in question is imposed following conviction for a 'criminal offence'." The ECtHR continued by stating that:

> "Other factors that may be taken into account as relevant in this connection are the nature and purpose of the measure; its characterisation under national law; the procedures involved in the making and implementation of the measure; and its severity. The severity of the order is not in itself decisive, however, since many non-penal measures of a preventive nature may have a substantial impact on the person concerned."

(c) The distinction between measures constituting a penalty and those representing the execution or enforcement of a penalty

82. There is an important qualification to the autonomous concept of a penalty. Measures representing the execution or enforcement of a penalty do not fall within the scope of the autonomous concept. Accordingly, retroactive changes to the

execution or enforcement of a penalty, whilst a person is serving a sentence, do not fall within the prohibition enshrined in article 7(1) of the ECHR.

83. In *Del Río Prada v Spain*, the ECtHR endorsed the distinction between measures constituting a penalty and those representing the execution or enforcement of a penalty by stating at para 83 that:

> "Both the Commission and the Court in their case-law have drawn a distinction between a measure that constitutes in substance a 'penalty' and a measure that concerns the 'execution' or 'enforcement' of the 'penalty'. In consequence, where the nature and purpose of a measure relate to the remission of a sentence or a change in a regime for early release, this does not form part of the 'penalty' within the meaning of art.7. "

In support of that distinction, the ECtHR relied on *Hogben v United Kingdom* (Application 11653/85) (1986) 46 DR 231; *Hosein v United Kingdom* (Application No 26293/95) (unreported) 28 February 1996; *L-GR v Sweden* (Application No 27032/95) (unreported) 15 January 1997; *Grava v Italy* (Application No 43522/98) (unreported) 10 July 2003 at para 51; *Uttley v United Kingdom*; *Kafkaris v Cyprus* at para 142; *Monne v France* (Application No 39420/06) (unreported) 1 April 2008; *M v Germany* (Application No 19359/04) (2010) 51 EHRR 41 at para 121; and *Giza v Poland* (Application No 1997/11) (unreported) 23 October 2012 at para 31.

84. It is appropriate to consider some, but not all of these authorities, as I consider that the distinction is clearly established in both domestic and ECtHR case law.

85. The first ECtHR case is *Hogben v United Kingdom*. In that case, because of a change in the policy on release on parole, the applicant was transferred from open to closed prison, and had to serve a substantially longer time in prison than would otherwise have been the case. In answering his article 7 complaint, the Commission said:

> "3. The Commission recalls that the applicant was sentenced to life imprisonment in 1973 for committing a murder in the course of a robbery. It is clear that the penalty for this offence at the time it was committed was life imprisonment and thus no issue under article 7 arises in this respect.

> 4. Furthermore, in the opinion of the Commission, the 'penalty' for purposes of article 7.1 must be considered to be that of life imprisonment. Nevertheless it is true that as a result of the change in parole policy the applicant will not become eligible for release on parole until he has served 20 years' imprisonment. *Although this may give rise to the result that his imprisonment is effectively harsher than if he had been eligible for release on parole at an earlier stage, such matters relate to the execution of the sentence as opposed to the 'penalty' which remains that of life imprisonment. Accordingly, it cannot be said that the 'penalty' imposed is a heavier one than that imposed by the trial judge*." (Emphasis added)

86. A domestic authority which was subsequently considered in Strasbourg is *R (Uttley) v Secretary of State for the Home Department*. The facts in that case were that before 1983 the applicant committed the offences of rape and several other sexual offences. After he had committed the offences, but before his conviction in 1995, the Criminal Justice Act 1991 ("the 1991 Act") had for the first time imposed licence conditions on long term prisoners released after serving two-thirds of their sentence. In 1995, the applicant was sentenced to a long prison sentence. In October 2003, the Secretary of State determined that the applicant was eligible for release. The applicant sought judicial review by way of declarations that the imposition of licence conditions on his release under the provisions of the 1991 Act constituted a heavier penalty than a sentence allowing his release without such conditions, to which he would have been subject if he had been convicted before the 1991 Act took effect, and as such was a breach of his rights under article 7(1) of the ECHR. The judge held ([2003] EWHC 950 (Admin)) that the licence was not part of the sentence, that it was for the benefit of the applicant and the community as part of the process of rehabilitation and that it was merely the statutory consequences of the imposition of the penalty, and dismissed the application. The Court of Appeal reversed that decision and granted the declaration ([2003] EWCA Civ 1130; [2003] 1 WLR 2590). The Secretary of State's appeal to the House of Lords was allowed ([2004] UKHL 38; [2004] 1 WLR 2278). Lord Rodger of Earlsferry, at para 43 of his speech in the House of Lords, reasoned:

> "Here there was no change in the relevant penalties which the law permitted a court to impose. What changed between 1983 and 1995 were the arrangements that were to apply on the prisoner's early release from any sentence of imprisonment imposed by the court."

87. The case then went to Strasbourg as *Uttley v United Kingdom*. The ECtHR declared the application manifestly inadmissible. It held at page 7 that:

> "In the present case, the 'penalties' foreseen by law for the offences committed by the applicant were the various sentences of imprisonment imposed by the trial judge, and not challenged by the applicant on appeal."

The ECtHR also stated at page 8 that:

> "The 'measure' in the present case, the application of the rules on early release, was not a 'measure' in the sense understood by the Court in the case of *Welch*, and was not 'imposed' at all, but was part of the general regime applicable to prisoners. The nature and purpose of the 'measure', far from being punitive, were to permit early release, and they cannot be considered as inherently 'severe' in any ordinary meaning of the word.
>
> Although, as the Court of Appeal found in the present case, the licence conditions imposed on the applicant on his release after eight years can be considered as 'onerous' in the sense that they inevitably limited his freedom of action, they did not form part of the 'penalty' within the meaning of Article 7, but were part of the regime by which prisoners could be released before serving the full term of the sentence imposed.
>
> Accordingly, the application to the applicant of the post-1991 Act regime for early release was not part of the 'penalty' imposed on him, with the result that no comparison is necessary between the early release regime before 1983 and that after 1991. As the sole penalties applied were those imposed by the sentencing judge, no 'heavier' penalty was applied than the one applicable when the offences were committed."

88. *R (Uttley) v Secretary of State for the Home Department* and *Uttley v United Kingdom* support the distinction between measures constituting a penalty and those representing the execution or enforcement of a penalty.

89. Another domestic authority to the same effect is *R (Robinson) v Secretary of State for Justice* [2010] EWCA Civ 848; [2010] 1 WLR 2380, which involved a challenge under article 6 of the ECHR rather than under article 7 of the ECHR. However, Moses LJ made clear, at para 26, that the distinction between a penalty and the administration of the penalty applied "whether the right in issue is enshrined in article 5, in article 6 or in article 7". In that case, the Court of Appeal held that provisions relating to the early or conditional release related to the administration or execution of a determinate sentence. They were not part of the sentence. Moses LJ said, at para 22, that:

> "For the purposes of the issue in the instant appeal article 6 requires an answer to the question: what was the sentence passed by the court with which it is said the legislature has interfered? The answer under English jurisprudence is that it was a sentence of five years. *The legislative changes have not affected or increased the level of that sentence*." (Emphasis added).

90. Another Strasbourg authority to the same effect is *Kafkaris v Cyprus* in which the ECtHR considered whether the changes to the prison legislation had deprived prisoners serving life sentences, including the applicant, of the right to remissions of sentence in violation of article 7 of the ECHR. The ECtHR held, at para 152, that the changes related to the execution of the sentence as opposed to the penalty imposed on the applicant, which remained that of life imprisonment. It explained that although the changes in the prison legislation and in the conditions of release might have rendered the applicant's imprisonment harsher, these changes could not be construed as imposing a heavier "penalty" than that imposed by the trial court. It reiterated in this connection that issues relating to release policies, the manner of their implementation, and the reasoning behind them fell within the power of the contracting states to determine their own criminal policy. Accordingly, there had not been a violation of article 7 of the ECHR in that regard.

91. A further Strasbourg authority to the same effect is *Del Río Prada v Spain* though on the application of the relevant principles in that case the majority judgment concluded that a new precedent set by the Spanish Supreme Court, termed the Parot doctrine, constituted a redefinition of the scope of the penalty imposed on Ms Del Río Prada, rather than a measure going to the execution or enforcement of a penalty.

92. Ms Del Río Prada had been sentenced to a total of 3,000 years' imprisonment for offences linked to terrorist attacks, committed between 1982 and 1987 in eight different sets of criminal proceedings. On 30 November 2000, the Audiencia Nacional grouped the offences together and in accordance with the law at the time, the maximum term of imprisonment to be served for all sentences was fixed at 30 years. In February 2001, the date on which the applicant would fully discharge her sentence was set at 27 June 2017. In April 2008, a new release date was proposed for 2 July 2008, after taking into account remissions of sentence on the basis of work the applicant had done in detention. The applicant was granted ordinary and extraordinary remissions of sentence on six occasions between 1993 and 2004. In May 2008, the Audiencia Nacional rejected the proposed release date and requested a new date based upon the Parot doctrine, the new precedent set by the Supreme Court on 28 February 2006 which stated that sentence adjustments and remissions were not to be applied to the maximum term of imprisonment of 30 years but to each of the sentences imposed.

93. Ms Del Río Prada contended that the judgment of the Supreme Court had resulted in an increase to the term of her imprisonment by almost nine years and was in breach of the principle of non-retroactive application of criminal law provisions less favourable to the accused. In applying the principle that there should be no retroactive modification of the scope of a penalty, the majority judgment of the ECtHR stated at para 101 that "… days of remission of sentence already granted were deemed to have been served and formed part of the prisoner's legally acquired rights". The ECtHR set out, at para 26, the Spanish Prison Regulations and stated, at para 102, that "the Spanish legislature considered those rules to be part of substantive criminal law, that is to say of the provisions which affected the actual fixing of the sentence, not just its execution". In this way the ECtHR considered, at para 109, that:

> "… recourse … to the new approach to the application of remissions of sentence for work done in detention introduced by the 'Parot doctrine' cannot be regarded as a measure relating solely to the execution of the penalty imposed on the applicant …. This measure … also led to the redefinition of the scope of the 'penalty' imposed. As a result of the 'Parot doctrine', the maximum term of 30 years' imprisonment ceased to be an independent sentence to which remissions of sentence for work done in detention were applied, and instead became a 30-year sentence to which no such remissions would effectively be applied."

94. I consider that the decision of the ECtHR in *Del Río Prada v Spain* was specifically geared to the facts of the case, which were described in the joint partly dissenting

opinion of Judges Mahoney and Vehabovic, at OIII-10, as being “quite extraordinary”. In summary, under Spanish law the remission provisions had amended the sentence of the court and thereafter, the application of the Parot doctrine had retroactively increased that sentence. The significant point is that there was no erosion in principle of the well-established distinction between the penalty imposed and the means of its enforcement or execution.

95. That there was no erosion of principle was confirmed by the ECtHR in *Abedin v United Kingdom* (Application No 54026/16); (2021) 72 EHRR SE6. The ECtHR stated at para 36 that:

> “Nothing in the court's judgment in *Del Río Prada* called into question the central proposition outlined in *Uttley* that where the nature and purpose of a measure relate exclusively to a change in the regime for early release, this does not form part of the ‘penalty’ within the meaning of article 7.”

96. The central proposition outlined in *Uttley* was again confirmed by the ECtHR by its judgment dated 10 November 2022 in *Kupinskyy v Ukraine*. The ECtHR, at para 47 reiterated “that in its established case-law a distinction is drawn between a measure that constitutes in substance a ‘penalty’ and a measure that concerns the ‘execution’ or ‘enforcement’ of a ‘penalty’”.

97. It is therefore clear that there is an established domestic and ECtHR case law which draws a distinction between measures constituting a penalty and those representing the execution or enforcement of a penalty. Furthermore, I consider that changes to the manner of execution of a sentence reflect the principle that "… inherent in the whole of the Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights"; see *Soering v United Kingdom* (1989) 11 EHRR 439, 468, para 89. It would be surprising if article 7(1) of the ECHR prohibited the legislature from making changes in relation to the manner of execution or enforcement of a sentence when faced, as here, with what it considered to be compelling policy reasons supporting the change.

(d) Foreseeability of criminal law

98. The Grand Chamber of the ECtHR in *Del Río Prada v Spain* stated, at para 91, that:

> "When speaking of 'law' art.7 alludes to the very same concept as that to which the Convention refers elsewhere when using that term, a concept which comprises statutory law as well as case-law and implies qualitative requirements, notably those of accessibility and foreseeability. These qualitative requirements must be satisfied as regards both the definition of an offence and the penalty the offence carries."

The qualitative requirement in relation to article 7 of the ECHR is repeated in other ECtHR judgments including *Kafkaris v Cyprus* at para 140, *Achour v France* (Application No 67335/01) (2007) 45 EHRR 2 at para 42 and *Khodorkovskiy v Russia* (Application Nos 11082/06 and 13772/05) at para 779.

99. It is common ground in the present case that the determinate custodial sentences imposed by Colton J were penalties that met these qualitative requirements. Each of the determinate custodial sentences were penalties foreseen by law for the offences committed by the respondents and not challenged on appeal.

100. As the ECtHR has equally made clear, changes to the execution or enforcement of a penalty do not fall within the scope of article 7(1) of the ECHR and contracting states are free to determine their own criminal policy in respect of such changes. Where a measure relates to the execution or enforcement of a penalty, this measure does not fall within the concept of "law" in article 7(1) of the ECHR. As such, a measure relating to the execution or enforcement of a penalty is not subject to the qualitative requirements under article 7 of the ECHR including foreseeability.

101. An example of a quality of law issue arising in relation to the imposition of a penalty is to be found in *Kafkaris v Cyprus*. Mr Kafkaris, the applicant, was convicted and sentenced for the offence of premeditated murder which was punishable by mandatory life imprisonment under section 203(2) of the Criminal Code. The legal basis for the applicant's conviction and sentence was therefore the criminal law applicable at the material time and his sentence corresponded to that prescribed in the relevant provisions of the Criminal Code. The ECtHR rejected, at para 150, the submission that there had been a retrospective imposition of a heavier penalty. However, the case raised a quality of law issue in relation to the actual meaning of the term "life imprisonment" which was the penalty imposed on Mr Kafkaris. On the one

hand, Mr Kafkaris maintained that at the time he committed the offence of which he was convicted life imprisonment had been tantamount to imprisonment for a period of twenty years. On the other hand, the Government submitted that section 203(2) of the Criminal Code was, and remained, the only substantive provision of domestic law prescribing the penalty of a life sentence to be imposed by the courts for premeditated murder. The ECtHR determined that there was a breach of the quality of law requirement in article 7(1) of the ECHR because at the time Mr Kafkaris committed the offence of murder, the relevant Cypriot law taken as a whole was not formulated with sufficient precision as to enable him to discern, even with appropriate advice, to a degree that was reasonable in the circumstances, the scope of the penalty of life imprisonment. The quality of law issue arose in the context of the penalty to be imposed for the offence. It did not arise in relation to the manner of execution of the sentence.

102. As set out above, in *Del Río Prada v Spain*, the ECtHR found, at para 109, that the new precedent set by the Spanish Supreme Court constituted a redefinition of the scope of the penalty imposed on Ms Del Río Prada. Therefore, the question of foresight arose in the context of a change to the scope of the penalty imposed, rather than in the context of changes to the execution or enforcement of penalties. The ECtHR found, at para 110, that article 7(1) of the ECtHR applied and it went on to consider the foreseeability of the new precedent which constituted a redefinition of the scope of the penalty.

103. In considering the question of foresight in *Del Río Prada v Spain* the ECtHR recognised, at para 93, that foresight of a change in a penalty is to be assessed in the context that "the progressive development of the criminal law through judicial law-making is a well-entrenched and necessary part of legal tradition in the Convention States". Therefore, even if the new precedent set by the Supreme Court fell within the scope of article 7 of the ECHR, there would be no violation if the new precedent was "reasonably foreseeable for the applicant, that is to say, whether it could be considered to reflect a perceptible line of case-law development"; see para 112. In relation to foresight the ECtHR concluded at para 117 that:

> "… the Court considers that at the time when the applicant was convicted and at the time when she was notified of the decision to combine her sentences and set a maximum term of imprisonment, there was no indication of any perceptible line of case-law development in keeping with the Supreme Court's judgment of 28 February 2006. The applicant therefore had no reason to believe that the Supreme Court would depart from its previous case-law …".

104. Two propositions follow from the above:

(i) First, where a measure relates to the execution or enforcement of a penalty, it does not fall within the concept of "law" in article 7(1) of the ECHR and the requirement of foreseeability does not apply.

(ii) Second, wherever a measure relates to a change in the penalty imposed and as such falls within article 7(1) of the ECHR, any such change falls within the concept of "law" within article 7(1) of the ECHR and is subject to the qualitative requirements that follow, including foreseeability.

Application of these principles to the present case

105. The fundamental issue is whether the measures taken by the legislature in enacting section 30 of the 2021 Act, which inserted article 20A into the 2008 Order, redefined or modified the scope of the penalty imposed on the respondents by Colton J, or whether the measures changed the manner of execution or enforcement of the penalties which had been imposed.

106. In addressing that issue, it is appropriate to ask two questions. First, what were the penalties imposed on the respondents by Colton J? Second, did section 30 of the 2021 Act, which inserted article 20A into the 2008 Order, redefine or modify the scope of the penalty imposed on the respondents?

107. The answer to the first question, as a matter of domestic law and within the ECHR's autonomous concept of a penalty, is that the penalties were the determinate custodial sentences imposed on the respondents.

108. Under article 7 of the 2008 Order, Colton J imposed appropriate penalties on the respondents for the offences which they had committed. In doing so he was required to and did disregard the release provisions under articles 8 and 17 of the 2008 Order. After determining the appropriate penalties imposed on the respondents, Colton J turned to the separate and distinct task under article 8 of the 2008 Order which related to the manner of execution of those sentences. As a matter of domestic law and in accordance with ECtHR authorities, the provisions in article 8 of the 2008 Order were part of the regime by which prisoners could be released on licence before serving the full term of the sentence imposed.

109. It is correct that in Northern Ireland, under article 8 of the 2008 Order, there is judicial involvement in determining the date when prisoners are to be released on licence. Furthermore, it is correct that there is no judicial involvement in determining that date in England and Wales; see para 25 above. However, just because there is judicial involvement in a measure which relates to the execution or enforcement of a penalty does not change the measure to one in which a penalty is fixed. The predominant focus should remain on the activity rather than on the identity of the actor. In this way, in different contracting states, a measure representing the execution or enforcement of a penalty may be automatic or discretionary and it may be judicial in its operation. Indeed, as under article 8 of the 2008 Order, it may involve a mixture between the court and the legislature. The autonomous concept of a penalty does not change simply because there is judicial involvement under article 8 of the 2008 Order in determining the manner of execution or enforcement of a penalty.

110. At para 35 of its judgment the Court of Appeal recorded the respondents' submission that "the new provision retrospectively has increased the judicially-determined custodial period required to be served by the [respondents] … from a maximum of one half of the applicable sentence to two thirds of the applicable sentence". The Court of Appeal accepted the submission as to the significance of judicial involvement under article 8 of the 2008 Order in specifying the custodial period. At para 86 the Court of Appeal stated that "[in] Northern Ireland the judge is required to determine not just the length of the sentence imposed but also the apportionment as between the period which the prisoner will serve in custody and the period he will serve on licence". The Court of Appeal continued by stating, at para 92, that the changes brought about by the 2021 Act were "a serious erosion of the role and function of the trial judge". It is correct, as the Court of Appeal stated, that there was judicial involvement in determining the custodial periods, though I would add that the function being performed under article 8 is not the exclusive function of the court; see paras 21 and 22 above. I consider that the Court of Appeal was incorrect to place weight on any erosion of the role and function of the trial judge. As I have indicated, just because there is judicial involvement in a measure which relates to the execution or enforcement of a penalty does not have the consequence that the measure changes to one in which a penalty is fixed either as a matter of domestic law or within the ECHR autonomous concept of a penalty. While this factor was central to the Court of Appeal's reasoning, I consider that the Court of Appeal was incorrect to place any reliance on it in determining whether, by specifying the custodial periods, Colton J had imposed penalties on the respondents.

111. I also reject the submission made in the Court of Appeal on behalf of the respondents that "section 30 seeks to extend the custodial period beyond that which the Crown Court had formerly declared to be commensurate with the circumstances of the [respondents'] offending …". Under article 8 of the 2008 Order, Colton J made no

declaration that the custodial period was commensurate with the circumstances of the respondents' offending. Rather, the declaration that the penalty was commensurate with each respondent's offending came at the anterior stage when Colton J imposed determinate custodial sentences on the respondents under article 7 of the 2008 Order. Colton J's task under article 8 of the 2008 Order was to specify the custodial period. He was required to do so by a discretion to extend the licence period so that the prisoner is released on licence at an earlier point than the halfway point; see para 20 above. Under article 8(5) of the 2008 Order, the discretion to extend can only be exercised if the effect of the offender's supervision by a probation officer would protect the public from harm from the offender and prevent the commission by the offender of further offences; see para 22 above. Accordingly, the court under article 8(5) is not considering the appropriate penalty to impose on the offender. The penalty has already been imposed under article 7. Rather, the factors in article 8(5) relate to the risk posed by the offender to the public on release so as to lead to a determination that the manner of execution of the sentence of imprisonment can include a longer period of release on licence. Finally, in specifying the custodial period Colton J was subject to the limitation that the custodial period shall not exceed one half of the term of the sentence; see para 21 above.

112. By specifying the custodial periods under article 8 of the 2008 Order, Colton J did not alter the scope of the penalties imposed on the respondents. Rather, I consider that the determinate custodial sentences were the only penalties imposed on each of the respondents.

113. The answer to the second question is that section 30 of the 2021 Act, which inserted article 20A into the 2008 Order, did not redefine or modify the scope of the penalties imposed on the respondents, namely their determinate custodial sentences.

114. I have set out the nature and purpose of the measures contained in section 30 of the 2021 Act and article 20A of the 2008 Order. The purpose was to protect the public from terrorist prisoners by confining them for a longer period under their determinate custodial sentences and then only releasing them on licence after the Parole Commissioners directed their release being satisfied that it was no longer necessary for the protection of the public that they should be confined. The nature of the measures was to change the manner of execution of the determinate custodial sentences by restricting the eligibility for release on licence of terrorist prisoners. The nature and purpose of the changes brought about by section 30 of the 2021 Act and article 20A of the 2008 Order was not to lengthen the determinate custodial sentences imposed on the respondents. The length of those sentences was not increased in any sense.

115. The ECtHR in *Del Río Prada v Spain*, at para 82, stated that a factor that may be taken into account as to whether a particular measure amounts in substance to a penalty is the severity of the measure. However, the ECtHR entered the qualification at para 82 that "the severity of the order is not itself decisive, …, since many non-penal measures of a preventive nature may have a substantial impact on the person concerned". In this case, the Court of Appeal noted, at para 91(i), that the new provision had retrospectively increased the judicially determined custodial period. It is correct that the new provision increased the custodial period from a maximum of one half of the term of the applicable sentence to two-thirds of the applicable sentence. However, the degree of alteration is not decisive as to whether the section 30 of the 2021 Act and article 20A of the 2008 Order modified or adjusted the penalty imposed by Colton J. Rather, the nature and purpose of section 30 of the 2021 Act and article 20A of the 2008 Order remains the same; namely, to permit early release. As the nature and purpose of the measures is to permit early release then the measures cannot be regarded as inherently "severe"; see para 83 of *Del Río Prada v Spain*.

116. I consider that there has been no retroactive increase in the penalties imposed on the respondents by Colton J. Section 30 of the 2021 Act and article 20A of the 2008 Order concern exclusively the way in which the lawfully prescribed determinate custodial sentences imposed on the respondents are to be executed.

117. As section 30 of the 2021 Act and article 20A of the 2008 Order relate to the execution or enforcement of a penalty, they do not fall within the concept of "law" in article 7(1) of the ECHR and the requirement of foreseeability does not apply under that article.

Conclusion in relation to article 7 of the ECHR

118. There is no incompatibility between on the one hand section 30 of the 2021 Act and article 20A of the 2008 Order and on the other hand article 7(1) of the ECHR.

Alleged violation of article 5(1) of the ECHR

119. Article 5(1) of the ECHR in so far as relevant provides:

> "Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: (a)

> the lawful detention of a person after conviction by a competent court …."

120. The Grand Chamber of the ECtHR addressed the concept of the qualitative requirements of lawful detention under article 5(1) of the ECHR in its judgment in *Del Río Prada v Spain*. At para 125 it stated:

> "It is well established in the Court's case-law on art.5(1) that all deprivation of liberty must not only be based on one of the exceptions listed in subparas (a)–(f) but must also be 'lawful'. Where the 'lawfulness' of detention is in issue, including the question whether 'a procedure prescribed by law' has been followed, the Convention refers essentially to national law and lays down the obligation to conform to the substantive and procedural rules of national law. This primarily requires any arrest or detention to have a legal basis in domestic law but also relates to the quality of the law, requiring it to be compatible with the rule of law, a concept inherent in all the articles of the Convention. The 'quality of the law' implies that where a national law authorises deprivation of liberty it must be sufficiently accessible, precise and foreseeable in its application to avoid all risk of arbitrariness. The standard of 'lawfulness' set by the Convention requires that all law be sufficiently precise to allow the person—if need be, with appropriate advice—to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Where deprivation of liberty is concerned, it is essential that the domestic law define clearly the conditions for detention."

121. The qualitative requirements in respect of "law" in article 7 of the ECHR applies to (a) the offence with which the offender is charged and (b) the penalty imposed by the sentencing court for committing the offence. By contrast, the qualitative requirement in respect of "law" in article 5 applies to the resulting detention; see para 127 of *Del Río Prada v Spain*. Measures relating to the execution of a sentence can affect the right to liberty protected by article 5 of the ECHR.

122. Accordingly, the distinction between the penalty and execution of the penalty is not decisive in connection with article 5(1)(a); see para 127 of *Del Río Prada v Spain*. In other words, while a measure which affects the execution of a penalty is not subject to the qualitative requirements under article 7 of the ECHR, where the same measure

involves a detention or deprivation of liberty, the measure will be subject to the qualitive requirements of “law” under article 5 of the ECHR.

123. I consider that the change in the regime for the release on licence of the respondents met the qualitative requirements of “lawfulness” in article 5(1)(a) in respect of their detention. I come to that conclusion for several reasons.

124. First, the term of the sentences imposed on the respondents were calculated without account being taken of the early release provisions under articles 8 and 17 of the 2008 Order; see paras 14 and 53 above.

125. Second, the lawfulness of the respondents’ detention was decided for the duration of the whole sentence, by the determinate custodial sentences imposed by Colton J; see para 15 above.

126. Third, the fact that the respondents expected to be released on licence at the halfway point does not affect the analysis that the determinate custodial sentences provided legal authority for their detention throughout the terms of the sentences imposed by Colton J.

127. Fourth, it is entirely foreseeable, if necessary with appropriate legal advice, that during the currency of a determinate custodial sentence, which was calculated and imposed without account being taken of the possibility of early release, the arrangements for the manner of execution of the sentence might be changed by policy or legislation.

128. The foreseeability of the potential for changes to the execution of a sentence would be informed by:

> (a) The fact that such changes have been made in the past; see *Hogben v United Kingdom*, *Uttley v United Kingdom* and *Kafkaris v Cyprus*.
>
> (b) The principle that, "… inherent in the whole of the Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights"; see *Soering v United Kingdom*, para 89. Accordingly, it could be foreseen, with if necessary appropriate legal advice, that the legislature could make changes in relation to the manner of execution or

enforcement of a sentence when faced, as here, with compelling policy reasons supporting the change. It should be foreseen that the manner of execution of a sentence must be able to keep pace with changing circumstances.

129. The challenge to the lawfulness of the respondents' detention under article 5 of the ECHR must fail. The changes effected by section 30 of the 2021 Act and article 20A of the 2008 Order, insofar as they impact on the respondents' detention, are in accordance with article 5 of the ECHR.

Conclusion

130. I would allow the appeal brought by the Ministry of Justice and set aside the declaration made by the Court of Appeal.

131. I would dismiss the respondents' cross appeal.