

Terrorism and Retrospective Punishment

Abstract: This brief article is written in light of the Terrorist Offenders (Restriction of Early Release) Bill. I examine one obstacle to any future article 7 challenges mounted against the emergency legislation. In so doing, I query whether the judgment of the House of Lords in R (Uttley) v Secretary of State for the Home Department, should be departed from or distinguished.

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On the 2nd of February, two members of the public were stabbed by Sudesh Amman. At the time, Amman was serving a determinate sentence of three and a half years for terrorism offences. Amman had been released from prison automatically after serving half his total sentence the week before the attack.² The following day, the Lord Chancellor, Robert Buckland MP, announced plans to introduce emergency legislation that will end the automatic release of terrorist offenders halfway through a determinate sentence.³ The Terrorist Offenders (Restriction of Early Release) Bill was introduced on the 11th of February and made its way through the House of Commons on the 12th of February. Under the Bill, terrorism offenders serving a determinate sentence would only be eligible for release after two-thirds of their sentence and then the Parole Board would have to consider it was “no longer necessary for the protection of the public that the prisoner should be confined.”⁴ The reform will apply prospectively and retrospectively.⁵ The government has suggested the Bill will affect around 50 people in prison for terrorism offences.⁶

At first glance, the proposal may strike some as retrospective punishment that could infringe article 7 of the ECHR. The relevant part of the article reads, “Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.” In this brief article, I examine one obstacle to any future article 7 challenges mounted against the emergency legislation.⁷ I do not review all the aspects of any possible article 7 challenges.⁸ My query is whether, the application of the proposed legislation to existing prisoners would make

¹ UCL Faculty of Laws. My thanks to Professor David Ormerod for his comments on an earlier draft, and to Professor Colm O’Cinneide for useful discussion.

² This summary of the facts is drawn from the Parliamentary comments of the Lord Chancellor: HC Deb 03 February 2020 vol 671 col 54; HC Deb 12 February 2020 vol 671 col 863.

³ HC Deb 03 February 2020 vol 671 cols 55-56.

⁴ Terrorist Offenders (Restriction of Early Release) Bill (HC Bill 88) cl 1(2) inserting Criminal Justice Act 2003, s 247A(5)(b). The Bill would not only affect determinate sentences: cl 1(2) inserting s 247A(1)(a). For a useful overview of the current law, pre-Bill, on the sentencing and release of terrorism offenders, see Jonathan Hall, “Sentencing and release provisions in relation to terrorism offences” (7 February 2020) *Independent Reviewer of Terrorism Legislation* <https://terrorismlegislationreviewer.independent.gov.uk/release-of-terrorist-offenders-note-on-the-law/> [Accessed 13 February 2020].

⁵ Terrorist Offenders (Restriction of Early Release) Bill (HC Bill 88) cl (1)(2) inserting Criminal Justice Act 2003, s 247A(1). Though, as this insertion makes clear, the Bill would not affect those serving a relevant sentence who have already been released on licence.

⁶ Ministry of Justice, “End to automatic early release of terrorists” (11 February 2020) *gov.uk* <https://www.gov.uk/government/news/end-to-automatic-early-release-of-terrorists> [Accessed 20 February 2020]

⁷ I work on the assumption the Bill will be enacted as introduced, or in a very similar form.

⁸ Another likely, and related, aspect of any article 7 review will be whether the reform concerns a penalty or the execution of a penalty. For the government’s position see Government, “Terrorist Offenders (Restriction of Early Release) Bill 2020: ECHR Memorandum (February 2020) paras [26]-[30]. For relevant commentary in this Review, see Elise Maes, “Del Rio Prada v Spain and the execution of a penalty under Article 7: a shifting conception of punishment?” [2017] (5) E.H.R.L.R 443.

their sentences “heavier” than that which “was applicable at the time the criminal offence was committed.” I first outline the key decision of the House of Lords, then assess whether the decision can be departed from or distinguished.

R (Uttley) v Secretary of State for the Home Department

Uttley committed numerous sexual offences, including rape, before 1983. He was prosecuted in 1995, and pleaded guilty to some of the offences and was convicted of others. He received a sentence of 12 years’ imprisonment. In the intervening period between the commission of the offences and conviction, new provisions had come into force that meant Uttley would have to serve one year, after release, on licence. This entailed restrictions on Uttley’s freedom. At first instance, Moses J, as he then was, provided the following example conditions: staying in touch with a supervising officer, being subject to visits from a supervising officer, staying at an approved address and a requirement to see a psychiatrist.⁹ Breach of a condition could result in recall to prison.¹⁰ In addition, the commission of another imprisonable offence whilst on licence could result in the outstanding period of the original 12 year sentence being added to the new sentence.¹¹

Uttley sought a declaration that the provisions that would subject him to a period on licence were contrary to article 7. The central issue in the Administrative Court was whether the licence conditions meant Uttley had received a penalty that was heavier than he would have received when he committed the offences.¹² Moses J accepted that the licence restricted Uttley’s liberty and meant that he ran a risk of further imprisonment. Yet his Lordship held that the nature and purpose of the licence conditions were preventive: they were designed to protect the public from further offending. As such, article 7 was not engaged.¹³

The Court of Appeal allowed Uttley’s appeal. The thrust of the judgment was that the effect of the sentence imposed on Uttley was more severe than that which would have been imposed when he committed the offences. As Pill LJ stated,

Arguments that the purpose of the licence procedures is rehabilitative and preventative, as undoubtedly in part they are, do not detract from their onerous nature viewed as a part of the sentence. Whatever the purpose, the effect is onerous. In my judgment, the judge fell into error in deciding the case on a consideration of the purpose of a licence as such rather than its effect as a part of the sentence.¹⁴

The Court of Appeal, therefore, granted a declaration under section 4 of the Human Rights Act 1998: the relevant sentencing provisions were incompatible with article 7.¹⁵

The House of Lords took a different approach than the courts below it. Their Lordships did not ask whether Uttley’s sentence was heavier than that he would have received had he been convicted when he committed the offence. Instead their Lordships considered whether the sentence Uttley was serving was heavier than that “applicable at the time” of the sentence as

⁹ *R (Uttley) v Secretary of State for the Home Department* [2003] EWHC 950 Admin [4].

¹⁰ *R (Uttley) v Secretary of State for the Home Department* [2004] UKHL 38 [5].

¹¹ *R (Uttley) v Secretary of State for the Home Department* [2004] UKHL 38 [5].

¹² *R (Uttley) v Secretary of State for the Home Department* [2003] EWHC 950 Admin [8].

¹³ *R (Uttley) v Secretary of State for the Home Department* [2003] EWHC 950 Admin [13].

¹⁴ *R (Uttley) v Secretary of State for the Home Department* [2003] EWCA Civ 1130 [15].

¹⁵ *R (Uttley) v Secretary of State for the Home Department* [2003] EWCA Civ 1130 [26].

per article 7. The central point of contention was thus as to the meaning of “applicable at the time”. The point, and the view of the court, was well encapsulated by Lord Philips:

The respondent's argument is misconceived. 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).

In applying article 7(1) in this way, I interpret the word “applicable” as referring to the penalties which the law authorised a court to impose at the time of the offences.¹⁶ The House of Lords was of the view that if we want to know what sentence was applicable when an offence was committed, we should not try to discern what sentence *would* have been imposed. Instead, we should discern what sentence *could* have been imposed with reference to the then maximum sentence.¹⁷ This approach aligned with earlier judgments of the European Court of Human Rights¹⁸ and the Privy Council.¹⁹

Departing from *Uttley*

Any increase to the maximum penalty available for an offence can only apply prospectively. If the maximum applicable sentence for an offence was 10 years when a person committed it, it would not be ECHR compliant for that person to receive a sentence of 11 years for the offence if there had been an increase in the maximum between the date of commission and the date of trial.²⁰ This much seems clear, and has been accepted recently by the Law Commission.²¹ Yet the statutory maximum is not the only legislation that affects what sentence a judge can impose in a given case. To give one example, section 125 of the Coroners and Justice Act 2009 provides that a sentencing judge must follow relevant Sentencing Council guidelines unless it would be “contrary to the interests of justice” to do so.

Let us assume that D committed an offence. The maximum sentence was five years when the offence was committed. The application of the Sentencing Council definitive guideline for offence X would have led to a sentence of two to three years at the time of its commission. Let us also assume that there are no factors which could have given rise to a departure from that guideline. Now assume the maximum and the guideline are amended before D is tried: the maximum becomes 10 years and the guideline generally shifts upwards to reflect this. D is sentenced under the new guideline for an offence they committed when the old maximum and

¹⁶ *R (Uttley) v Secretary of State for the Home Department* [2004] UKHL 38 [38]-[39].

¹⁷ See also the comments of Lord Rodgers and Lord Carswell: *R (Uttley) v Secretary of State for the Home Department* [2004] UKHL 38 [42] and [62].

¹⁸ *Coëme v Belgium* (App. No.32492/96), judgment of 22 June 2000. For critical commentary on the applicability of *Coëme*, see Simon Atrill, “Nulla Poena Sine Lege in comparative perspective: retrospectivity under the ECHR and US Constitution” [2005] (Spr) *Public Law* 107, 128-129.

¹⁹ *Flynn v HM Advocate* [2004] UKPC D 1.

²⁰ Here I note that the maximum sentences for numerous terrorism offence were increased by the Counter-Terrorism and Border Security Act 2019, s 7.

²¹ Law Commission, *Sentencing Procedure Issues Paper 1: Transition* (July 2015) para 4.43(3); Law Commission, *The Sentencing Code Volume 1: Consultation Paper* (CP no 232, July 2017) paras 3.10-3.16; Law Commission, *The Sentencing Code Volume 1: Report* (HC 1724, LC no 382, November 2018) Paras 4.21-4.22

guideline applied. They receive five years' imprisonment. In what sense was a sentence of five years "applicable" when the person committed the offence? Such a sentence could not have been imposed at the time the offence was committed due to the statutory duty to follow the relevant guideline. In fact, a five-year sentence, if it had been imposed on the date of commission, could possibly have been appealed as manifestly excessive.²² A sentence that may be described as both "applicable" and "manifestly excessive" may be a contradiction in terms. If *Uttley* must be read so narrowly that it is dealing only with the statutory maximum for the offence at issue, it should be departed from in any future challenge to the proposed emergency legislation. The relevant comparator for article 7 purposes should not be the maximum sentence for the relevant terrorism offence when it was committed. Instead, the comparator should be based on a more holistic assessment of legislation that affected what sentences were applicable when the offence was committed. Attrill made the following observation in the wake of *Uttley*:

This [judgment] severely curtails the protections afforded by Art.7 ECHR, and has several noteworthy effects. It provides least protection to criminals convicted of serious offences, who arguably are most at risk of a populist Home Secretary: the higher the maximum sentence, the greater the potential for a substantial increase in the time one will spend in prison.²³

The emergency legislation would appear to evidence the prescience of this observation. Statutory maxima give too little a steer on what penalty was applicable at the time an offence was committed. Other legislation may have a more significant effect on what sentence was applicable at the time the offence was committed be it the duty to follow guidelines,²⁴ the custody threshold,²⁵ or the purposes of sentencing.²⁶ If the court considers only the available maximum, this hollows out the protections against retrospective punishment in article 7.²⁷ A related complexity raised in the House of Lords was how hard it would be to "divine" what sentence would have been imposed if the offender had been sentenced at the date the offence was committed.²⁸ If it was accepted that more legislation than the statutory maximum is of relevance to assessing what sentence was applicable at the time, we would move toward such an endeavour. In other words, once we look beyond statutory maxima, the divide between what sentence would and could have been imposed is not as clear cut. A number of points can be given in response to their Lordships' hesitancy to engage in "speculative excursions into the realm of the counter-factual."²⁹ First, as a point of principle, is it sufficient to say it would be too taxing to refer to wider legislation? Article 7 is a non-derogable human right without exception. If legislation beyond the statutory maximum did affect what sentence was applicable

²² Likewise, the availability of appeal against manifestly excessive sentences makes Lord Philip's suggestion that *Uttley* could have received a sentence of life imprisonment questionable: "The sentence of 12 years' imprisonment, with release on licence after serving eight years, imposed on the respondent under the new regime, was...manifestly less severe than the sentence of life imprisonment which could have been imposed on him under that [previous] regime." *R (Uttley) v Secretary of State for the Home Department* [2004] UKHL 38 [28].

²³ Simon Attrill, "Nulla Poena Sine Lege in comparative perspective: retrospectivity under the ECHR and US Constitution" [2005] (Spr) *Public Law* 107, 127.

²⁴ Coroners and Justice Act 2009, s 125.

²⁵ Criminal Justice Act 2003, 152.

²⁶ Criminal Justice Act 2003, s 142.

²⁷ The emergency legislation may indicate Lord Rodgers was somewhat optimistic when he described article 7 as a "well adapted" safeguard against increase in sentences for political reasons: *R (Uttley) v Secretary of State for the Home Department* [2004] UKHL 38 [40]-[41].

²⁸ *R (Uttley) v Secretary of State for the Home Department* [2004] UKHL 38 [64].

²⁹ *R (Uttley) v Secretary of State for the Home Department* [2004] UKHL 38 [42].

at the time an offence was committed, surely it should also be considered. Secondly, and more practically, the Sentencing Council could retain old definitive guidelines on their website. A sentencing judge, assisted by counsel, could refer to the old guidelines and work out what sentence was applicable, or what sentences were applicable, at the date of commission.³⁰

Distinguishing *Utley*

If in any challenge to the proposed law the Court decides not to reject *Utley* outright, can it nevertheless distinguish it? In *Utley*, Baroness Hale remarked that: “There may be changes in the essential quality or character of such a sentence which make it unquestionably more severe than any sentence which might have been imposed at the time of the offence.”³¹ Could it be argued that the proposals at issue so change the nature of sentences already handed down that article 7 issues arise? The central issue here is thus not what sentence was applicable, but the effect of the proposals on the nature of sentences already imposed.

At its strongest, in the context of the Emergency Bill, the argument would be that a person has become subject to a sentence that is significantly more like an extended determinate sentence than the determinate sentence that was initially handed down because of the delayed availability of release and the role of the Parole Board in assessing risk. An extended determinate sentence is of a fundamentally different nature than a determinate sentence: 1. it is more coercive and 2. it is more risk-orientated (and can thus only be imposed when an offender has been found to be dangerous).³² Yet the analogy is imperfect. Those subject to an extended determinate sentence must also serve an additional licence period of at least one year and up to five years for specified violent offences and eight years for specified sexual and terrorism offences.³³ It is, in fact, this licence period that is described as the “extension period” in the Criminal Justice Act 2003.³⁴

In addition, Baroness Hale refers to “any sentence which might have been imposed”. If any future applicant had received a sentence significantly below the maximum, it may be argued that their new sentence with later release was not heavier than the maximum sentence that was applicable when they committed the offence. This would then bring us right back to the issue outlined above, what sentence was applicable at the time of commission? Finally, both Baroness Hale and Lord Rodgers gave the example of the reintroduction of hard labour when discussing such changes to the nature of a sentence.³⁵ This may indicate a particularly high threshold for the changed nature exception. Given these issues, any future article 7 challenge to the emergency legislation may benefit from seeking to depart from *Utley*. Sometimes it is easier to go through an obstacle than around it.

³⁰ My focus here has been on sentencing guidelines, a central feature of current sentencing. Atrill maintained such counterfactual reasoning is also “a central component of the US jurisprudence” and *Utley* itself evidences it is not necessarily complex. Simon Atrill, “Nulla Poena Sine Lege in comparative perspective: retrospectivity under the ECHR and US Constitution” [2005] (Spr) *Public Law* 107, 129.

³¹ *R (Utley) v Secretary of State for the Home Department* [2004] UKHL 38 [46]. See also, Lord Rodgers at [43].

³² The Court of Appeal has likewise stated there are “substantial differences” between determinate and extended determinate sentences: *Bourke* [2017] EWCA Crim 2150 [42].

³³ Criminal Justice Act, 2003, s 226A(7A)-(8). Specified terrorism offences were added recently by the Counter-Terrorism and Border Security Act 2019, s 9.

³⁴ Criminal Justice Act, 2003, s 226A(7).

³⁵ *R (Utley) v Secretary of State for the Home Department* [2004] UKHL 38 [46], [43]. Though Baroness Hale also acknowledged a less “fanciful” example may also engage article 7.

