Criminal Justice Notes

In this month's edition of KLS Criminal Justice Notes:

- **The Terrorist Offenders (Restriction of Early Release) Act 2020 has garnered widespread public support, but there is room to question whether it is an effective and appropriate response to the threat it is intended to address.**

- **In its recent decision in *Gaughern v United Kingdom* (13th February 2020), the First Section of the European Court of Human Rights held that a policy of retaining a convicted person's DNA profile, fingerprints and photograph on a police database (Northern Ireland) is a breach of the person's right to privacy under Article 8 of the European Convention on Human Rights..**

Early Release of Terrorist Offenders

Introduction

The Terrorist Offenders (Restriction of Early Release) Act 2020 came into force on the 26th February 2020. It is an emergency measure introduced by the government in response to the public alarm provoked by two separate terrorist attacks on the streets of London in less than three months. A key feature in each was that the attacker had already served a custodial sentence for a previous terrorist offence and, in accordance with the law at the time, had been released before serving the full custodial term of his sentence. The new Act restricts the availability of early release for offenders sentenced to imprisonment for a terrorist offence.

As is often the case with emergency legislation introduced in response to the latest atrocity, the new Act might be criticised as a knee-jerk reaction driven by the political expediency of conveying the impression of resolute remedial action by the government. The case for a measured response tailored to deal proportionately and effectively with the underlying problem tends to get lost in the rush. The emergency remedy often ends up perpetuating the problem. This is the lesson that should have been learned and never forgotten from the experience of emergency legislation in Northern Ireland.

Pre-existing law

UK sentencing law provides for a number of different types of custodial sentence. Three are of particular relevance to the application of the 2020 Act. The first is the standard determinate sentence in which the offender serves fifty percent of the custodial term imposed by the judge, followed by automatic release on licence for the remainder of the term. Typically, the licence will be subject to specified conditions supervised by the probation service. Failure to comply with the conditions can result in the offender being recalled to prison to serve the remainder of the custodial term.

The second type concerns sentences for offenders of particular concern (SOPC). At

the half-way point of their custodial term, they are referred to the Parole Board for consideration for release on licence. Unless granted conditional release at that point or later, they will serve out their full custodial term before being released subject to a period of post release supervision.

The third type is the extended determinate sentence (EDS) for offenders assessed by the court as dangerous. These offenders are only considered for conditional release by the Parole Board when they have served two thirds of their custodial term. Unless granted conditional release at that point or later, they will serve out their full term subject to a lengthy period of post-release supervision.

The new law

The new provisions introduced by the 2020 Act apply only to offenders sentenced to a custodial term for a terrorist or terrorist related offence. There are two core changes. The first is that those sentenced to a standard determinate sentence no longer have a legal entitlement to release on licence having served fifty percent of their custodial term. The second core change is that all terrorist offenders serving a determinate custodial sentence will now have to serve two thirds of the custodial term imposed by the judge before they are eligible to apply to the Parole Board for conditional release. Whether they are released before the completion of their full custodial term will be a matter for the discretion of the Parole Board.

The Parole Board can only grant release on licence in any of these cases where it is satisfied that the continued incarceration of the offender in question is no longer necessary for the protection of the public. In making this decision, the Board considers whether the individual presents a risk to life and limb. An offender can present such a risk indirectly, even if he or she is not likely to carry out a terrorist attack such as that on London Bridge in November 2019 or in Streatham in February 2020. It may be, for example, that he or she merely presents a risk of inspiring others to carry out such attacks. In that sense the new measures are by no means confined to terrorist offenders who present a direct risk of violence post-release.

The message being projected by government is that these measures will result in terrorist offenders serving a greater portion of their custodial sentences in prison than under the pre-existing law, and that the public will be safer as a result. However, there are reasons to question the substance of these claims. Equally, there are grounds to argue that the new measures are an unnecessary, disproportionate and counter-productive attack on basic concepts of fairness in criminal justice.

Appearance over substance?

Superficially, the biggest change effected by the new measures concerns terrorist offenders sentenced to a standard determinate sentence. It is they who will lose the most in that their legal entitlement to release at the half way point is pushed forward to the two thirds point, and then converted into a mere possibility of release between that point and the expiry of their full custodial term. They will be kept in prison for longer than they could have expected at the time of being sentenced. This could be interpreted as evidence of a new tougher approach by government.

The reality is that most terrorist offenders sentenced to a custodial term since April 2019 will receive a SOPC or an EDS. In other words, they already lack an

entitlement to automatic release at any point in the course of their custodial term. Moreover, many of them (the EDSs) are not even eligible for conditional release until they have served two thirds of their custodial term. It follows that for these offenders, and those who would otherwise have been sentenced in the future under the pre-existing law, the new measures will have little tangible effect. It is at least arguable, therefore, that the government's rhetoric is not matched by the substance.

Existing prisoners

Perhaps the most pernicious and disturbing feature of the new measures is that they apply retrospectively to prisoners serving custodial sentences handed down under the pre-existing law. The result is that many of these prisoners will have to serve a longer custodial term than that which applied under the law at the time they were sentenced. Those already serving a standard determinate sentence imposed before the measures came into effect have been summarily denied the legitimate expectation that they will be released, as a matter of law, on a pre-determined date in the future.

The date of their release has been pushed further out by the direct operation of emergency law rushed through by a government keen to be seen to be responding uncompromisingly to the latest terrorist incident. That law can be interpreted as punishing them not for an offence that they have actually committed, but for possible offences that they may (or may not) commit in the future during their period of early release. Apart from the inherent moral unfairness of such a policy, there has to be serious doubt over its compatibility with basic human rights standards enshrined in the European Convention on Human Rights (ECHR).

The government's case for asserting that the retroactive application of the Act is human rights compatible seems particularly thin. It argues, for example, that the measures do not infringe the Article 7 ECHR prohibition on retroactive criminal law, as they do not retrospectively increase the length of a full custodial term handed down by a court. They are concerned only with the administration of a custodial sentence. To this end, the government relies on jurisprudence from the UK courts and the European Court of Human Rights which distinguishes between the penalty (full custodial term) imposed by a court, and measures concerned with the execution or enforcement of the penalty in this context. The government argues that the measures in the 2020 Act are concerned with the latter rather than the former and, as such, are not caught by the Article 7 prohibition on retroactive penal laws.

It is submitted, however, that it is by no means clear from the jurisprudence that the changes effected by the 2020 Act would be interpreted as changes in the enforcement of a penalty, as distinct from changes in the penalty itself. The European jurisprudence, in particular, seems to weigh against the government's position. Critically, the increase in the length of the sentence that must be served by a prisoner, who has already been sentenced to a definite custodial term, is effected directly by the terms of the 2020 Act which were not reasonably foreseeable at the time the offence was committed. This is not a situation in which, for example, a prisoner released on licence is recalled to prison as a result of changes effected to the 'release on licence' regime after he committed the offence.

It can be expected, therefore, that existing prisoners prejudiced by the new measures will challenge them in the courts; possibly

all the way to the European Court of Human Rights. In the meantime, of course, they will be left to serve out their sentences under the new more draconian and, it is submitted, unjust regime. As terrorist offenders, their plight may not generate much public sympathy in an environment where terrorism presents a real and potent threat to life and the effects of past terrorist atrocities are still keenly felt.

It is important to remember, however, that there is an important principle of law and justice at stake here; and it is one that affects us all. The State must not be allowed to punish a person for conduct that was not punishable under the law in force at the time he or she engaged in it. Changes in the law which seek to punish acts that were lawful at the time they were committed, or which seek to apply more severe punishment than that applicable under the law at the time, have no place in a society based on the rule of law and respect for human rights. This principle applies equally (arguably more acutely) to retrospective changes in the law which directly increase the severity of punishment already handed down to an offender.

Separately, it is no secret that the retrospective aspect of the legislation was framed and rushed through to catch a small number of current prisoners who would otherwise be due for imminent release under the pre-existing law. It is unsettling, and surely unprecedented in modern times, for the full legislative power of Parliament to be harnessed against a small number of identifiable individuals.

Protecting the public?

On a more pragmatic level, it is important to recall that the government introduced the new measures in the discharge of its primary duty to protect the public. Obviously, if a terrorist offender is kept in prison for a longer period than that applicable at the time he or she was sentenced, any threat he or she may pose to the public is largely removed for that extra period. The value of any such protection, however, is clearly limited in time. It is also difficult to quantify the benefit, as not all terrorist offenders who have served their time will continue to pose a real and persistent threat to the public.

Indeed, it is possible that the new measures could even increase the threat. Most terrorist offenders have been sentenced to imprisonment for non-violent offences. In the year ending September 2019, for example, the most common offences were possessing information likely to be useful to a terrorist (20%), dissemination of terrorist publications (17%), membership (15%) and fundraising (15%). Typically, these attracted custodial sentences of between one and four years. None of them are inherently violent offences and, in some instances, might be interpreted as mere expressions of opinion.

It is easy to imagine the alienating effect that a retrospective increase in the custodial term to be served would have on these individuals. It may just be sufficient to make them more committed to the terrorist enterprise than they might otherwise have been. To this must be added the known radicalising effect that imprisonment can have on terrorist prisoners. Keeping them in prison for a longer term than had been provided for in the law at the time of their sentencing is likely to enhance that effect. It is possible, therefore, that the new measures may actually increase the threat to the public rather than diminish it.

Northern Ireland

The 2020 Act applies to England and Wales and to Scotland. It contains specific provision to accommodate minor contextual changes in the relevant Scots law. A notable omission is Northern Ireland. Given the long and continuing legacy of terrorism and emergency legislation in Northern Ireland, it might be considered ironic that it is the sole jurisdiction in the UK where this emergency legislation does not apply at all. Also intriguing is that there is virtually no mention of Northern Ireland in the background papers to the legislation. Certainly, there is no express explanation as to why Northern Ireland has been excluded from its provisions.

There may, of course, be an objective justification for the Northern Ireland exclusion. The official position seems to be that the manner in which a sentence is constructed by the courts there is so different to that in the rest of the UK that it would be too complex to extend the Act to Northern Ireland. That position has been challenged by the Justice Minister in the devolved administration in Northern Ireland. In any event, the mere fact that the Act does not extend to that part of the United Kingdom, which has experienced the fear and reality of terrorism more than any other, must raise some doubt over the need for its application to the other parts.

Conclusion

It must be questioned whether the 2020 Act is an effective and appropriate response to the threat of terrorist offenders committing violent terrorist acts after being released early from prison.

Changing the law to increase retrospectively the length of custodial term that a terrorist offender must serve is at best a limited (arguably token) response to the perceived threat it is meant to address. At worst, it will accentuate that threat by converting more fringe non-violent sympathisers into hardened violent terrorists.

Equally, it is difficult to see the justification for requiring terrorist offenders of all classes to serve longer portions of their custodial terms than non-terrorist offenders. The argument that they are more likely to re-offend violently if released before the expiry of their full custodial term has not been supported by any credible empirical base. Moreover, there are other categories of offender who may be considered to pose n equally significant risk of re-offending.

It is easy to understand why a government would want to be seen to be taking tough and resolute action to reassure the public in the wake of violent incidents that provoke public alarm. Nevertheless, emergency criminal justice measures, that often prove to be permanent, are rarely a wise or effective solution. Not only do they frequently fail to eliminate the perceived threat, but they often prove to be counterproductive. They carry a risk of inflicting long-term (perhaps irreparable) damage on rule of law and justice values hammered out on the anvil of liberal democracy and enlightened jurisprudence over several centuries. Perversely, they can even be seen as a victory of sorts for terrorists.

A more constructive response would begin with addressing why prison, and the rehabilitation potential it offers, is not working more effectively to divert terrorist offenders from their cause. It also needs to be complemented by targeted programmes and investments designed to work with communities and individuals to defuse the tensions and frustrations that

provoke terrorist sympathies. Admittedly, this approach will be multi-faceted and time consuming. It will lack the dramatics and (false) quick fix solution of emergency legislation. On the other hand, it just might deliver more effective long-term benefits.

Police Retention of Biometric Data

Introduction

Before 2012, it was standard practice for the police to take the fingerprints, photograph and a DNA sample (from which a DNA profile was extracted) from a person arrested for, or convicted of, a criminal offence. The DNA profiles, fingerprints and photographs (hereafter referred to collectively as biometric data) were then retained indefinitely on a police national database, even where the persons in question were not actually charged with, or convicted of, an offence. The purported justification for such a gross encroachment on the privacy and personal rights of the individual was the perceived value of the resultant database in the investigation and detection of crime.

In *S & Marper v UK* (2008), the Grand Chamber of the European Court of Human Rights held that the indefinite retention of the fingerprints and DNA profile of a person taken consequent to his or her arrest was a breach of the right to privacy, as guaranteed by Article 8 of the European Convention on Human Rights (ECHR). The Court acknowledged that these intimate identifying features were a valuable resource in the detection and prevention of crime. However, it found that it would be a disproportionate interference in the private life of a person to retain them indefinitely, where that person had not been charged and/or convicted of an offence.

The decision in *S & Marper* was limited to persons who were not subsequently charged or convicted. The question remained, therefore, whether it would also be a breach of the ECHR to retain a person's biometric data where they had been convicted of a criminal offence. That question was addressed by a Chamber (First Section) of the European Court a few weeks ago in *Gaughren v United Kingdom*, Application No.4524/15 (13th February 2020).

The Facts

In October 2008, the applicant was arrested on suspicion of driving with excess alcohol in the blood in Northern Ireland. The offence in question was a recordable offence, which broadly covers any offence punishable on conviction by a term of imprisonment. The applicant was brought to a police station where the police took, among other things, his fingerprints, photograph and a DNA sample by a buccal swab (from the inside of his cheek). His DNA profile was extracted from the sample.

In November 2009, the applicant pleaded guilty to the offence of driving with excess alcohol in the blood. He was fined £50 and suspended from driving for 12 months. Under the rehabilitation of offences legislation, his conviction was spent after five years. This meant that from November 2014 evidence could not be admitted in any proceedings to prove that he had been charged with, prosecuted, convicted or sentenced for the offence. His only previous criminal conviction was for disorderly behaviour in 1990 when he was

17 years of age, and for which he was fined £25.

Two months after his conviction, the applicant's solicitor wrote to the police requesting that his fingerprints, photograph (custody image), DNA sample and DNA profile be destroyed or returned to him. The DNA sample was eventually destroyed in 2015, but the police refused to destroy or return the fingerprints, photograph or DNA sample, and made it clear that they would retain them indefinitely.

Domestic law

The Protection of Freedoms Act 2012 was enacted, among other things, to bring the law in England and Wales into line with the decision of the European Court of Human Rights in *S & Marper*. The Act imposed strict limits on the retention of the DNA profile and fingerprints of a person who had been arrested for an offence but not charged or convicted. However, it left intact their indefinite retention where the person concerned was convicted of a recordable offence (and it permitted rolling retention for national security purposes).

The issue of retention of an arrested person's photograph did not arise in the *S & Marper* case (or the 2012 Act). Subsequently, however, in *RMC and FJ v Commissioner of Police for the Metropolis and Secretary of State for the Home Department* [2012] EWHC 1681, a Queen's Bench Divisional Court in England and Wales held that the *S & Marper* principle also applied to the retention of photographs.

In 2017, UK government guidelines stated that an individual convicted of a non-serious recordable offence should be able to apply to have their custody image deleted six years after conviction. In such cases, there is a presumption in favour of deletion. Police forces were required to review the custody images they held, and to update their retention policy, in accordance with the guidelines. These, and other associated privacy-friendly changes, were prompted partly by advances in technology which rendered the images searchable using facial recognition software.

Surprisingly, perhaps, the law in Northern Ireland was not brought into line with the requirements of the *S & Marper* decision. The police there continued to take and retain the DNA profile, fingerprints (and photograph) of a person arrested for a recordable offence, irrespective of whether he or she was subsequently charged with or convicted of an offence.

The continuance of the old non-ECHR compliant regime in Northern Ireland was explained, unconvincingly, by a combination of confusion over the division of competence in the matter between the Northern Ireland Assembly and the Westminster Parliament, technical issues, drafting errors and the dissolution of the Northern Ireland Assembly. One could also suspect the continued influence of the old 'police state' mentality among some powerful political and security sectors in Northern Ireland.

Domestic decisions

The applicant in *Gaughran* sought a judicial review of the police refusal to delete or return his biometric data. He argued that their policy of indefinite retention constituted a breach of his right to privacy under Article 8 ECHR. The High Court of Northern Ireland accepted that there was an interference with his privacy, but it also held that it was justified and proportionate within the scope of Article 8 in the interests of the prevention and detection of crime. In

particular, the Court considered that adopting a conviction for a recordable offence as the threshold for indefinite retention reflected an appropriate balance between the individual right to privacy and the public interest in the detection and prevention of crime.

The UK Supreme Court upheld the High Court's decision by a majority of four to one. As well as agreeing with the High Court's approach, the majority attached some importance to the apparent diversity of approach among Council of Europe Member States on retention policy in respect of convicted persons. It considered that this left individual States with a wide margin of appreciation (or discretion) to set their own policy. Significantly, on the specific issue of retaining his photograph, the Court considered that the applicant's privacy interest was very low as (at the time) it did not form part of a database that could be subject to facial recognition technology.

The decisions of the High Court and the Supreme Court reflect a heavy preference for crime control values over privacy. All persons convicted of a recordable offence are lumped together as a criminal underclass whose intimate personal identifiers (biometric data) will be held on the police national database forever. No distinction is made among categories of offence within the recordable offence classification. A person convicted of taking part in a prohibited public procession, for example, is treated the same as a person convicted of rape.

Given the incredibly broad sweep of recordable offences, and the inclusion of many relatively minor offences, it can be expected that the number of persons whose biometric data are held indefinitely on the police national database are huge and expanding relentlessly. In July 2016, for example, no less than 19 million photographs (custody images) were held, 16 million of which were searchable using facial recognition technology.

Only Lord Kerr, the dissenting judge in the Supreme Court, offered an approach that sought to refine the draconian retention policy so that it would be targeted more rationally and precisely at the aim of detecting crime and assisting in the identification of future offenders. This could entail the removal of some of the less serious recordable offence from the scheme, the adoption of a gradation of retention periods matching the seriousness of the offence and provision for periodic review of the need to retain an individual's biometric data. Indefinite retention would be confined to offenders for whom that was necessary for the future detection and prevention of certain serious crimes.

The question for the European Court, therefore, was whether it was a breach of Article 8 ECHR to retain the applicant's biometric data indefinitely given that he had been convicted of a recordable offence.

The ECtHR decision

The Court accepted at the outset that the indefinite retention of the applicant's biometric data amounted to an interference with his private life within the meaning of Article 8(1) ECHR. In the case of the photograph, this represented a development of the Court's earlier jurisprudence which held that the retention and use of photographs taken on arrest did not raise the Article 8 privacy interest. The Court felt compelled to change course on the facts of the instant case because the photograph was taken following arrest, will be held indefinitely on the police

national database and, critically, could be subjected to facial recognition and facial mapping techniques by the police.

The key issue for the Court was whether the interference with the applicant's privacy was in accordance with law and necessary in order to protect one of the interests specified in Article 8(2), most notably public safety and the prevention of crime. On this it had no difficulty in accepting that the retention policy pursued a legitimate aim of preventing and detecting crime. Whether the measure was necessary to achieve that aim was a more difficult matter.

The Court rejected the UK argument that there was sufficient diversity in retention periods across Council Member States to justify giving it a broad margin of appreciation over its own retention period. The Court found that very few States adopted indefinite retention. Most imposed defined time limits (or other checks on the duration of retention), even if they were very long and, in some cases, exceeded the life of the person concerned. In the case of DNA profiles, especially, the Court considered that indefinite retention presented a significant encroachment on the privacy rights of the offender which would continue indefinitely after the offender's death. Accordingly, it found a degree of consensus around the adoption of defined periods of retention (even if there was variation among the periods themselves) sufficient to reject the UK government's argument for a wide margin of appreciation in the matter.

The Court was also not persuaded by the UK argument that the scheme in Northern Ireland applied a minimum threshold of seriousness insofar as indefinite retention was limited to recordable offences. The Court noted that this argument was rejected in *S & Marper*, and it saw no reason to depart from that in respect of convicted offenders. Echoing the position of Lord Kerr, it referred to the fact that recordable offences were so broad that the regime could be characterised as applying irrespective of the nature or seriousness of the offence.

The Court rejected another argument presented by the UK to the effect that the police retention policy had already been carefully examined by the domestic courts which had applied the Convention rights in accordance with the case law and had adequately balanced the applicant's personal interest against the public interest. In this scenario, according to the UK, it was not for the European Court to substitute its own view of the merits for that of the competent national judicial authorities, unless there was a compelling reason for doing so.

The European Court considered that there were compelling reasons for overriding the decision of the domestic authorities. In the case of photographs, it noted that the UK Supreme Court had proceeded on the basis that facial recognition technology was not applicable, whereas it was clear now that it was. It also noted that the UK Supreme Court had proceeded on the basis that very few other States had a process of review in respect of retained biometric data, whereas it is clear that most do. Finally, it noted that the UK Supreme Court equated indefinite retention with a retention period linked to the death of the subject. As noted above, however, the European Court drew an important distinction between the two, especially in the case of DNA profiles.

The European Court concluded that there is a "narrowed" margin of appreciation for States setting retention limits for the

biometric data of convicted persons. The duration of that period, however, is not necessarily conclusive in determining whether a State has overstepped the limits of that margin. Because it concerns convicted persons, there is less risk of stigmatisation than is the case in the *S & Marper* type situation of a person not convicted. Other important factors are whether the regime takes into account the seriousness of the offence, the need to retain the data and the safeguards available to the individual. Where the State has opted for indefinite retention, the existence and functioning of certain safeguards become decisive.

The indefinite retention policy in Northern Ireland was found to be in breach of Article 8. It failed to strike a fair balance between the applicant's right to privacy and the public interest in the prevention and detection of crime. The key flaws were the indiscriminate nature of the powers of retention in respect of a person convicted of an offence (even though it was spent) without reference to the seriousness of the offence or the need for indefinite retention, coupled with the absence of any real possibility of review. The Court acknowledged that the State retained a slightly wider margin of appreciation in respect of the retention of photographs and fingerprints (relative to DNA profiles). In the absence of any real safeguards and provision for review, that margin is not sufficient to conclude that retention could be a proportionate interference with the right to privacy.

Conclusion

It is submitted that the decision in *Gaughran* is a welcome check on excessive police encroachment on the privacy of the individual under cover of the need to detect and prevent crime. The indefinite retention policy in respect of the biometric data of persons convicted of recordable offences has the effect of stigmatising a large and expanding portion of the population; designating them forever as criminally suspect. It is difficult to see the justification for applying that to the very large number of such persons who have been convicted of offences which are not sufficiently serious to single them out as presenting a constant and permanent risk to others or the State.

The mere fact that the retention of their intimate personal data may be convenient for the police in detecting and preventing crime is hardly a sufficiently justification. To think otherwise is an argument for a police state in which everyone's personal data is uploaded and retained on the police database.

As explained by Lord Kerr, there is no fundamental reason why a retention policy cannot be designed to strike a rational and proportionate balance between the individual interest in privacy and the public interest in crime prevention and detection. Using recordable offences as the sole determinant in this context patently does not strike that balance. They are too broad and encompass too many offences that can be classed as less serious. Compliance with the Court's judgment in *Gaughran* now requires Lord Kerr's more nuanced and targeted approach to be introduced in Northern Ireland.

The Republic of Ireland also needs to take heed. It was identified in the Court's judgment as one of only four other jurisdictions to apply indefinite retention to DNA profiles. It and North Macedonia are also reported as applying indefinite retention to fingerprints and photographs.