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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

CRIMINAL APPEAL (NORTHERN IRELAND) ACT 1980

THE QUEEN

v

SEAMUS MORGAN, TERENCE MARKS, JOSEPH LYNCH AND KEVIN HEANEY

John Larkin QC and Mr Terence McCleave BL (instructed by McNamee McDonnell Solicitors) for Seamus Morgan and Terence Marks
Mr Barry MacDonald QC and Mr Joseph O'Keeffe BL (instructed by Phoenix Law Solicitors) for Joseph Lynch
Mr Ciaran Mallon QC and Ms Bobbie Rea BL (instructed by M L White Solicitors) for Kevin Heaney
Mr Ciaran Murphy QC, Mr Magee QC and Mr Russell BL (instructed by the Public Prosecution Service) for the Prosecution
Dr Tony McGleenan QC and Mr Philip McAteer BL (instructed by Crown Solicitor's Office) for the Notice Party, the Ministry of Justice

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Before: Treacy LJ, Maguire LJ and Horner J

MAGUIRE LJ (delivering the judgment of the court)

Introduction

[1] In these proceedings the court is sitting as a Court of Criminal Appeal to hear appeals against sentence on the part of four offenders[1] who were initially sentenced at a hearing before the trial judge, Colton J, on 13 November 2020.

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[1] **Originally there were six offenders before the Court but for reasons which do not need elucidation two have decided to stand back for the moment.**

[2] The period within which each and every one of the offenders could have appealed against the sentence imposed on him by the judge has long since expired. But in each case the offender now seeks an order from the court extending the time in which to appeal.

[3] If time is extended it appears to be common case that there is no need for the Court to grant leave to appeal as the offences at issue in these cases are all "scheduled" offences and in respect of such offences leave to appeal is not required: see, section 5(7)(b) of the Justice and Security (Northern Ireland) Act 2007.

The underlying position

[4] It is worthwhile to refer briefly to the underlying position in these cases. All of the offenders were tried together and charged with a variety of offences. All of the offences were terrorist offences with the events giving rise to the offences having occurred chiefly in or about 2014. While initially everyone pleaded "not guilty", on 19 January 2020, each of the offenders pleaded guilty. Thereafter, on 13 November 2020, Colton J handed down sentences in respect of each offender. It is convenient for the court to set out in tabular form the following information in respect of the sentencing exercise:

Offender	Offences	Sentence imposed by Colton J - 13/11/2020
Terence Marks	Belonging to or professing to belong to a proscribed organisation contrary to section 11(1) of the Terrorism Act 2000 – one count	4 years' imprisonment (50% custody, 50% licence)
	Receiving weapons, training or instruction contrary to section 54(2) of the Terrorism Act 2000	4 years' imprisonment (50% custody, 50% licence)
		Note the above sentences run concurrently.
Seamus Morgan	Belonging to or professing to belong to a proscribed organisation contrary to section 11(1) of the Terrorism Act 2000 – one count	3 years' imprisonment (50% custody, 50% licence)
Joseph Matthew Lynch	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 – one count	6 years and 6 months imprisonment (50% custody, 50% licence)

	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 – one count	6 years and 6 months imprisonment (50% custody, 50% licence)
	Preparation of terrorist acts, contrary to section 5(1) of the Terrorism Act 2006 – 5 counts	6 years and 6 months imprisonment (50% custody, 50% licence)
	Belonging to or professing to belong to a proscribed organisation contrary, to section 11(1) of the Terrorism Act 2000 – one count	5 years' imprisonment (50% custody, 50% licence)
	Receiving training or instruction in the making or use of weapons for terrorism, contrary to section 54(2) of the Terrorism Act 2000 – 2 counts	6 years and 6 months imprisonment (50% custody, 50% licence)
	Attending at a place used for terrorist training, contrary to section 8 of the Terrorism Act 2006 – 2 counts	6 years and 6 months imprisonment (50% custody, 50% licence)
		Note the above sentences run concurrently.
Kevin John Paul Heaney	Belonging to or professing to belong to a proscribed organisation contrary, to section 11(1) of the Terrorism Act 2000 – one count	3 years and 6 months imprisonment (50% custody, 50% licence)

[5] As has already been noted, none of offenders appealed against sentence and it is clear that interest in an appeal against sentence has been generated only in recent days.

The Appeals

[6] The precipitating factor in relation to the appeals which have now come forward has been the passage through Parliament in 2021 of the Counter Terrorism and Sentencing Act. This received Royal Assent on 29 April 2021. By virtue of section 50, section 30 entered into force the day after the Act was passed. Section 30 introduced Article 20A into the Criminal Justice (Northern Ireland) Order 2008 from 30 April 2021. It is this step which is at the core of events and will be discussed later on in this judgment.

[7] In fact, the 2021 Act owes its origin to the passage through Parliament of the Terrorist Offenders (Restriction of Early Release) Act 2020. It came about as a result of acts of terrorism which occurred in England at the hands of terrorist offenders who had been in prison in that jurisdiction but who had been released automatically at the half way point of their sentences. In the case of the first attack it had occurred at Fishmongers' Hall in London and involved the death of two civilians and injuries to several others. The second attack occurred in the Streatham area of London. It also involved a terrorist offender who had automatically been released at the half way point of his sentence. While no-one was fatally injured, a number of members of the public were stabbed. In both cases, the terrorist perpetrator had been shot dead by the police.

[8] There had already been a public outcry in respect of the events that had occurred in relation to the first incident, which centred on the need to protect the public from the risk which a terrorist who received early release represented, when the second incident occurred. This gave rise to a speedy reaction on the part of the Government which entailed, *inter alia*, the passage of legislation designed to require a terrorist offender to serve a greater portion of his prison sentence in prison without release and for a prisoner of this sort only to be able to secure release before the end of his sentence with the express approval of the parole authorities. Any prisoner, who previously was entitled to automatic release at the half way point in his sentence, in future would now have to serve two thirds of his sentence before he could be released. Even then, the release would have to be approved by the parole authorities. Importantly, these new arrangements, according to the new legislation, would apply to any convicted terrorist prisoner currently in prison hoping to access release on licence, irrespective of the fact that he would until then have had an expectation that he would have been treated under the previous regime.

[9] It will have been at some point in or about the passage of the 2020 Act that a decision was taken to apply the incoming regime to terrorist prisoners in Northern Ireland. This happened with the passage of the 2021 Act.

[10] In these proceedings, what has occurred is that since 30 April 2021 the new arrangements have *via* the 2021 Act and the Criminal Justice (Northern Ireland) Order 2008 been brought into force in Northern Ireland for terrorist prisoners to reflect the way such prisoners would be dealt with in England and Wales for such terrorist offending.

[11] As a result, there is no dispute but that the law applying to the applicants in this case now involves the specific provisions referred to in the 2021 Act. This means that, as the law stands, each of the offenders must now serve two thirds of his sentence in custody before he can be released and his release must be approved by the Parole Commissioners.

[12] In these circumstances the present applicants now seek to challenge the legality of the Government's actions. This involves the claim that the 2021 Act is in

breach of the Human Rights Act 1998 as it is contended that the new regime is repugnant to Article 7, Article 6 and Article 5 of the European Convention on Human Rights. In short, it is asserted that the legal basis of the new regime is incompatible with the Convention. Moreover, the applicants suggest that this court should, using its role as the senior criminal court in Northern Ireland, restore their position to the *status quo ante.*

The Legal Provisions

[13] While there is no dispute about the overall legal framework which is now in place, the court will nonetheless set out those provisions which are helpful in terms of the evolution of the law.

[14] In respect of the four offenders with which this judgment is concerned each of them was handed down by the trial Judge a determinate custodial sentence based on the legal requirements which at the time were to be found in the Criminal Justice (Northern Ireland) Order 2008, prior to its amendment by the 2021 Act.

[15] The key Articles concerned are as follows:

> "**Length of custodial sentences**
>
> 7.—(1) This Article applies where a court passes a sentence—
>
> (a) of imprisonment for a determinate term;
>
> (b) of detention in a young offenders centre;
>
> (c) of detention under Article 14(5); or
>
> (d) of detention under Article 45(2) of the Criminal Justice (Children) (Northern Ireland) Order 1998 (NI 9).
>
> (2) Subject to Article 14 and the statutory provisions mentioned in paragraph (3), 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) The statutory provisions referred to in paragraph (2) are—

(a) Article 70(2) of the Firearms (Northern Ireland) Order 2004 (NI 3);

(b) paragraph 2(4) or (5) of Schedule 2 to the Violent Crime Reduction Act 2006 (c. 38);

(c) section 7(2) of the Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015.

Length of custodial period

8.—(1) This Article applies where a court passes—

(a) a sentence of imprisonment for a determinate term, other than an extended custodial sentence, or

(b) a sentence of detention in a young offenders centre

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.

Duty to release certain fixed-term prisoners

17.—(1) As soon as a fixed-term prisoner, other than a prisoner serving an extended custodial sentence, 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) subject to sub-paragraph (b), the custodial period specified by the court under Article 8;

(b) in relation to a person serving two or more concurrent or consecutive sentences, the period determined under Article 32(2) or 33(2)."

[16] The terms of section 30 of the 2021 Act which introduced a new Article 20A into the 2008 Order are as follows:

"**30 Restricted eligibility for early release of terrorist prisoners: Northern Ireland**

(1) In the Criminal Justice (Northern Ireland) Order 2008 (S.I. 2008/1216 (N.I. 1)), after Article 20 insert—

"**Terrorist Prisoners U.K.**

20A Restricted eligibility for release on licence of terrorist prisoners

(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) In determining for the purpose of this Article whether a terrorist prisoner has served the relevant part of a sentence, no account shall be taken of any time during which the prisoner was unlawfully at large, unless the Department of Justice otherwise directs.

(8) If the terrorist prisoner is serving a serious terrorism sentence, an extended custodial sentence or an Article 15A terrorism sentence, the Department of Justice shall release the terrorist prisoner on licence under this Article as soon as the prisoner has served the appropriate custodial term unless the prisoner has previously been recalled under Article 28.

(9) For the purposes of this Article—

"appropriate custodial term", in relation to a serious terrorism sentence, an extended custodial sentence or an Article 15A terrorism sentence, means the term determined as such by the court under Article 13A, 14 or 15A;

"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) For the purposes of this Article, a reference of a terrorist prisoner's case to the Parole Commissioners under Article 18 that was disposed of—

(a) before the commencement date; and

> (b) at a time when the prisoner had served two-thirds of the appropriate custodial term,
>
> is to be treated as if it was made (and disposed of) under this Article."
>
> (2) The amendment made by subsection (1) does not affect any duty of the Department of Justice under Chapter 4 of Part 2 of the Criminal Justice (Northern Ireland) Order 2008 to release a person whose release has been directed by the Parole Commissioners before this section comes into force."

The impact of the change in the law

[17] The court will now set out in tabular form the impact of the change in the law upon the applicants. The name of the applicant is given in column 1. It is followed in column 2 with the date each of the applicants would have been released on licence in the normal course of events if there had been no change. Column 3 then provides the date of release on licence post the legislative change. Finally, Column 4 is a statement of the end-date of each's overall sentence.

Defendant	**Release on licence date**	**Release on licence date post the 2021 Act**	**Date of the end of the Determinate Custodial Sentence**
Marks	13 February 2022	13 October 2022	14 February 2024
Morgan	24 June 2021	25 December 2021	24 December 2022
Heaney	31 October 2021	31 May 2022	31 July 2023
Lynch	28 March 2023	28 April 2024	25 June 2026

[18] Thus, by way of example, it can be seen that Mr Morgan had been sentenced on 13 November 2020. His sentence involved a custodial element which, in his case was 2 years (half the overall sentence). At the end of service of that period, which was to have been on the 24 June 2021, he was due to be released on licence. However, before that date was reached, on 30 April 2021, the new legislation entered into force. The effect of this was that his release on licence date changed to the date when he will have served two thirds of his sentence. This date is the 25 December 2021. Subject to the approval of a Parole Commissioner, he may then be released on licence. To complete the picture, in his case, the end point of his sentence, which has not changed, is 24 December 2022.

The Role of the Sentencing Judge

[19] All four of the applicants in this case are serving determinate custodial sentences (DCSs). These sentences are commonplace within our legal system. The principal hallmark of a DCS is that it is a sentence for a fixed term. It comprises two elements, a period in custody and a period on licence. Once the whole of the sentence is completed the prisoner is then, at that pre-set fixed point, discharged administratively. The Judge has the task of determining the length of the custodial sentence which is a task reserved to him by Article 7 of the 2008 Order. As can be seen from the text of Article 7 above (at paragraph [15] above), the Judge goes through a process of passing the sentence as one of "imprisonment for a determinate term." Article 7(2) notes that, subject to some particular provisions, "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."

[20] Article 8 of the Order deals with the length of the custodial period. It applies where the court passes a sentence of imprisonment for a determinate term. At 8(2) it is recorded that "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 under Article 17." In respect of this period, sub-paragraph (3) goes on to say that "the custodial period shall not exceed half of the term of the sentence" and later at sub-paragraph (4) it adds that "the custodial period shall be the term of the sentence less the licence period" which later term (according to paragraph (5)) 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."

[21] It is to be noted that Article 8 in respect of the matters above is speaking to the court and what it must do.

[22] It is now necessary to refer to Article 17 which is headed "Duty to release certain fixed term prisoners." Paragraph 17(1) states:

> "17-(1) As soon as a fixed term prisoner, other than a prisoner serving an extended custodial sentence, 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) Subject to sub–paragraph (b), the custodial period specified by the court under Article 8;

> (b) In relation to a person serving two or more concurrent or consecutive sentences, the period determined under Article 32(2) or 33(2)."

[23] The upshot of the above appears to be as below:

(i) It is the judge who determines when sentencing what is the custodial period.

(ii) The timing of the beginning of the licence is derived from this.

(iii) The custodial period cannot exceed one half of the term of the sentence.

(iv) But it can be less that the half way term of the sentence.

(v) The judge determines where the line is to be drawn by virtue of his control over the length of the custodial period.

(vi) It is the end of the custodial period which once set by the judge heralds the mechanism for release.

(vii) The licence period is the period which the judge thinks appropriate taking account of the offender's supervision.

[24] Thus, it is the judge who determines both the sentence as a whole and the split between custody and licence and, in particular, when release on licence occurs.

[25] The judge, having heard argument about how he should sentence, announces publicly the overall sentence and split between the custodial period and release on licence. Once this is pronounced the Department is obliged at the point of split to arrange for release on licence, as required by Article 17(1).

[26] In respect of each of the applicants Colton J explained in his sentencing remarks in each case how he carried out his function. The method used was essentially the same in each case.

[27] The case of Morgan can be used as an example. The key paragraphs were as follows:

> "[171] Having regard to the nature of the conviction in this case clearly the threshold for custody is met.
>
> [172] In determining the appropriate sentence I consider that the appropriate starting point before mitigation having regard to the degree of culpability of

the defendant and the aggravating feature of his record is one of four and a half years' imprisonment.

[173] I propose to reduce this figure to three years and nine months to reflect the restrictions on the applicant's liberty whilst on bail and the impact of the Covid-19 restrictions in the prison environment.

[174] The defendant is entitled to a reduction for his plea of guilty, entered on 23 January 2020, shortly before the commencement of the trial. This was not an early plea and in the circumstances he is not entitled to what might be described as the maximum discount. Nonetheless, the plea of guilty was of particular assistance to the court in that it removed the necessity for a lengthy trial with a panoply of witnesses. The acknowledgement of guilt is something which is to be welcomed and to be encouraged and reflected in a reduction in the defendant's sentence.

[175] I propose to reduce the sentence to one of three years in custody. I do not consider that there are exceptional circumstances which would justify suspending this sentence or reducing it further to avoid the necessity of the defendant being returned to custody. I have taken into account all relevant mitigating factors in coming to a final disposition.

[176] The defendant will therefore be sentenced to a term of imprisonment of three years in respect of count 4.

[177] Under Article 8 of the 2008 Order I must specify a custodial period which the defendant must serve which cannot exceed one half of the term. Having considered the appropriate licence period I have determined that the appropriate order in this case to be that the custodial term shall be the maximum permitted namely 18 months in custody with a period of 18 months on licence."

The Sentencing Judge's Role in England and Wales

[28] In the course of the hearing counsel for the Ministry of Justice offered some comment on the England and Wales equivalent of the DCS in Northern Ireland, with reference to the role of the judge.

[29] The court was informed that the sentencing regimes were "the same for practical purposes" but that it was accepted that the Judge in England and Wales,

while setting the overall sentence, was not involved in setting the term of release on licence. This, the court was informed, was a function dealt with by other means. Until the passage of the Terrorist Offenders (Restriction of Early Release) Act 2000, the terrorist offender had the benefit of early release once he had served half his sentence but the new legislation has altered this in the same way as in Northern Ireland: see section 247A of the Criminal Justice Act 2003.

The issues before the Court

Article 7

[30] It appears clear that the central issue before the court in these proceedings is that of the alleged repugnancy of the new regime with Article 7 of the ECHR.

[31] Article 7.1 reads as follows:

> "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 Court's emphasis]

[32] It is the italicised sentence which is at the centre of this appeal.

The Applicants' Case

[33] The applicants acknowledge that the case being pursued in these proceedings is unusual because it is borne out of events which have occurred long after the sentencing process has been completed. What is at issue, they say, is the retrospective legislative increase in their custodial terms which occurred out of the blue and which has had the consequence of breaching multiple human rights. In effect, what has been put in place is a new penalty replacing what had been the sentencing decision of the Judge. The landscape has been decisively changed.

[34] Another way of looking at this is that the scope of the sentence, long after it was imposed, has been enlarged in ways which constitute a heavy intrusion into the *status quo ante.*

[35] Moreover, the intervention of Article 20A of the new legislation, it has been submitted, has had two principal effects. First, the new provision retrospectively has increased the judicially-determined custodial period required to be served by the applicants and other fixed term prisoners convicted of specified terrorist offences from a maximum of one half of the applicable sentence to two thirds of the applicable sentence. Second, even after completion of the two thirds period those

subject to the new regime have to have their cases considered and ruled upon by the Parole Commissioners.

[36] In respect of Article 7 the applicants have made the following detailed submissions:

> "56. The law governing the imposition of the penalty in the appellants' respective cases was found in the provisions of the 2008 Order. Articles 8 and 16 of the 2008 Order provided for the constitutive elements of the sentence to be determined by the trial judge. Thus, pursuant to Article 8(3), the sentencing judge was required to expressly declare the exact custodial period that the appellants would be required to serve before they would be released on licence pursuant to Article 17. By virtue of the same provision, and at the time the appellants were sentenced, the custodial period could be no longer than one half of the overall sentence.
>
> 57. The provisions of the 2008 Order therefore clearly and unambiguously defined both the scope and the nature of the penalty to be imposed in respect of the appellants. In accordance with those provisions, the trial Judge, in the sentence imposed on each of the appellants, gave expression to the penalty structured by the 2008 Order in the circumstances of the appellants respective cases. To that end, both the sentencing remarks of the trial judge and the concomitant Order of the Crown Court, expressly declared that the appellants were to serve a specified custodial period before they would be released on licence.
>
> 58. The provisions of the 2021 Act seek to alter the substance of the penalty that was formally pronounced by the Crown Court on 13 November 2020. Thus section 30 seeks to extend the custodial period beyond that which the Crown Court had formally declared to be commensurate with the circumstances of the appellants' offending in accordance with the statutory scheme as it applied at that time. In extending the period in custody, section 30 does not reflect, nor can it be reconciled with, the penalties imposed by the sentencing Court when giving effect to the provisions of the 2008 Order as they applied at the time of sentencing.

> 59. Section 30 cannot therefore be viewed as the administration or execution of the penalty previous imposed by the Crown Court. Conversely the effect of section 30 represents a modification and/or redefinition of the penalty imposed and *pro tanto* offends the prohibition of retroactive application of penalties contained within Article 7 ECHR (Del Rio Prada). Section 30 therefore represents a violation of the protections afforded to the appellants by Article 7 ECHR."

[37] It will be noted that the major case, in respect of which, the applicants sought to rely on this aspect of the matter is that referred to in the last paragraph, that of *Del Rio Prada v Spain* 58 EHRR 37 ("*Del Rio Prada*"), which will be discussed below.

The Ministry of Justice's Case

[38] The substantive defence of this case has been mounted by the Ministry of Justice of England and Wales. It appears to have been involved extensively in the preparation of the 2020 Act in England and Wales and later, in respect of defending that legislation following it being challenged in that jurisdiction.

[39] The Ministry's main submissions in the case overall can be summarised in four main points taken from its skeleton argument:

(i) The sentencing judge sentenced each appellant to a three year determinate custodial sentence[2]. The sentence has not changed. The question of what period within that overall DCS requires to be served must now be calculated having regard to Article 20A of the 2008 Order as inserted by section 30 of the 2021 Act.

(ii) The plain effect of Article 20A in each case is that they are required to serve at least two thirds of their DCS in prison and their ongoing detention at this time is therefore lawful.

(iii) There has been no breach of the appellants' Article 5, 6 or 7 rights.

(iv) The question of relief therefore does not arise and the appeals, insofar as they depend on establishing the alleged incompatibility should be dismissed.

[40] Specifically, in relation to the Article 7 challenge, the following main points can be extracted from the Ministry's skeleton argument:

> "27. The fundamental issue to be determined when considering whether the provisions breach Articles 5, 6, and 7 is whether the new sentencing regime amounts to

[2] This sentence contains an error as is evidenced in the box found at paragraph [4] above.

an increase to the penalty imposed as contended for by the Appellants. The term of the custodial sentence imposed has not increased, early release provisions forming part of the administration of the sentence, and the penalty has therefore not increased.

28. The sentencing Judge sentenced the Appellants to DCSs. Article 20A is only concerned with provision as to release. Its application did not change the DCSs which the Court imposed but rather only changed each Appellant's early release date within the overall sentence envelop (which remained the same). The DCS itself was not increased. Only the early release date was changed.

29. The length of the custodial sentence and the length of the custodial period are two different things and should not be confused. Each Appellant has always been and remains subject to a custodial sentence of the full DCS imposed.

30. Two general considerations support the position that this change was not one which extended or changed the custodial sentence imposed under Article 7 of the 2008 Order itself that being the penalty imposed.

31. First, early release, remission and licence are irrelevant considerations when sentencing and therefore changes that only affect the early release provisions and licence cannot be changes to the sentence.

32. Secondly, it is the whole of the determinate sentence of imprisonment which constitutes the penalty imposed by the court for the commission of an offence. It is for this reason that no breach of Article 5 can arise at any time during the currency of the DCS, whether during the custodial period or the licence period. Recall and revocation provisions (Article 28 of the 2008 Order) which allow for a DCS (or ECS) prisoner to be recalled to custody during the licence period do not infringe article 5 or article 7 ECHR because the additional period of custody falls within the overall sentence envelope.

33. The sentences imposed are unchanged notwithstanding that the legislature has altered the conditions relating to release on licence. The penalty imposed remains the DCS sentence handed down in

> court. Any change to the apportionment of the custodial and licence periods within that determinate sentence does not change the penalty imposed.
>
> 34. The amendment to the regime made by the addition of Article 20A involves changes to the administration of that penalty, and in particular to the early release arrangements. As well as the general principles as set out above, domestic and ECtHR case-law supports the analysis that changes of this nature do not infringe Article 7."

[41] In support of these arguments, the Ministry cited a battery of authorities, some of which will have to be considered later.

Relevant Case Law

[42] While a substantial volume of case law, both from the ECtHR and domestically, has been opened to the court, it is proposed to deal with this in an economical way. There has been one main authority highlighted in the submissions of each side, albeit different ones. But even though the authorities favoured by each side are different, the reality is that there is a high level of commonality as to the overall legal test to be applied as between these authorities with the bulk of the difference between them arising out of the facts of the cases.

Del Rio Prada

[43] In relation to the applicants, the chief authority relied on is the decision of the European Court of Human Rights in *Del Rio Prada v Spain* [2014] 58 EHRR 37. This case has a somewhat involved factual background but it is underpinned by what might be viewed as well-established authority.

[44] As to the facts, the case concerned an application by a prisoner who committed a range of terrorist attacks between 1982 and 1987 which resulted in 8 different sets of criminal proceedings. In 2000 the relevant Spanish Court grouped the various cases together based on legal and chronological links. Applying different sources of Spanish law which had been in force at the time when the offences were committed, it was decided the maximum term of imprisonment for all sentences was fixed at 30 years.

[45] Later in February 2001, it was determined that the applicant would fully discharge her sentences on 27 June 2017.

[46] The next event to occur was that in April 2008 a proposal was made that the applicant should be released on 2 July 2008, taking into account remissions of sentence on the basis of work she had done in detention. It appears that the

applicant had been granted ordinary and extraordinary remissions of sentence on six occasions between 1993 and 2004.

[47] In May 2008 the Spanish court rejected the proposal referred to in the last paragraph and requested that a new date based on a new precedent set by the Supreme Court on 26 February 2006 ("the Parot Doctrine") 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. This new approach applied only to those dealt with in accordance with Article 70.2 of the 1973 Code.

[48] The applicant appealed against the decision of the court on the basis that the judgment of the Supreme Court had resulted in an increase to the term of 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. This appeal was rejected on the basis that the criminal law applied had been in force at the time of its application and had not breached the principle of non-retroactive application.

[49] Having exhausted domestic remedies the applicant took the case to the ECtHR where a central issue was whether these circumstances gave rise to a breach of Article 7. While there were other aspects of the Convention involved as well, it is not necessary to dwell on these.

[50] Ultimately, the case was heard in the Grand Chamber and it was decided:

- That there had been a violation of Article 7; and
- That there had been a breach of Article 5.

[51] In the headnote of the report, the following was stated by way of a summary of the complex key elements in the outcome:

> "**1. The imposition of a heavier sentence (art.7)**
>
> (a) When the applicant had committed the offences, art 70.2 of the Criminal Code of 1973 referred to a maximum term of 30 years' imprisonment to be served in relation to multiple sentences and distinguished between "time to be served" and the individual sentences. Article 100 of the Code provided for remission of sentence, but did not state how the remissions should be applied to multiple sentences under art. 70.2 where the maximum total sentence was fixed. The case-law and practice of the domestic courts regarding the interpretation of these provisions was to take into

account the maximum legal term of 30 years' imprisonment when applying remissions of sentence for work done in detention. This approach was clarified by the Supreme Court in 1994 and adopted when comparing sentences to be served under the Criminal Code of 1995 (the 1995 Code) and the previous code in order to determine which was more lenient. Although the ambiguity of the relevant provisions of the Criminal Code of 1973 was not clarified until 1994, the practice of the Spanish prison and judicial authorities was clear. [96]–[99]

(b) Following the decision on 30 November 2000 the applicant had an expectation that she would serve a 30-year maximum term, from which any remissions for work done in detention would be deducted. The *Audiencia Nacional* had taken into account the maximum term of imprisonment provided for under the 1973 Code combined with remissions of sentence in determining which Criminal Code was the more favourable to the applicant in its last judgment convicting her. It was not decisive that the applicant had not challenged the decision that her sentence would be discharged on 27 June 2017, as the decision had not taken into account the remissions of sentence already earned. The 1973 Code expressly provided for remissions of sentence for work done in detention, which could reduce the term to be served by up to a third of the total sentence, and were not subject to the discretion of the judge responsible for the execution of sentences, but operated automatically. In this regard the present case was distinguished from *Kafkaris*. The transitional provisions of the Criminal Code of 1995 authorised prisoners convicted under the 1973 Code to continue to benefit from remissions for work done in detention if it was to their advantage. By inference the Spanish legislature considered the rules to be part of the provisions which affected the actual fixing of the sentence and not just its execution. The relevant Spanish law in force at the material time was sufficiently precise to enable the applicant to foresee the scope of the penalty imposed on her. [100]–[103]

(c) The judgment of the Supreme Court in February 2006 took place years after the offences had been committed, the sentences combined and the maximum term fixed and departed from its earlier interpretation in 1994. The application of the Parot Doctrine meant that the remissions of sentence to which the applicant was entitled had no effect on the length of her imprisonment. The application of the Parot Doctrine was not a measure relating solely to the execution of the penalty imposed on the applicant but constituted a redefinition of the scope of the "penalty" imposed and fell within the scope of art.7(1). [104]–[110]

(d) The change in the system resulted from the Supreme Court's departure from previous case-law as opposed to a change in legislation. An agreement adopted by the Supreme Court in July 1996 required the Spanish courts to take into account remissions of sentence granted under the Criminal Code of 1973 when comparing sentences to be served under the new and old criminal codes to determine which was more lenient. It was accepted practice for the prison and judicial authorities to apply remissions of sentence for work done in detention to the maximum term of 30 years' imprisonment prior to the Parot Doctrine. In departing from this practice 10 years after the 1973 Code had been repealed, the Supreme Court gave a new interpretation of a law that was no longer in force and rendered ineffective the transitional provisions of the 1995 Code which were designed to comply with the rules prohibiting retroactive application of the more stringent criminal law. The departure from case-law in the present case was distinguished from the judicial interpretations in *SW v United Kingdom; CR v United Kingdom (1996) 21 E.H.R.R. 363* and did not amount to an interpretation of criminal law pursuing a perceptible line of case-law development. [112] – [115]

(e) The criminal-policy considerations relied on by the Supreme Court did not justify such a departure from case-law. Although the Supreme Court did

not retroactively apply Law No.7/2003 amending the Code of 1995, its aim was to guarantee the same outcome. At the material time there was no perceptible line of case-law development in keeping with the Supreme Court's judgment of February 2006. The applicant could not have foreseen the resulting consequences of the judgment in modifying the scope of the penalty imposed to her detriment. There had been a violation of art.7. [116]–[118]

2. **The applicant's detention post 3 July 2008 (art.5(1))**

(a) The distinction between the "penalty" and its "execution" was not decisive for the purposes of art 5(1)(a). The applicant was convicted by a competent court in accordance with a procedure prescribed by law and she did not dispute that her initial detention was lawful. The applicant's detention had not reached the maximum term of 30 years and there was a clear causal link between the applicant's convictions and her continuing detention after 2 July 2008. Following the factors which led to a breach of art 7, the applicant could not have foreseen that the change in the method used to apply remissions of sentence for work done in detention would have resulted in the delay of her release by almost nine years. She had served a longer sentence than under the legislation in force at the time of her conviction. Her detention since 3 July 2008 was not lawful and was in breach of art 5(1). [127]-[132]

[52] The most helpful part of the court's judgment for the purpose of these proceedings is found under the heading "the Court's Assessment." The following quotation expresses in substance the court's view of the key principles. The court at paragraph 78 and 79 offered the following general perspective:

> "78. The guarantee enshrined in Article 7, which is an essential element of the rule of law, occupies a prominent place in the Convention system of protection, as is underlined by the fact that no derogation from it is permissible under Article 15 even in time of war or other public emergency threatening the life of the nation. It should be construed and applied, as follows from its

object and purpose, in such a way as to provide effective safeguards against arbitrary prosecution, conviction and punishment.

79. Article 7 of the Convention is not confined to prohibiting the retrospective application of the criminal law to an accused's disadvantage. It also embodies more generally the principle that only the law can define a crime and prescribe a penalty. While it prohibits in particular extending the scope of existing offences to acts which previously were not criminal offences, it also lays down the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy."

[53] Later at paragraph [83] the court makes an important general statement:

"[83] 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 the regime for early release, this does not form part of the 'penalty' within the meaning of Article 7. In the *Uttley* case, for example, the court found that the changes made to the rules on early release after the applicant's conviction had not been `imposed' on him but were part of a general regime applicable to prisoners, and far from punitive, the nature and purpose of the 'measure' were to permit early release so they could not be regarded as inherently 'severe.' The court accordingly found that the application to the applicant of the new regime for early release was not part of the 'penalty' imposed on him."

[54] In an adjacent footnote to the above the court refers to a number of authorities in support of what it had said. These included such cases as *Hogben* 3 March 1986; *Grava* 10 July 2003 at [51]; *Uttley (36949/03)* 29 November 2005; and *Kafkaris* [2009] 49 EHRR 35 at [142]. These are all authorities which were referred to by the Ministry of Justice's counsel in these proceedings.

[55] In particular the case of *Kafkaris* was referred to directly by the court at paragraph 84. In that case changes had been made to prison legislation which had deprived prisoners serving life sentences – including the applicant – of the right to remissions of sentence. However, the court considered that 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. The court explained that although the changes in the prison legislation and in the conditions of release might have rendered the applicant's imprisonment harsher, those changes could not be construed as a heavier "penalty" than that imposed by the trial judge. 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 State Parties to the Convention to determine their own criminal policy. The court went on: "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." In that case the court considered that "the distinction between the scope of a life sentence and the manner of its execution was…not immediately apparent."

[56] Additionally, at paragraphs 86 and 87, the court also made reference to two cases in which the steps taken fell on the 'breach' side of the line. One was that case of *Gurguchiani*[3] and the second was *M v Germany*.[4] As regards the former, the Court considered that the replacement of a prison sentence while it was being served by expulsion combined with a 10 year ban on entering the country amounted to a penalty just like the one imposed when the applicant was convicted. As regards the latter, the court considered that the extension of the applicant's preventive detention by the courts responsible for the execution of sentences by virtue of a law enacted after the applicant had committed his offence, amounted to an additional sentence imposed on him retrospectively.

[57] In the light of the above review of the authorities, the court at paragraph 89 went on to say that it did not rule out "the possibility that 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 result in the redefinition or modification of the scope of the "penalty" imposed by the trial court." Moreover: "When that happens, the Court considers that the measures concerned should fall within the scope of the prohibition of the retroactive application of penalties enshrined in article 7(1) *in fine* of the Convention. Otherwise, states would be free – by amending the law or reinterpreting the established regulations, for example - to adopt measures which retroactively redefined the scope of the penalty imposed, to the convicted person's detriment, when the latter could not have imagined such a development at the time when the offence or the sentence was imposed. In such conditions art 7(1) would be deprived of any useful effect for convicted persons, the scope of whose sentences was changed ex post facto to their disadvantage."

[58] At paragraph 90, the court made a further observation which will need to be borne in mind. It said that in order to determine whether a measure taken during the execution of a sentence concerns only the manner of execution of the sentence or, on the contrary, affects its scope, the Court must examine in each case what the

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[3] **15 December 2009 at para [31].**
[4] **(2010) 51 EHRR 44 at [121].**

"penalty" imposed actually entailed under the domestic law in force at the material time, or in other words, what its intrinsic nature was.

[59] Later, at paragraph 94, the court moved on to deal with the application of the principles it had set out to the facts of the case. This led to the outcome whereby the court found that there had been a violation of Article 7 of the Convention.

[60] In short form, the Grand Chamber appeared to have maintained the distinction between a penalty and the manner of its execution, but to have held on the facts that there had been a judicial re-interpretation of the penalty so that Article 7 applied. While the initial sentence in respect of the applicant for multiple terrorist offences totalled over 3,000 years imprisonment, the trial court had ruled that the applicant should only serve 30 years, being the maximum period that the Criminal Code allowed for a person convicted of linked offences. However, under the Code remission from part of the 30 year term was possible for work done.

[61] The problem which emerged was that following the applicant's imprisonment the relevant Code was judicially interpreted so that remission was viewed as unavailable. This meant that the full 30 years had to be served with the result that the applicant lost in the region of 9 years release.

[62] The Grand Chamber, in the end, held that the outcome of the re-interpretation was that a new penalty, not a change in the execution of the original sentence, had emerged. Hence the court distinguished cases such as *Kafkaris*.

Khan

[63] In relation to the Ministry of Justice, the chief authority relied on before this court is the decision of the Divisional Court in England in the case of *R (Khan) v Secretary of State for Justice* [2020] 1 WLR 3932. This case has close parallels to the case of the applicants. *Khan* involved a challenge by a terrorist prisoner in England to the introduction of the regime introduced by virtue of the Terrorist Offenders (Restriction of Early Release) Act 2020, which has been discussed above.

[64] The background to the introduction of the new regime in England has been touched on above at paragraphs [7] and [8]. In essence, the claimant was a terrorist prisoner who was in the course of serving a determinate sentence of 4 years and 6 months for offences of encouraging terrorism. After receiving the sentence, the prisoner – Mr Khan – would have expected to have been released on licence automatically at the half-way point of the sentence, were it not for the passage of the 2020 Act which inserted into the Criminal Justice Act 2003 a new section 247A. Similarly to the changes of regime the following year in Northern Ireland, the effect of the changes made in *Khan's* case were that:

(a) Mr Khan would have to serve two-thirds of his sentence before he could be eligible for release; and

(b) Before he could actually gain release his case would have had to go to the Parole Board, which would decide whether it was satisfied that it was no longer necessary for the protection of the public that he should remain in custody.

[65] Not unlike this case, Mr Khan sought a declaration in proceedings for judicial review to the effect that the new provisions in England were incompatible with Articles 5, 7 and 14 of the ECHR.

[66] The outcome of the proceedings was negative from the claimant's point of view, the court deciding as follows, as expressed in the headnote of the law report:

> "[1] That, for the purposes of Article 14 of the Convention there was a distinction between different treatment for different groups of people, which might amount to discrimination on grounds of "other status", and different treatment for different types of offence based on the legislature's view of their gravity, which did not; that what mattered for the purposes of that distinction was the objective basis for the difference in treatment rather than the motivation of the legislature in enacting the allegedly discriminatory legislation; that the objective basis for the difference between "terrorist prisoners" within section 247A of the Criminal Justice Act 2003 and other prisoners serving determinate sentence or sentences of life imprisonment was the nature and gravity of the offence, rather than the type of sentence that had been imposed; and that, accordingly, "terrorist prisoners" within section 247A did not have an "other status" on which a claim under Article 14 could be based.
>
> [2] That, for the purpose of Article 7 of the Convention, a change to the administration of a penalty, by an alteration to the relevant early release provisions or the like did not amount to the imposition of a heavier penalty than the one applicable at the time the criminal offence was committed; that the changes introduced by the insertion of section 247A of the 2003 Act were changes in the arrangements for early release rather than changes to the sentence imposed by the sentencing judge; and that, accordingly, section 247A did not amount to the imposition of a heavier penalty on terrorist prisoners so as to give rise to a breach of Article 7.

> [3] That, in order to comply with the requirement under Article 5 of the Convention that any deprivation of liberty be "lawful", it was essential to allow the person, if need be with appropriate advice, to foresee, to a degree that was reasonable in the circumstances, the consequences which a given act might entail; that, however, it was well-established that for the purpose of Article 5 a sentence of imprisonment provided legal authority for the prisoner's detention throughout the term of the sentence, notwithstanding that the prisoner might expect to be released on licence before the end of the sentence; that, therefore, it was entirely foreseeable, if necessary with appropriate legal advice, that during the currency of the determinate sentence, which was calculated and imposed without account being taken of the possibility of early release, the arrangements for the execution of the sentence might be changed by policy or legislation; and that, accordingly, the lawfulness of sentences being served by terrorist prisoners was not undermined or compromised by the changes to the early release provisions effected by the insertion of section 247A of the 2003 Act."

[67] For present purposes, the court will concentrate on the Article 7 ground of challenge which is discussed between paragraphs 84 and 105 in the judgment of Garnham J.

[68] As the judge puts it at the outset of his judgment:

> "The fundamental question is, what is the "penalty?" Is it the sentence imposed by the sentencing court or is it the sentence ameliorated by whatever provisions are then in force for early release?"

[69] Much of the discussion then proceeds against the background that counsel for the claimant based his argument in favour of a breach of Article 7 on the decision of the Grand Chamber of the ECtHR in *Del Rio Prada*. Thus, at paragraph 94, counsel submitted that the decision in *Del Rio Prada* amounted to "an authoritative re-statement of principle." The ECtHR, counsel argued, emphasised that the key question in determining whether there had been a breach of Article 7 when a prisoner complained about changes in a release scheme was whether the change was foreseeable at the time of the sentence.

[70] In response, counsel for the Ministry of Justice, on the other hand, submitted that reliance on *Del Rio Prada* was misplaced given the analysis of the relevant principles in a series of cases culminating in the ECtHR decision in *Atelin v United*

Kingdom. In particular, it was submitted that ECtHR case law "had long distinguished between measures constituting a penalty and those representing the execution or enforcement of a penalty." In accordance with this approach, counsel for the respondent submitted that the 2020 Act did not change the penalty imposed on the prisoner. As counsel put it "the length of a prisoner's sentence, imposed by the court, is not increased in any sense."

[71] At paragraph [96] the court indicated that it was its view that prior to *Del Rio Prada* "it was well-established in domestic and Strasbourg jurisprudence that a change to the administration of a penalty, by an alteration to the early release provisions or the like, will not engage Article 7."

[72] Consequent upon this assertion, the court then referred to a range of authorities, nearly all of which were referred to by counsel for the Ministry of Justice in the present case.

[73] The first of these was the case of *Hogben v United Kingdom* [1986] DR 231 which was described in the following way by Garnham J:

> "In this case, as a result 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 former 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 the purpose 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 in prison. Although this may give rise to the result that his imprisonment is effectively harsher than if he had been eligible for licence on parole at that earlier stage, such matters relate 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.'"

[74] Next the court referred to the case of *Uttley*. Initially it was dealt with domestically in the United Kingdom: see *R(Uttley) v Secretary of State for the Home Department* [2004] 1 WLR 2278. But later the case was taken to the Strasbourg court.

[75] At the domestic level Lord Rodger of Earlsferry held as follows:

> "38. … For the purposes of article 7(1) the proper comparison is between the penalties which the court imposed for the offences in 1995 and the penalties which the legislature prescribed for those offences when they were committed around 1983. As I have explained, the cumulative penalty of 12 years' imprisonment that the court imposed for all the offences in 1995 was not heavier than the maximum sentence which the law would have permitted it to pass for the same offences at the time they were committed in 1983. There is accordingly no breach of article 7(1).
>
> 43. 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. In particular, since 1992 a prisoner such as the respondent has remained subject to his sentence for its entire duration of 12 years, whereas before 1992 an equivalent sentence would have expired when he was released after serving 8 years. The respondent says that, for this reason, the sentence of 12 years imposed on him in 1995 was "heavier" than a sentence of 12 years imposed at the time of the offences in 1983. Leaving aside all the other possible objections, this argument simply involves a misinterpretation of article 7(1). Of course, if legislation passed after the offences were to say, for instance, that a sentence of imprisonment was to become a sentence of imprisonment with hard labour, then issues would arise as to whether the article was engaged, even where the maximum sentence had been life imprisonment at the time of the offences. But in this case there is no suggestion that the actual conditions of the respondent's imprisonment changed. The very worst that could have

> happened to him under the 1991 Act was that he would have required to serve the whole of his 12 year sentence in gaol. Happily for him, that has not in fact happened. But, even if it had, he would still have spent only 12 years in prison - which is well within the limits of the penalty that was allowed by law for the three rapes and many other offences at the time when he committed them. There is no violation of article 7(1)."

[76] When the *Uttley* case reached Strasbourg the court referred to *Hogben* and ruled that the application in the case before them was manifestly inadmissible. It was held that for the purpose of Article 7 the penalty was, and was only, the sentence passed by the court. The court concluded:

> "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 limit his freedom of action, they do 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."

[77] Accordingly, the application to the applicant of the post 1991 regime for early release was not part of the "penalty" imposed on him, with the result that no comparison was 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.

[78] The next case referred to in the court's judgement is that of *R(Robinson) v Secretary of State for Justice*, a decision of the Court of Appeal in England and Wales: see [2010] 1 WLR 2380. In that case the Court of Appeal held that provisions relating to 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 paragraph [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."

[79] By way of comment the court in *Khan* commented that *Robinson* was an Article 6 case but Moses LJ had made clear 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."

[80] The case of *Del Rio Prada* was the subject of further consideration in the Strasbourg court in the case of *Abedin v United Kingdom*. In *Abedin* the ECtHR unanimously declared the *Abedin* case inadmissible. The judgment of the court included the following:

> "32. The starting point for the court's examination of whether Article 7 was engaged here must be, as explained in Uttley, and reaffirmed explicitly in the Del Rio Prada judgment paragraph 83, that where the nature and purpose of a measure relate to a change in the regime for early release, this does not form part of the "penalty" within the meaning of Article 7. The applicant's submission that Del Rio Prada and Sarasola v Spain confirmed that early release provisions could lead to the modification of the scope of the sentence overly simplified the court's analysis in that case …
>
> 33. The court went on to underline that such changes had to be distinguished from changes made to the manner of execution of the sentence, which did not fall within the scope of Article 7.1 in *fine*. It can be seen, therefore, that the critical element in determining the applicability of Article 7 to such a case is whether the changes introduced had the effect of modifying or redefining the penalty itself.
>
> 34. In Del Rio Prada the multiple, lengthy, individual sentences imposed on the applicant (amounting to over 3,000 years' imprisonment) were converted into a single 30 year sentence pursuant to applicable legislation. At the same time, Spanish law provided for prisoners to earn remissions of sentence for work done in detention, at a stipulated rate of one day's remission for every two days' work. As the court explained:
>
>> '101. … remissions of sentence gave rise to substantial reductions of the term to be served – up to a third of the total sentence – unlike release on licence which simply provided for improved or more lenient conditions of

> execution of the sentence (see, for example, Hogben and Uttley) both cited above.'"

Consideration

[81] At paragraph [42] above, the court made reference to what it described as the high level of commonality as between the authorities chosen by the parties in relation to the approach to be taken in Article 7 cases.

[82] There is no significant doubt, it seems to us, about the existence of the important distinction between, on the one hand, legislation, policy or other administrative initiatives which from time to time are introduced to effect change in the prison environment, without changing the overall sentence of a prisoner and measures which have the effect of altering the fundamental sentence the prisoner is serving.

[83] The key sentence within Article 7, with which the court is concerned, speaks of "a heavier penalty" being imposed, as a result of the relevant measures under consideration "than the one that was applicable at the time the criminal offence was committed."

[84] There appears, moreover, to be merit in the remark made by the European Court of Human Rights (ECtHR) in *Kafkaris* 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."

[85] The approach to be taken in weighing the issues which arise in a case of this kind inevitably involves a consideration of the "intrinsic nature" of what is occurring including what the "penalty" originally imposed actually entails under the domestic law in force at the material time.

[86] It is for the above reason that in this case the court set out the domestic legal framework as it operated prior to the introduction of the new arrangement in 2021. As noted earlier, that framework involved the sentencing judge in respect of determinate custodial sentences performing an enhanced role, in comparison with his or her judicial counterparts in England, in respect of DCS prisoners in that jurisdiction. 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. As has already been explained, in Northern Ireland, it is the judge who independently decides whether a DCS prisoner serves any more than one day in custody before being released on licence, against the backdrop that the most, in ordinary circumstances without a recall, he can serve is 50% of the term of the sentence. This

outcome, it should be stressed, arises out of well-established statutory provisions laid down in accordance with law. While in none of the cases before the court did the judge adjust the custodial sentence to a position below the maximum of 50%, it is clear that he or she could have done.

[87] The question therefore is whether this state of affairs is relevant and has consequences for the Article 7 issue before this court. In particular, the issue arises as to which side of the line, as described in *Kafkaris* above, this case falls. The court stresses that often this will be a matter of fine judgment.

[88] As always, the context is significant because it is plain that the judge at the date of the sentence will have decided how the sentence, in the case of the offender before him, is going to operate. Mr Morgan, for example, on the day of sentencing will become aware in full detail as to what the sentence will consist of in terms of the length of time he is to spend in prison; when that time (to the day) will expire; when (to the day) he will be released on licence; and the date on which the licence (and the sentence overall) will expire.

[89] It also seems clear that what Mr Morgan receives is more than an expectation or even a promise. It was not disputed at the hearing that the combination of Articles 7, 8 and 17 of the 2008 Order involves the conferral of a right to release on licence at the due date set for this to occur (see, in particular, Article 17(1) and Article 8(3) of the 2008 Order). Provided the offender does not thereafter attract a lawful recall pursuant to Article 28 of the Order, he is entitled to remain in the community, subject only to his obligation to act consistently with his licence conditions.

[90] The effects brought about by the introduction of the salient aspects of the 2021 Act, set against the above context, can reasonably be described as considerable.

[91] In broad terms they include:

(i) That while the ultimate date of release from the sentence as a whole may remain, the offender loses his statutory entitlement to release on licence at the time set by the judge at the end point of the period spent in custody - which could be any date between (in an extreme case) 1 day in custody and 50% of the overall sentence. In fact, as the judge must, under the statutory scheme prior to 2021, ensure release is provided for an offender at maximum at the 50% point, every offender subject to the new arrangements will be bound to suffer at least a 16% loss of time on licence as opposed to time in custody, contrary to the stipulations of the judge as laid down at the date of sentencing. This loss therefore is irrecoverable.

(ii) That, in addition, a new requirement in the form of having to obtain the approval of the parole authorities in the context of release on licence has been introduced against the background that, prior to the relevant change, no such approval was required because hitherto the offender in the particular class

with which this case is concerned was under no obligation to obtain such approval. It is obvious that, from the offender's point of view, this is a potentially strong negative factor, because there will be a risk that the offender fails to pass the test which the Parole authorities must apply under the legislation i.e. the test of whether the authority can conclude that it is no longer necessary for the protection of the public that the prisoner should be confined. Should the test be failed, it would be expected that this will bring about the continuation of custody (which situation may persist until the overall end of the sentence).

[92] It appears to the court that when it stands back and considers the effect of the changes brought about by the 2021 Act, it is evident that there has, as a result, been a serious erosion of the role and function of the trial judge which arises whether or not (i) and (ii) are read together or separately. Moreover, in significant ways the terms of the 2008 Order in respect of the penalty imposed on the DCS prisoner have been changed. While self-evidently this has occurred in relation to the length of the period in custody before release on licence, it also arises by virtue of the fact that a parole commissioner has now a crucial role to play in determining whether actual release on licence can take place.

[93] Independently of one another, each of the new measures have the effect of dismantling aspects of the law governing the sentence of the offenders as it was at the date when it was handed down. While the span of the overall sentence survives, it does so at the cost of expunging key elements within the sentencing process which hitherto had been applied to these offenders.

[94] In these circumstances, the court is driven to the conclusion that the sentencing arrangements which have governed the sentencing process in respect of these men has been subverted. In the court's opinion, in the above referred respects, and acknowledging that the law in Northern Ireland is not the same as that applying in England, these cases engage Article 7 and breach it as being contrary to the principle of non-retrospective application of a "penalty." To use the language of *Del Rio Prada* – see paragraph [89] – the penalty imposed by the trial judge has been the subject of redefinition or modification of its scope as imposed originally by the trial court.

[95] In arriving at this view, the court has considered the question of whether its finding should be limited to the issue of the increase in length of the mandatory custodial period (for example, in Morgan 24 months instead of 18) leaving alone and unaffected the role of the parole authorities. There may, in some respects, be an attraction to do so, as it is not easy to see why the legislation contains two separate new sanctions (one relating to the length of time spent in custody prior to being able to seek release on licence and one involving the control of risk to the public from the offender). One might have thought that, on their merits, the latter option would be by far the more logical approach. However, we have decided that approaching the matter in this way the court would be failing to recognise and give effect to the

objective of a provision such as Article 7. This provision is about the rule of law and is there to protect against arbitrary action, not just from measures which appear to have limited logical appeal but also from measures which offend the Article despite otherwise appearing rational and purposeful.

Foreseeability

[96] Before completing its consideration of alleged breach of Article 7, the court will briefly consider the above issue, as it is alleged to have arisen in this context, though it is correct to say that the same issue could also arise in respect of other provisions of the Convention.

[97] The basis for this aspect arising, as we understand it, is that the introduction of the 2021 Act breaches the notion of "quality of law" requirements[5] because of the alleged imposition of the new regime in respect of terrorist offenders out of the blue and without notice and in circumstances in which the offender could not have foreseen them arising.

[98] The case being made is not about accessibility or vagueness of language, neither of which seems apposite to the present facts.

[99] In this case, we are not attracted to this argument. In our view, the real issue in respect of Article 7 is that which has been discussed at paragraphs 76-90 above. If the new provisions which have been introduced, fall within the category of case which does not involve the imposition of a "penalty" i.e. a case in which the new measures are properly to be viewed as about "execution" or "enforcement" of issues within the framework of the prison regime, including the administration of sentences, the issue of foreseeability is unlikely to be of any significant weight because issues of this sort will often arise because it is in the nature of them that they may emerge at short notice or in circumstances which require speedy action or which would be unsuitable for general discussion or debate, in any event.

[100] The reality, it seems to us, is that offenders, in any event, either know or have the means of knowing, that changes of the sort currently under discussion are not uncommonly made with no or limited notice and are to be expected, as very many of the cases cited to the court by the Ministry show.

[101] The events which had given rise to the steps introduced in this case were the subject of public controversy and discussion and we incline to the view that a terrorist offender who had considered the matter could, especially if he took legal advice, have foreseen the direction in which events were going. Given that the Northern Ireland measures were taken quite some time after the English measures, this is all the more so.[6]

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[5] As referred to, for example, at paragraph 90 of Del Rio Prada.
[6] In Khan it was held at paragraph 122 that the measures taken in England were foreseeable in a passage which rejected the argument that there had been a breach of Article 5 in that case.

[102] Accordingly, we do not consider that there is force in this particular aspect of the challenge.

Article 6

[103] The relevant terms of Article 6 relevant at this stage of the enquiry are found at paragraph 1 of the Article:

> "1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

[104] It is claimed by the applicants that Article 6.1 may be infringed by the enactment of retrospective legislation which affects the result of pending proceedings.

[105] The case put by the applicants refers to a variety of authorities as follows:

> "35. As was recognised by the English Court of Appeal at [33] in *R (On the Application of Reilly) v SSWP* [2016] EWCA 413, it is well-established in the case law of the European Court of Human Rights ("ECtHR") that the rights recognised by Article 6(1) may be infringed by the enactment of retrospective legislation which affects the result of pending proceedings.
>
> 36. Thus, in *Zielinski v France* (2001) 31 EHRR 19 the court noted at [57] that while in principle the legislature is not precluded in civil matters from adopting new retrospective provisions to regulate rights arising under existing laws, the principle of the rule of law and the notion of fair trial enshrined in Article 6 precluded any interference by the legislature, other than on compelling grounds of the general interest, with the administration of

justice designed to influence the judicial determination of a dispute.

37. That such protections extend beyond the civil sphere and encompass measures adopted in the criminal context has been expressly recognised by the ECtHR (see *Scoppola v Italy (No.2)* [2010] 51 EHRR 12 at [132] and *Affaire Vegotex International S.A. v Belgigue (Requete No: 49812/09)* [2020] ECHR 795 at [59]).

38. The case of *Scoppola* concerned an attempt by the state to unilaterally alter a sentence following its imposition in accordance with a summary procedure. In considering the principles to be applied the court stated at [132]:

> 'The court observes first of all that, in the context of civil disputes, it has repeatedly ruled that although, in principle, the legislature is not prevented from regulating, through new retrospective provisions, rights derived from the laws enforced, the principle of the rule of law and the notion of fair trial enshrined in Article 6 preclude, except for compelling public interest reasons, interference by the legislature with the administration of justice designed to influence a judicial determination of a dispute…the court considers that those principles which are essential elements of the concept of legal certainty and protection of litigants legitimate trust…are applicable, mutatis mutandis, to criminal proceedings.'

39. In applying these principles to the context of *Scoppola*, and ultimately in finding that there has been a breach of Article 6 ECHR (and also Article 7 ECHR) in that case, the court further stated at [139]:

> 'The court considers that the person charged with an offence must be able to expect the state to act in good faith and take due account of the procedural choices made by the defence, using the possibilities made available by law. It is contrary to the principle of legal certainty and the protection of the legitimate trust of persons engaged in judicial proceedings for a state to be

> able to reduce unilaterally the advantages attached to the waiver of certain rights inherent in the concept of fair trial. As such a waiver is made in exchange for the advantages mentioned, it cannot be regarded as fair if once the competent domestic authorities have agreed to adopt a simplified procedure, a crucial element of the agreement between the state and the defendant is altered to the latter's detriment without his consent. In that connection, the court notes that although the contracting states are not required by the Convention to provide for simplified procedures (see *Hany*, decision cited above) where such procedures exist and have been adopted, the principles of fair trial require that defendants should not be deprived arbitrarily of the advantages attached to them.'"

[106] In its response to these paragraphs the Ministry of Justice has argued that:

> "56. Article 6 is not engaged on the facts of this matter. There are no pending criminal proceedings. There has been no state interference with the judicial determination of the appellants' cases. The trial judge sentenced each appellant to a DCS and each one's sentence remained a DCS of the period proposed. The changes that have been made relate to the early release regime, not the sentence imposed as addressed above.
>
> 57. Insofar as the applicant relies on *Scoppola v Italy (No.2)* [2010] 51 EHRR 12 the case is not in point. In that case legislation was amended during the judicial proceedings, coming into force on the day of the applicant's sentence, increasing the maximum penalty on summary conviction from 30 years to life imprisonment in circumstances in which the applicant had chosen to dispose of the matter summarily because of the difference in sentencing provisions and, as a result, waived his right to a public trial to call/examine witnesses, and to produce new evidence."

Consideration

[107] The issue in the present context is not the alleged breach of Article 7, which has been discussed above. Rather, it is a contention that there has been a separate

alleged breach of Article 6. While it is correct that there has been in this case, subsequent to the completion of the original criminal trial, the passage of new statutory provisions which operate retrospectively, these provisions, it seems to us, are not properly to be viewed as being concerned with pending proceedings. This is an important element in the case-law in this sphere. It is clear that for the purpose of Article 6, the steps which have been taken by the state, Article 7 aside, are not part of, or intended to influence judicial determination of a dispute. The proceedings leading up to the applicants' convictions were resolved in 2020 when the sentences of the court were imposed.

[108] The court therefore is inclined to accept the Ministry's argument that Article 6 is not engaged on the facts of this case. In any event, if the court is wrong about this, it is of the view that the claim made under Article 6 adds nothing to the *lex specialis* of Article 7, which the court has already dealt with.

Article 5

[109] This aspect of the applicants' case has been dealt with succinctly in a single paragraph in its skeleton argument. This states as follows:

> "It is evident from the case law of the ECtHR that where deprivation of liberty is concerned it is of particular importance that the general principle of legal certainty be satisfied. The Convention jurisprudence therefore requires that the conditions for deprivation of liberty under domestic law be clearly defined and that the law itself be foreseeable in its application, so as to meet the standard of "lawfulness" set by the Convention, a standard which requires that all law be sufficiently precise to allow a person to foresee to a degree that is reasonable in the circumstances, the consequences which a given act may entail. Notably, Article 5 applies even with respect to the "administration of a sentence" when Article 7 does not apply."

A number of authorities are then cited, which the court has considered, but need not set out.

[110] In response, the Ministry of Justice has put forward a response running to some four pages, the highlights of which are as follows:

(i) Firstly, the response reiterates the Ministry's position that the new provisions "do not change the penalty imposed on the terrorist offender" and "the length of his or her sentence is not increased in any sense." There have been changes in relation to the administration of the penalty.

(ii) Secondly, it cites the decision of the Supreme Court in *R (Whiston) v Secretary of State for Justice* [2004] UKSC 39 for the proposition that Article 5(4) of the Convention does not apply to recall to custody in the context of a standard determinate sentences. The reason for this, it is said, is that "the whole of the sentence was lawfully passed/imposed by the lawful penalty of the court under Article 5(1)(a)." In this context the Strasbourg case of *Brown v the United Kingdom* is cited.

(iii) Thirdly, it is pointed out that the Article 5 argument was considered and rejected in *Khan*; see paragraphs 106-123. At paragraph 121 the court said:

> "121. From those authorities it is possible to draw the following principles:
>
> (i) The early release arrangements do not affect the judge's sentencing decision;
>
> (ii) Article 5 of the Convention does not guarantee a prisoner's right to early release;
>
> (iii) The lawfulness of a prisoner's detention is decided, for the duration of the whole sentence, by the court which sentenced him to the term of imprisonment;
>
> (iv) The sentence of the trial court satisfies Article 5(1) throughout the term imposed, not only in relation to the initial period of detention but also in relation to revocation and recall; and
>
> (v) The fact that a prisoner may expect to be released on licence before the end of the sentence does not affect the analysis that the original sentence provides legal authority for detention throughout the term."

Consideration

[111] It is obvious that the bulk of the arguments put forward under the banner of Article 5, in reality are re-runs of the central argument in respect of Article 7, which has been discussed at length above.

[112] The court would be inclined to accept the submissions made by the Ministry of Justice were it not for the fact that, as has already been pointed out, the law in Northern Ireland as to sentencing of offenders prior to the passage of the 2021 Act, in particular in respect of the role of the trial judge, was not the same in Northern Ireland as in England: see paras 13-29 and 76-90 *supra*.

[113] The differences, in the opinion of the court, have led us to the conclusion that, in the light of the new provisions introduced by the 2021 Act, a breach of Article 7 has arisen in the particular circumstances of this case.

[114] In our view, this conclusion is sufficient for the purpose of determining human rights compliance in the light of the legislative developments which have occurred. Accordingly, the court is content to leave to one side whether there could also be a breach of Article 5.

[115] Plainly the court is not in agreement with a number of the legal principles which have been set out at paragraph [121] of *Khan,* above, but, in our view, it is unnecessary for the court to say more as, in its view, it is enough for it to concentrate on Article 7, as the court has done, rather than Article 5. Plainly, the approach taken in Khan, where it was held that there had been no breach of Article 5, can be distinguished from the approach which has been taken by this Court, arising out of the different statutory setting and the different role of the trial judge in the sentencing process.

Remedy

[116] The court has reached the conclusion that in a single respect there has been a breach of the Convention arising from the passage of the 2021 Act as it affects terrorist prisoners in Northern Ireland.

[117] This is the breach referred to at paragraphs [94] and [95] above relating to Article 7 of the Convention and the measures introduced by the 2021 Act, as implemented by the insertion of new provisions at Article 20A of the Criminal Justice (Northern Ireland) Order 2008.

[118] In these circumstances, the court has considered what remedy, if any, it can provide.

[119] In approaching this issue, the court has paid attention to the language of section 3 of the Human Rights Act 1998. This is the first port of call. The heading of this section of the Act is "Interpretation of Legislation."

[120] Section 3(1) states:

> "(1) So far as it is possible to do so, primary legislation [which is what the 2021 Act is] must be read and given effect in a way which is compatible with the Convention rights."

Section 3(2) is also important. It states:

"(2) This section—

(a) applies to primary legislation and subordinate legislation whenever enacted;

(b) does not affect the validity, continuing operation or enforcement of any incompatible primary legislation; and

(c) does not affect the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation) primary legislation prevents removal of the incompatibility."

[121] In other words, the courts will be required to interpret legislation so as to uphold Convention rights unless the legislation itself is so clearly incompatible with the Convention that it is impossible to do so.[7]

[122] It is clear, moreover, that the court must strive for compatibility between the legislation and Convention rights, so far as possible. This may involve reading the legislation down – that is limiting in scope and effect - provisions which would otherwise breach Convention rights, and reading in necessary safeguards to protect such rights.

[123] However, it is well established that, to use the language of one of the early cases interpreting section 3:

> "Not all provisions in primary legislation can be rendered Convention compliant by the application of section 3(1) …
>
> In applying section 3 courts must be ever mindful of this outer limit. The Human Rights Act reserves the amendment of primary legislation to Parliament. By this it means the Act seeks to preserve parliamentary sovereignty. The Act maintains the constitutional boundary. Interpretation of statutes is a matter for the courts; the enactment of statutes, and the amendment of statutes, are matters for Parliament…The area of real

[7] See the White Paper preceding the 1998 Act entitled, 'Rights brought Home' (Cm3789 1997, para 2.7) where it was stated, speaking of the 'interpretative obligation', that it went "far beyond the present rule which enables the courts to take the Convention into account in resolving any ambiguity in a legislative provision. The courts will be required to interpret legislation so as to uphold the Convention rights unless the legislation itself is so clearly incompatible with the Convention that it is impossible to do so."

> difficulty lies in identifying the limits of interpretation in a particular case…[A] meaning which departs substantially from a fundamental feature of an Act of Parliament is likely to have crossed the boundary between interpretation and amendment …"[8].

[124] In the present case, it seems to us, that there is little or no room for the court, by means of interpretation to read the 2021 Act in the way the applicants' would wish. The reality, rather, is that the offending provisions cannot be read in a manner opposite to the direction which the whole of the legislation was intended to go. We reject the proposition advanced on behalf of the applicants that "the court can do whatever is necessary by way of remedy." This fails to take into account the need to respect the relevant boundary lines.[9] The present situation, rather, points to the need for the court to look, in the context of remedy, to section 4 of the Human Rights Act.

[125] Section 4 of the Human Rights Act is about the provision of a judicial mechanism for bringing to the attention of Government and Parliament any provision of primary legislation which cannot be read and given effect in a manner compatible with Convention rights.

[126] Section 4 deals with the issue of a "declaration of incompatibility." It reads as follows:

> "(1) Subsection (2) applies in any proceedings in which a court determines whether a provision of primary legislation is compatible with a Convention right.
>
> (2) If the court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of that incompatibility.
>
> (3) Subsection (4) applies in any proceedings in which a court determines whether a provision of subordinate legislation, made in the exercise of a power conferred by primary legislation, is compatible with a Convention right.
>
> (4) If the court is satisfied—

[8] In Re S (Care Order: Implementation of Care Plan) [2002] 2 AC 291 at [37] – [40] per Lord Nicholls.

[9] It was also argued that the court should provide a remedy where a Ministerial Statement of Compatibility wrongly claimed that legislation was compatible with Convention rights. However, it is to be borne in mind that the Minister is expressing a view and is not issuing a guarantee and we do not consider that an incorrect call has this consequence.

(a) that the provision is incompatible with a Convention right, and

(b) that (disregarding any possibility of revocation) the primary legislation concerned prevents removal of the incompatibility,

it may make a declaration of that incompatibility.

(5) In this section "court" means—

…

(e) in England and Wales or Northern Ireland, the High Court or the Court of Appeal.

(6) A declaration under this section ("a declaration of incompatibility")—

(a) does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given; and

(b) is not binding on the parties to the proceedings in which it is made."

[127] It is clear that section 4 sets out the circumstances in which a court may make a declaration of incompatibility and it is also clear that section 4 is central to the compromise which was adopted at the date when the Act was made between, on the one hand, Parliamentary Sovereignty and, on the other, the need to give proper effect to the European Convention.

[128] A declaration of incompatibility does not affect the validity, continued operation or enforcement of the provision in respect of which it is made. It follows that the relevant legislative provision will continue to have force and effect, notwithstanding its incompatibility with Convention rights, until such time as it may be amended. A well-known dictum recognising this comes from Lord Hutton in the case of *R (Anderson) v Secretary of State for the Home Department* [2003] AC 837 at paragraph [63]. Lord Hutton stated that Parliament had made it clear that "it remains supreme and that if a statute cannot be read so as to be compatible with the Convention, a court has no power to override or set aside the statute. All that a court may do, pursuant to section 4 of the 1998 Act, is to declare that the statute is incompatible with the Convention. Therefore, if a court declares that an Act is incompatible with the Convention, there is no question of the court being in conflict with Parliament or of seeking or purporting to override the will of Parliament. The court is doing what Parliament has instructed it to do in s4 of the 1998 Act."

[129] In this regard, section 10 of the Act is also important as it provides a mechanism for the amendment of the relevant provision.

[130] The purpose of section 10 is to enable provisions of legislation declared to be incompatible with a Convention right to be amended speedily.

[131] In respect of remedy overall, the conclusions reached by the court are as follows:

(i) The offending provision in this case cannot be read in a manner which obviates its inconsistency with the Convention and nor can it be given an interpretation which avoids it.

(ii) This is a case where the object, purpose and meaning of the statute points in a clear direction which, in fact, is a direction directly opposite to the direction in which the applicants' wish to go.[10]

(iii) In these circumstances the court must decide whether this is a case for a declaration of incompatibility, which requires the exercise of discretion by the court.

(iv) The court sees no reason to refuse such a declaration and will make one in this case.

(v) This will, however, not affect the validity, continued operation or enforcement of the law. In other words, the offending statute is not overridden or set aside and remains operative.

(vi) Whether or not these circumstances lead to the amendment of the law is not a matter for this court but it is for others to decide.

The Ullah Principle

[132] Before considering the criminal appeal aspects of this appeal, the court wishes briefly to comment on an issue raised by the Ministry at the end of its skeleton argument under the heading of "The *Ullah* Principle." In essence, the court, in this section of its argument, is warned about the risk of it adopting the arguments of the applicants. It is suggested that to adopt such a position "would be to step beyond the present boundaries of the Strasbourg jurisprudence in the absence of clear and constant authority supporting such a step contrary to the *Ullah* principle, as recently re-iterated by Lord Reed in delivering the unanimous decision of the Supreme Court in *R (on the application of AB) v Secretary of State for Justice* [2021] UKSC 28."

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[10] The court agrees therefore with the view of the Divisional Court at paragraph 36 of its judgment in the case of an application by Seamus Morgan for a writ of habeas corpus: [2012] NIQB 71.

[133] The argument is then buttressed by three to four pages of quotations from the *AB* decision, notably without any significant attempt to link what is said in the quotations to the task of this court in this case.

[134] The only part of the *AB* case which the court will set out in this judgment is paragraph 59 where Lord Reed, having reviewed a large number of authorities, indicated that:

> "It follows from these authorities that it is not the function of our domestic courts to establish new principles of Convention law."

This is in line with the case of Ullah and many other judgments of domestic law which followed it. Interestingly, Lord Reed went on: "But that is not to say that they are unable to develop the law in relation to Convention rights beyond the limits of the Strasbourg case law. In situations which have not yet come before the European court, they can and should aim to anticipate, where possible, how the European court might be expected to decide the case, on the basis of the principles established in the case law. Indeed that is the exercise which the High Court and the Court of Appeal undertook in the present case. The application of the Convention by our domestic courts, in such circumstances, will be based on the principles established by the European court, even if some incremental development may be involved…"

[135] This court wishes to make it clear that, in its view, the approach taken by the Ministry under the heading set out above is misconceived and is without merit.

[136] The court on the facts of this case has accepted the central doctrinal issue which has operated in this area *viz* that there is distinction to be drawn between a "penalty" and steps which concern the "execution" or "enforcement" of a penalty. In fact, the court also accepts that this distinction features both in decisions of the Strasbourg court and decisions of the domestic courts, as the range of quotations found in this judgment demonstrate.

[137] In these circumstances, it seems to us that there was at no time a basis for the view that the court was seeking to advance some new, hitherto unheralded standard. Rather this was and is a case about the application of a well established existing standard but in a particular and unusual situation.

[138] We do not consider that in approaching the matter in this way, the court was seeking to abandon the *Ullah* case law or seeking to operate outside or in defiance of the *AB* authority.

Conclusion

[139] The court returns now to discuss its role. As noted as early as paragraph [1] of this judgment the court is sitting as a Court of Criminal Appeal. It is not sitting as a

judicial review court. As noted at paragraph [2], the applicants' applications to this court are all substantially out of time. In these circumstances the court must decide whether or not to extend the time within which the proceedings may be taken.

[140] The principles governing extension of time in this court for an appeal of this type are found in *R v Brownlee* [2015] NICA 39. While these have been expressed in the context of appeals against conviction, they equally apply to appeals against sentence.

[141] An appeal in respect of a sentence must ordinarily be made within 28 days of the imposition of the sentence. In these cases, no such step was taken because the applicants did not wish to appeal against the sentence. That posture clearly would have remained had it not been for the 2021 Act and the impact it had upon their sentences. It is this impact which has promoted the initiation, after a period, of these appeals. The period in between, the court accepts would have involved consultation between the applicants and their lawyers.

[142] The case of *Brownlee* is an up to date expression of the tests which this court should apply when it is assessing whether to extend time. Having rehearsed the background in relation to how the law in respect of extension of time has developed in relation to this matter (both in England and Wales and in Northern Ireland) at paragraph [8] the court presided over by the then Lord Chief Justice said:

> "From this examination of the authorities we consider that the following principles governing the exercise of the discretion to extend time to apply for leave to appeal can be derived:
>
> (i) Where the defendant misses the deadline by a narrow margin and there appears to be merit in the grounds of appeal an extension will usually be granted. This occurs most frequently when the application to extend time for a conviction appeal is lodged immediately after sentencing.
>
> (ii) Where there has been considerable delay substantial grounds must be provided to explain the entire period. Where such an explanation is provided an extension will usually be granted if there appears to be merit in the grounds of appeal.
>
> (iii) The fact that a person involved in crime subsequently receives a more lenient sentence will generally not be a satisfactory explanation for any delay in an appeal against sentence. A defendant should take a

> view about his attitude to the sentence at the time it is imposed.
>
> (iv) A convicted defendant will usually get advice on any grounds of appeal from his legal representatives at the end of the trial. It will normally not be an adequate explanation for considerable delay that the defendant has sought further advice from alternative legal representatives.
>
> (v) Where the application is based upon an application to introduce fresh evidence the court may extend time even when a considerable period has elapsed as long as the evidence has first emerged after the conviction, the circumstances in which the evidence emerged are satisfactorily explained, the applicant has moved expeditiously thereafter to pursue the appeal and the evidence is relevant and cogent.
>
> (vi) Even where there has been considerable delay or a defendant had initially taken the decision not to appeal, an extension of time could well be granted where the merits of the appeal were such that it would probably succeed."

[143] This is a case where the reasons for mounting an appeal arose at a late stage but the court accepts that it was reasonable for the applicants' legal representatives to have taken time to consider what the next move of the applicants should be. The applicants themselves could not have acted without legal advice and there were a range of options which needed to be considered.

[144] While we consider that the most obvious option would have been to mount a judicial review, we accept that the option chosen – of seeking to proceed to this court – was a step which was open to the applicants, though the option was not without difficulty, principally related to the issue of obtaining a remedy, even if the appeal was otherwise successful.

[145] However, it might reasonably be said, that even if a judicial review had been initiated similar, if the not the same problems, might well have arisen.

[146] In the event, as has occurred, it is clear that, in fact, from the applicants' perspective, they are unable to obtain from this court the remedy they would have wanted *viz* a restoration of the *status quo ante.*

[147] In the court's opinion, it would be harsh not to grant to each applicant an extension of time in the unusual circumstances of this case.

Summary

The court will make the following orders:

1. Grant an extension of time in each of the four cases;

2. Grant a declaration of incompatibility to the effect that the 2021 Act is in breach of Article 7 of the ECHR, in the ways described in the text of the judgment; and

3. Dismiss the proceedings before the court.