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IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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ON APPEAL FROM BELFAST CROWN COURT AT LAGANSIDE

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THE KING

v

FIONNGHUALE MARY THERESA DYMPHA MARIE NUALA PERRY

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Before: McCloskey LJ, Colton J and Fowler J

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Mr D Hutton KC and Ms A Macauley (instructed by Phoenix Law) for the Appellant
Mr S Magee KC and Mr Robin Steer (instructed by the Public Prosecution Service) for the Respondent
Mr Tony McGleenan KC and Mr Philip McAteer (instructed by the Departmental Solicitors Office) for Department of Justice and Advocate General

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JUDGMENT: APPEAL AGAINST SENTENCE

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McCLOSKEY LJ (*delivering the judgment of the court*)

Preface

By its judgment delivered on 10 November 2023 ([2023] NICA 74) this court dismissed Ms Perry's appeal against conviction. This judgment determines her appeal against sentence. The main procedural feature of the appeal proceedings has been the issue of Notices under Orders 120 and 121 RCJ by reason of human rights incompatibility issues under article 7 ECHR.

Introduction

[1] On 15 March 2023 Nuala Perry, ("the appellant"), following a non-jury trial, was convicted of a single count of collecting or making a record of information likely to be useful to a terrorist, contrary to section 58(1)(a) of the Terrorism Act 2000 ("the Terrorism Act"). On 17 May 2023 she was punished by a sentence of four years imprisonment, to be followed by a period of 12 months licensed release. By its judgment delivered on 10 November 2023 this court dismissed her appeal against conviction. This further judgment determines the appeal against sentence.

The Impugned Sentence

[2] The trial judge first addressed the gravity of the appellant's offending. The content of the notes made and retained by her was described as "sinister and of great concern." They demonstrated the appellant's role in facilitating the continuing endeavours of so-called "dissidents" to "murder, maim and disrupt …" The single aggravating factor identified was the appellant's criminal record. In 1975 and 1976 she was convicted of hijacking a motor vehicle, possessing a firearm with intent to carry out the hijacking and membership of a proscribed organisation. Thus "… even in her teens she was committed to violent republicanism." The sole mitigating factor acknowledged was the appellant's Multiple Sclerosis ("MS"), which would render her imprisonment "particularly challenging." The judge expressly made "*some allowance*" for this. In sentencing the appellant to four years imprisonment, the judge observed that the term would have been five years but for her MS.

[3] The remainder of the judgment addresses the issue of the construction and effect of certain statutory provisions post-dating the appellant's offending. The court rejected the appellant's arguments, which are renewed before this court and will be examined *infra*.

[4] Before this court the appellant's sentence is challenged on two grounds, namely (a) it is manifestly excessive and (b) it is the product of an error of law by the sentencing judge, the centrepiece being article 7 ECHR, related to para [3] above.

New Evidence

[5] The appellant was sentenced on 17 May 2023. The first issue to be determined is whether this court should accede to her application to adduce fresh evidence. In brief compass, the materials assembled at the sentencing stage in the Crown Court included a plethora of medical reports spanning the period September 2019 to March 2023. The last of these reports was that of her General Medical Practitioner ("GP") dated 24 March 2023. This documented a marked deterioration in the appellant's MS with an associated adverse impact on her mental health, which would "undoubtedly" be progressive, prompting the observation that imprisonment would be "extremely difficult" for her.

[6] During the six months which have elapsed since sentencing the appellant's solicitors have procured a further report from her GP and a report from a consultant neurologist. They have also obtained certain prison medical records. This court is invited to permit the adduction of all of this new evidence.

[7] This court's powers were considered in *R v Ferris* [2020] NICA 60 at paras [17] – [32]. The relevant provision is section 25(1)(c) of The Criminal Appeal (NI) Act 1980 ("the 1980 Act"). By this provision the Court of Appeal is endowed with a discretionary power to receive fresh evidence:

> "… if it thinks it necessary or expedient in the interests of justice..."

By section 25(2) this court "… shall, in considering whether to receive any evidence, have regard in particular to" the following four considerations:

> "(a) whether the evidence appears to the court to be capable of belief;
>
> (b) whether it appears to the court that the evidence may afford any ground for allowing the appeal;
>
> (c) whether the evidence would have been admissible at the trial on an issue which is the subject of the appeal; and
>
> (d) whether there is a reasonable explanation for."

Having regard to the statutory language, this court may in addition have regard to <u>other</u> facts or considerations bearing on the exercise of its discretion: *Ferris*, para [21]. The overarching test is the interests of justice: *Ferris*, para [22].

[8] Notably, in *R v McDonald and Others (Attorney General's Reference 11-13 of 2005)* [2006] NICA 4 the Lord Chief Justice stated, at para [34]:

> "It would be illogical and contrary to justice to ignore material relevant to [the] sentencing exercise simply because it came into existence subsequent to the passing of sentence in the Crown Court …
>
> The Court of Appeal is entitled to have regard to material which was not available at the time sentence was passed and also to have regard to what has happened since sentence has passed."

These pronouncements point strongly in favour of admitting the new evidence. All of it has been generated post-sentencing and its materiality is beyond plausible dispute. Accordingly, we accede to the appellant's application.

[9] There is also an application on behalf of the prosecution for the receipt of two items of fresh evidence consisting of a report generated by Prism Health Care dated 16 October 2023 addressing various aspects of the appellant's health and health care during the period May to October 2023. The court's assessment at the conclusion of the immediately preceding paragraph applies fully to this material and we therefore accede to the application.

The Criminal Justice (NI) Order 2008

[10] At the time of the appellant's offending (September 2015 – February 2018) the 2008 Order was the main legislative instrument governing the sentencing of offenders in Northern Ireland. Prior to certain material amendments which we shall address in the immediately succeeding section of this judgment its main provisions, in the context of this appeal, were the following:

Article 4 (1)(a)

> This defines "custodial sentence" as inter alia "a sentence of imprisonment."

Article 5(2)

> "The court shall not pass a custodial sentence unless it is of the opinion that the offence, or the combination of the offences and one or more offences associated with it, was so serious that only a custodial sentence can be justified for the offence."

Article 5(4)

> Where a court passes a custodial sentence, it shall –

(a) "… state in open court that it is of the opinion referred to in paragraph (2) and why it is of that opinion; and

(b) In any case, explain to the offender in open court and in ordinary language why it is passing a custodial sentence."

Article 7

"(1) This Article applies where a court passes a sentence-

(a) Of imprisonment for a determinative term;

…

(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."

(Neither Article 14 nor Article 7(3) is relevant in the present context.)

Article 8

"(1) This Article applies where a court passes—

(a) a sentence of imprisonment for a determinate term, other than **[F1**a serious terrorism sentence,**]** an extended custodial sentence **[F2**or an Article 15A terrorism 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."

[Textual Amendments

F1Words in art. 8(1)(a) inserted (29.6.2021) by Counter-Terrorism and Sentencing Act 2021 (c. 11), s. 50(2)(v), Sch. 13 para. 66(6)
F2Words in art. 8(1)(a) inserted (30.4.2021) by Counter-Terrorism and Sentencing Act 2021 (c. 11), s. 50(1)(i), Sch. 13 para. 72(5)]

Article 9

"(1) In forming any such opinion as is mentioned in Article 5(2) or 7(2), a court shall take into account all such information as is available to it about the circumstances of the offence or (as the case may be) of the offence and the offence or offences associated with it (including any aggravating or mitigating factors).

(2) Subject to paragraph (3), a court shall obtain and consider a pre-sentence report before forming any such opinion …."

The 2019 Statutory Amendments

[11] The indictment alleged that the appellant's offending had occurred "… on a date unknown between 16 September 2015 and 21 February 2018." Throughout the whole of this period the maximum sentence, per section 58(4) of the Terrorism Act 2000 ("the 2000 Act"), was ten years imprisonment or a fine or both. This provision

was amended by the Counter-Terrorism and Border Security Act 2019 – sections 3(4), 25(1) and 27(3) – by increasing the maximum term of imprisonment to 15 years, with effect from 12 April 2019. The appellant was convicted on 15 March 2023 and sentenced on 17 May 2023. However, this increase in the maximum punishment did not apply to her sentencing by virtue of a transitional provision whereby, per section 25(1) of the 2019 Act, this amendment:

> "... applies only in a case where every act or other event proof of which is required for conviction of the offence in question takes place on or after the day on which the amendment comes into force."

Accordingly, both on the dates (or during the period) of the appellant's offending and the date of her sentencing the maximum punishment available was the same, namely ten years imprisonment, shall consider the significance of this infra in our determination of the appellant's article 7 ECHR ground of appeal.

The New Statutory Sentencing Regime: Article 15A

[12] Further changes to the statutory sentencing regime were made by the Counter-Terrorism and Sentencing Act 2021 ("the 2021 Act"), with effect from 30 April 2021. Notably, no change was made to the maximum punishment for offences under section 58 of the 2000 Act: see section 3 and Schedule 3, inserting a new Schedule 2A into the Criminal Justice (NI) Order 2008 ("the 2008 Order"). In the context of this appeal the most important change effected is that effected by section 24 of the 2021 Act, which inserted a new Article 15A into the 2008 Order. Article 15A applied to the sentencing of the appellant because (a) her conviction post-dated the commencement of section 24 of the 2021 Act (30 April 2021) and (b) her offence is one of those listed in Part 4 of Schedule 2A, thereby belonging to the class of "specified offence."

[13] The new Article 15A regime applies only where the three conditions specified in Article 15A(1) are satisfied:

> "(1) This Article applies where—
>
> (a) a person is convicted after the commencement of section 24 of the Counter-Terrorism and Sentencing Act 2021 of—
>
> (i) a serious terrorism offence;
>
> (ii) an offence within Part 4 of Schedule 2A (terrorism offences punishable with more than two years' imprisonment); or
>
> (iii) any other offence in respect of which a determination of terrorist connection is made;

(b) the court does not impose, in respect of the offence or any offence associated with it, a life sentence, an indeterminate custodial sentence, a serious terrorism sentence or an extended custodial sentence; and

(c) the court decides to impose a custodial sentence."

Furthermore, this regime does not apply, per Article 15A(2), in the following cases:

"(2) But this Article does not apply where—

(a) the offender is under the age of 18 when convicted of the offence; and

(b) the offence was committed before the commencement of section 24 of the Counter-Terrorism and Sentencing Act 2021."

The effect of Article 15A(3) is that where this provision applies:

"... the court shall impose on the offender a sentence under this Article."

[14] Article 15A (4) is the central provision of this new discrete sentencing regime, providing:

"Where the offender is aged 21 or over, a sentence under this Article is a sentence of imprisonment the term of which is equal to the aggregate of –

(a) The appropriate custodial term; and

(b) A further period of one year for which the offender is to be subject to a licence."

By para (7) "appropriate custodial term" is defined as –

"… the term that, in the opinion of the court, ensures that the sentence is appropriate."

[15] This new regime has four further noteworthy features. First, a suspended sentence order cannot be made: Article 15A (9) Second, a convicted offender cannot qualify for remission of sentence under the Prison Rules (which is set at 50%): Art 15A (10). Third, the obligatory custodial element of any term of imprisonment has been

raised from one half to two thirds, with no guarantee of release at this point: Article 20A(3)(a) in conjunction with Article 20A(9)(b). Fourth, at this latter stage it will be for the Parole Commissioners to make decisions about release and licence conditions: Article 20A(3) and (4).

Construing Article 15A

[16] Having regard to the arguments advanced on behalf of the appellant, it is necessary to construe certain of the provisions in the new Article 15A regime. We shall address firstly the phrase "the appropriate custodial term", which is employed in Article 15A (4) and (7). While the latter provision contains the statutory definition of this phrase, the word "appropriate" is not defined. This adjective is a familiar, uncomplicated member of the English language. It would have been open to the legislature to provide a special, contextual definition in devising the new regime. However, it did not do so. No purpose would be served by this court supplying a series of synonyms. In short, judicial definition is not required. We shall, however, elaborate when comparing and contrasting the new "appropriate" statutory provisions with Article 7(1)(b) (*supra*).

[17] The introduction of the new Article 15A sentencing regime does not represent the only change to the 2008 Order effected by the 2021 Act. Certain other changes, not directly relevant in the present context, were made. These were highlighted in the submission of Mr McGleenan KC on behalf of the Ministry of Justice which brought to the attention of the court certain other newly introduced provisions containing context specific definitions of the phrase "the appropriate custodial term." These are found in Article 13A (8) (sentencing for serious terrorism offences) and Article 14(3) (concerning extended custodial sentences for certain violent or sexual offences). These provisions stand in contrast to their analogues in Article 15A.

[18] Next, we consider the question of whether Article 7(2) of the 2008 Order applies to sentences imposed under the Article 15A regime. As the language of Article 7(1)(a) (*supra*) makes clear, Article 7 applies in every case where a court passes a sentence of imprisonment for a determinate term. The 2021 Act effected a minor amendment to Article 7(2):

> "Subject to **Articles 13A, 14 and 15A** 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."

The amended part of Article 7(2) is highlighted. It would have been open to the legislature to include within the new Article 15A regime a provision disapplying Article 7(2). However, it has not done so. Nor in our view is there any warrant for spelling out of Article 15A an <u>implied</u> intention to this effect. We consider that the

"*subject to*" clause is designed to ensure that in cases where the Article 15A sentencing regime must be applied the sentencing court, in giving effect to Article 7(2), will do so in a manner which does not defeat or dilute any of the new Article 15A provisions.

[19] There is a further consideration of some relevance. The sentencing principle expressed in Article 7(2) of the 2008 Order first appeared in legislative form in Article 20(2)(a) of the Criminal Justice (NI) Order 1996. Before then it is probably correct to suggest that it operated as a common law sentencing principle. Furthermore, it has a more elaborate analogue in England and Wales, in section 63 of the Sentencing Act 2020. It is a long-established principle of sentencing law in this jurisdiction. Given these considerations, had there been a legislative intention to exclude it from sentencing exercises under Article 15A of the 2008 Order one would expect this to have been clearly expressed.

[20] The new "appropriate" provisions in Article 15A inevitably invite some reflection. Neither party demurred from the court's suggestion that if and insofar as these new provisions were designed to enlarge and/or modify Article 7(2), they do so by expanding the judicial discretion. While recognising the potential for more detailed argument in an appropriate future case, on the one hand it is not easy to contemplate radically different results in cases where (a) the sentencing of an offender entails the application of Article 7(2) alone and (b) the sentencing of an offender entails the application of Article 7(2) in tandem with Article 15A(4). On the other hand, however, in all cases involving the sentencing of an offender under the new Article 15A regime the sentencing court will have to give effect to the policy and objects of the new statutory provisions (see *infra*), having regard to the *Padfield* principle.

[21] It is appropriate to elaborate on the latter issue at this juncture. We consider that the significant 2021 sentencing reforms evinced in the clearest terms Parliament's intention to introduce a more austere sentencing regime reflecting public concern and revulsion regarding offending of this kind, with a particular focus on protection of the public. This is particularly clear from *Morgan and others v Ministry of Justice* [2023] 2 WLR 905 ("*Morgan*"), at paras 66 – 71:

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

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

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

offender, who appeared to have reformed, nonetheless remained motivated to commit further terrorist offences.

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

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

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

> Crucially, we will introduce a requirement that no terrorist offender will be released before the end of the full custodial term unless the Parole Board agrees.'
>
> 70. The Secretary of State considered, as did Parliament in passing the 2020 Act, that in relation to the implementation of sentences of imprisonment in respect of terrorist offenders, the two terrorist incidents demonstrated that there was no fair balance between the demands of the general interests of the community and the interests of the individual terrorist prisoners. The balance required to be shifted to protect the public.

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

[22] To summarise, our analysis of the interplay between Article 7 of the 2008 Order (on the one hand) and Article 15A (4) and (7) (on the other) is one of co-existence. Notably, the phrase "in the opinion of the court" in Article 7(2) is repeated in Article 15A (7). This is the classic language of judicial discretion. Superimposing the *Padfield* principle, the court is enjoined to form the requisite opinion consistent with promoting the policy and objects of the legislation.

[23] If reinforcement of the construction which we have espoused is required it is found in Lady Black's exposition of the comparable English statutory provisions in section 236A of the Criminal Justice Act 2003 in *R (Stott) v Secretary of State for Justice* [2018] UKSC 59 at paras [93]–[95].

[24] At this juncture, we turn to consider another discrete issue of statutory construction. Article 8 of the 2008 Order is among the provisions of that instrument reproduced in para [10] above. We consider it abundantly clear from the "*other than*" clause in para (1)(a) that Article 8 has no application to cases where an offender is being sentenced under the new Article 15A regime. This becomes even clearer when one considers the main features of the new regime highlighted in paras [13]–[15] above.

[25] We shall consider next the discrete issue of the judicial function in sentencing under the Article 15A regime. Applying elementary principles this issue falls to be determined by considering the provisions of Article 15A as a whole and doing so in the broader context outlined in the preceding paragraphs. In our opinion the Article 15A "sentence of imprisonment" has two distinct components. The first is the "custodial term" which the court considers appropriate in the sense explained above. This period will in every case be measured by the exercise of judicial discretion, applying the *Padfield* principle. Its ultimate duration will be dependent upon how the Parole Commissioners exercise their statutory function.

[26] The second component is the obligatory period of licenced release for one year which will commence upon the offender's release from custody. We consider that two propositions emerge unambiguously from the statutory language. The first is that the measurement of the custodial period will in every case be a matter for the exercise of the discretion of the sentencing court within the constraints explained above. The second is that the sentencing court has no role whatsoever with regard to the second component of an Article 15A sentence viz the obligatory one year period of licenced release. This aspect of the sentence is mandated by the legislation. While we shall address *infra* what we consider to be good sentencing practice, we entertain no doubt that a failure by a sentencing judge to advert to this feature of a sentence imposed under Article 15A would be a matter of no moment. Thus, we reject unhesitatingly the submission of Mr Hutton KC that an omission of this kind would have the windfall benefit of unconditional and unlicenced release of an offender with no ensuing licence period.

[27] Thus, a court sentencing an offender under Article 15A of the 2008 Order will have to give effect to both Article 7(2) and Article 15A (7). It seems unlikely that the resulting sentence will differ radically from that which would have been imposed prior to the 2021 statutory reforms. However, the legislature must have contemplated that in suitable cases the outcome will be different. If the intention were otherwise, the introduction of the additional criterion of "appropriate" would be redundant. We consider that the effect of this additional criterion is to invest the sentencing court with a degree of latitude enabling it to impose a sentence outwith the confines of Article 7(2) in a suitable case.

Which Regime?

[28] One of the issues raised on behalf of the appellant is whether she was sentenced under the pre2021 2008 Order regime or the new Article 15A regime. It was submitted that the sentencing path contemplated by the new Article 15A regime was not explicitly followed by the judge. Furthermore, it is highlighted on behalf of the appellant that the judge did not employ any of the new linguistic terms contained in Article 15A.

[29] The sentencing process at first instance had the following several noteworthy features. First, the determination of the appellant's sentence was deferred to await the decision of the Supreme Court in *Morgan*. Second, both parties provided further written submissions following its promulgation. Third, in his sentencing decision the judge referred specifically to the changes effected to the 2008 Order by the 2021 Act. Fourth, he devoted several paragraphs to the decision in *Morgan*. He also expressed himself bound by this decision. Cumulatively, these considerations point firmly to the view that in sentencing the appellant the judge was operating under Article 15A.

[30] Furthermore, the discrete submission on behalf of the appellant that the judge "... did not impose a defined one-year licence period within the four-year envelope of the sentencing imposed" cannot in our view be sustained for three reasons. The first

is that, as we have explained above, the one-year licence period applies by operation of law, Article 15A(4)(b) rather than any judicial decision or act. The second is that, in our estimation, the judge clearly imposed a custodial term of four years exclusive of the mandatory one-year period of licenced release to follow. The third is that in our view the mandatory one-year licence must follow completion of the custodial term: adopting the expression of Mr Hutton KC and Ms Macauley, it belongs outside the custodial term "envelope."

[31] While there was a discrete contention that the judge did not engage with certain of the appellant's submissions, we are bound to observe that following the deferral of sentence noted above and the subsequent promulgation of the *Morgan* judgment all that materialised on the appellant's side was a somewhat perfunctory electronic communication from her solicitors.

[32] Given all of the foregoing considerations, there can in our view be no plausible doubt that the judge applied the new Article 15A regime in sentencing the appellant. The exercise of examining the sentencing judgment as a whole yields the analysis that, as submitted by Mr McGleenan KC, this is what the judge did in substance.

Best Sentencing Practice

[33] In modern sentencing practice transparency and clarity of language have become matters of high importance. This gives rise to yet another burden on sentencing judges whose daily diet is heavy court lists and complex statutory models. It is reflected in section 52 of The Sentencing Act 2020, which obliges courts in England and Wales to give reasons for, and explain the effect of, their sentences. While there is no direct analogue in Northern Irish legislation, this is in substance required generally by reason of an amalgam of statutory provisions dating from the Treatment of Offenders Act (NI) 1968 (see section 18(3) particularly), established sentencing practices and the common judicial duty to give reasons.

[34] The effect of Article 15A(1)(c), (4) and (7) is that where the qualifying conditions specified in Article 15A(1)(a) and (b) are satisfied and neither of the exclusions in para (2) applies, the first decision for the sentencing court is whether to impose a custodial sentence. If the court determines not to take this course, the Article 15A regime does not apply – and the court should say so and why. If the court decides to impose a custodial sentence, certain further procedural requirements are engaged. As a matter of good sentencing practice, it would be desirable for the court to state that it is sentencing the offender under this new regime, given that there is a judicial choice to be made and having regard to Article 5(4)(b) of the 2008 Order, which provides:

> "… (the) court shall …
>
> In any case, explain to the offender in open court and in ordinary language why it is passing a custodial sentence."

[35] Next, by virtue of Article 15A(4)(a) and (7), the court is required to state that the custodial term which in its opinion ensures that the sentence is appropriate is X. Given our analysis and construction of the statutory provisions above, the court should simultaneously employ the language of Article 7(2) and Article 15A (7) of the 2008 Order.

[36] Furthermore, it would be desirable for the sentencing judge to state that by virtue of the legislation (a) the offender will serve at least two thirds of the custodial term and (b) from that point the Parole Commissioners will decide whether the offender is to be released and, if so, when. Finally (although the court has no role to play in this discrete matter), it would be preferable to indicate that (i) this custodial term will, upon completion, be followed by a licence period of one year's duration and (ii) the terms of such licence will be determined by the Ministry of Justice and will have to be fully observed.

Article 7 ECHR

[37] Article 7 ECHR is one of the Convention rights protected by the Human Rights Act 1998. article 7 provides, in para (1):

> "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 highlighted sentence is the one which must be addressed in the context of this appeal.

[38] Article 7 is one of the Convention rights from which no derogation under Article 15 is permissible. Its language is uncompromising. The Strasbourg Court has emphasised in several decisions that it is to be construed and applied in such a manner as to provide effective safeguards against arbitrary prosecution, conviction and punishment: see for example *Del Rio Prada v Spain* [2013] 58 EHRR 1037 at para [77], a decision of the Grand Chamber, which held that a new post-sentence provision purporting to repeal a previous provision whereby remission of sentence for work done in detention was available contravened article 7. This was a contravention because it had the effect of increasing the penalty applicable at the time of the offending: a classic illustration of the *lex gravior* principle in operation.

[39] There is a recurring exhortation of the Strasbourg Court that article 7 must be construed and applied so as to provide effective safeguards against arbitrary punishment. Another familiar theme of the jurisprudence is that an abstract comparison of the two sentencing codes in question is to be avoided, the correct approach being a concrete assessment of the specific acts to determine whether the

offender has actually suffered a disadvantage in consequence of the introduction of the new sentencing regime: see, for example, *Jidic v Romania* (Application no. 45776/16 ECHR) paras [85]–[98].

[40] Another feature of the Strasbourg jurisprudence is the distinction which it has made between the sentence imposed by the court (on the one hand) and the manner of its subsequent execution, or enforcement (on the other). See for example *Del Rio Prada (supra)* at para [85] and *Kafkaris v Cyprus* [2009] 49 EHRR 35 at para [142].

[41] It is also necessary to consider the meaning of "penalty" in article 7. The jurisprudence of the ECtHR makes clear that this is an autonomous Convention concept: see for example *Welsh v United Kingdom* [1995] 20 EHRR 247 at para [27]. The approach of the Strasbourg Court entails a heavy emphasis on practicality, with substance prevailing over appearance or form. In *Del Rio Prada,* the court stated at paras 81 – 83:

> "81. The concept of a "penalty" in Article 7 § 1 of the Convention is, like the notions of "civil rights and obligations" and "criminal charge" in Article 6 § 1, an autonomous Convention concept. To render the protection offered by Article 7 effective, the court must remain free to go behind appearances and assess for itself whether a particular measure amounts in substance to a "penalty" within the meaning of this provision (see Welch, § 27, and Jamil, § 30, both cited above).
>
> 82. The wording of the second sentence of Article 7 § 1 indicates that the starting-point in any assessment of the existence of a penalty is whether the measure in question is imposed following conviction for a "criminal offence." Other factors that may be taken into account as relevant in this connection are the nature and purpose of the measure; its characterisation under national law; the procedures involved in the making and implementation of the measure; and its severity (see Welch, § 28; Jamil, § 31; Kafkaris, § 142; and M. v. Germany, § 120, all cited above). The severity of the order is not in itself decisive, however, since many non-penal measures of a preventive nature may have a substantial impact on the person concerned (see Welch, cited above, § 32, and Van der Velden v. the Netherlands (dec.), no. 29514/05, ECHR 2006-XV).
>
> 83. Both the European Commission of Human Rights and the court in their case-law have drawn a distinction between a measure that constitutes in substance a "penalty" and a measure that concerns the "execution" or

> "enforcement" of the "penalty." In consequence, **where the nature and purpose of a measure relate to the remission of a sentence or a change in a regime for early release, this does not form part of the "penalty" within the meaning of Article 7."**
> [emphasis added]

As these passages make clear, measures relating to the execution, or enforcement, of a sentence do not constitute a "penalty" within the meaning of article 7(2).

[42] The Strasbourg jurisprudence and the domestic jurisprudence are at one as regards the correct approach. This is clear from *R v Uttley* [2004] UKHL 38. Lord Phillips outlined the factual matrix and its legal outworkings at paras [2]–[5] thus:

> "Over a period prior to 1983 the respondent Mr Uttley committed a number of sexual offences, including three rapes … rape carried a maximum sentence of life.
>
> The respondent was not prosecuted for these offences until 1995. He pleaded guilty to some of the offences, was convicted of the others and was sentenced to a total of 12 years imprisonment. The practical consequences of that sentence differed significantly from those that would have followed had the respondent been sentenced to 12 years imprisonment in 1983, which has been treated for the purposes of this case as the date upon which he committed the offences in question. This was because the release regime applicable to prisoners had been changed by the Criminal Justice Act 1991 ('the 1991 Act') which had come into effect on 1 October 1992…
>
> Had the respondent been sentenced to 12 years' imprisonment under the old regime he would, subject to good behaviour have been released on remission after serving two-thirds of his sentence, which would then have expired. That would have been the effect of section 25(1) of the Prison Act 1952 and rule 5 of the Prison Rules 1964 (SI 1964/388), which remained applicable up to the introduction of the 1991 Act. In accordance with the provisions of the 1991 Act the respondent was released on 24 October 2003 after serving two-thirds of his sentence, but he was released on licence, the terms of which will remain in force until he has served three-quarters of his sentence, that is for a year. Those terms place the respondent under supervision and impose certain restrictions on his freedom.

> While subject to the conditions of the licence the respondent is at risk of recall to serve the balance of his sentence, should he fail to comply with those conditions. Furthermore, should he commit a further imprisonable offence before the 12 year term of his sentence has expired, the court dealing with that offence will be entitled to add all or part of the outstanding period of his 12 year sentence to any new sentence imposed."

[43] The offender's attempt to establish a breach of article 7(2) ECHR failed: see per Lord Phillips at paras [18]–[23], Lord Rodger at [38], Baroness Hale at [45] and Lord Carswell at [57]–[62]. It failed because the maximum punishment, namely life imprisonment, applied both at the time of the offending and at the time of sentencing. In the pithy formulation of Lord Phillips at para 21:

> "… article 7 (1) will only be infringed if a sentence is imposed on a defendant which constitutes a heavier penalty than that which could have been imposed on the defendant under the law in force at the time that his offence was committed."

And per Lord Rodger at para 38:

> "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 the language of Baroness Hale at para 45:

> "It is quite clear that the words 'penalty . . . applicable' in article 7(1) refer to the penalty or penalties prescribed by law for the offence in question at the time when it was committed. It does not refer to the actual penalty which would probably have been imposed upon the individual offender had he been caught and convicted shortly after he had committed the offence. The court does not have to make a comparison between the sentence he would have

> received then and the sentence which the court is minded to impose now."

[44] The decision of the House of Lords that there had been no breach of article 7 was affirmed by the ECtHR (Application 36946/03). The court reasoned, at page 8:

> "Although, as the Court of Appeal found in the present case, the licence conditions imposed on the applicant on his release after eight years can be considered as "onerous" in the sense that they inevitably limited his freedom of action, they did not form part of the "penalty" within the meaning of Article 7, but were part of the regime by which prisoners could be released before serving the full term of the sentence imposed. Accordingly, the application to the applicant of the post-1991 Act regime for early release was not part of the "penalty" imposed on him, with the result that no comparison is necessary between the early release regime before 1983 and that after 1991. As the sole penalties applied were those imposed by the sentencing judge, no "heavier" penalty was applied than the one applicable when the offences were committed."

Thus, the ECtHR, while agreeing with the decision of the House of Lords, preferred to decide the case on the basis that the one year period of licenced release to follow the prisoner's release from custody was to be viewed through the prism of the out workings, or execution, of the sentence of 12 years imprisonment imposed upon him.

[45] Arguably the clearest formulation of the *lex gravior* rule in article 7 is found In *Coeme v Belgium* [Reports of Judgments and Decisions 2000-VII],p 75, para [145]:

> "The court must therefore verify that at the time when an accused person performed the act which led to his being prosecuted and convicted there was in force a legal provision which made that act punishable, *and that the punishment imposed did not exceed the limits fixed by that provision*."
> [Emphasis supplied]

A vivid illustration of this core principle is provided in the more recent jurisprudence of the ECtHR in *Kupinskyy v Ukraine* [Application No 5084/18] where a life sentence reducible to 20 years imprisonment under the law of the sentencing court's state (Hungary) was effectively converted into an irreducible life sentence following the transfer of the offender to his home state (Poland). In short, this constituted an impermissible redefinition of the previously applicable penalty (see especially *Del Rio Prada*, para 89).

[46] The court invited the parties to address in their argument the decision of the Grand Chamber in *Maktouf v Bosnia and Herzegovina (*BiH*)* [2014] 58 EHRR 11. It is necessary to outline the framework of this case in a little detail. It concerned a sentence imposed which fell within the boundaries of the pre-offending sentencing code which had been amended – by increasing penalties – by the later, impugned code. The 1976 Criminal Code of the former Socialist Federal Republic of Yugoslavia (SFRY CC) was in force throughout the 1992-1995 conflict. Under this Code, war crimes and genocide could be punished with imprisonment from a minimum of five years (one year in case of extraordinary mitigating circumstances) to a maximum of 15 years or, in the most serious cases, with the death penalty, which could be commuted to 20 years imprisonment. Following the 1995 *Dayton* Agreement, the judicial practice was to impose sentences up to 15 years for war crimes. In 2003 this legal framework changed with the advent of a new sentencing code punishing war crimes, genocide and crimes against humanity with imprisonment, from a minimum of ten years (five years in case of extraordinary mitigating circumstances) to a maximum of 45 years. This new Code has been applied in the overwhelming majority of subsequent cases, including those of the two applicants. It would appear that both Codes continued to operate, thereby giving courts a choice of sentencing regimes.

[47] The first applicant was convicted of aiding and abetting war crimes, namely assisting in the abduction of two civilians for several days. The BiH State Court sentenced him to five years' imprisonment; the lowest possible sentence for aiding and abetting war crimes under the 2003 Code, whereas under the 1976 Code his sentence could have been just one year. The second applicant was convicted of the war crime of torture. He was sentenced to eleven years' imprisonment, slightly above the ten-year minimum applicable in his case under the 2003 Code, whereas under the 1976 Code a sentence of only five years would have been a possibility. The Grand Chamber recognised that the sentencing of both applicants was within the "latitude" of both Codes. Notwithstanding, the crucial consideration, according to the court, was the possibility that the sentencing of the offenders under the earlier code could have resulted in lower sentences. Para [70] is the key passage:

> "Admittedly, the applicants' sentences in the instant case were within the latitude of both the 1976 Criminal Code and the 2003 Criminal Code. It thus cannot be said with any certainty that either applicant would have received lower sentences had the former Code been applied (contrast Jamil v. France, 8 June 1995, Series A no. 317-B; Gabarri Moreno v. Spain, no. 68066/01, 22 July 2003; Scoppola, cited above). What is crucial, however, is that the applicants could have received lower sentences had that Code been applied in their cases. As already observed in paragraph 68 above, the State Court held, when imposing Mr Maktouf's sentence, that it should be reduced to the lowest possible level permitted by the 2003 Code. Similarly, Mr Damjanović received a sentence that was close to the minimum level. It

> should further be noted that, according to the approach followed in some more recent war crimes cases referred to in paragraph 29 above, the appeals chambers of the State Court had opted for the 1976 Code rather than the 2003 Code, specifically with a view to applying the most lenient sentencing rules. Accordingly, since there exists a real possibility that the retroactive application of the 2003 Code operated to the applicants' disadvantage as concerns the sentencing, it cannot be said that they were afforded effective safeguards against the imposition of a heavier penalty, in breach of Article 7 of the Convention."

Inter alia, the consideration that the 2003 Code may have been more lenient as regards the maximum sentence was immaterial as the crimes of which the applicants had been convicted clearly did not belong to the category to which the maximum sentence was applicable.

[48] In *Re Docherty* [2017] 1 WLR 181 the Supreme Court examined the second sentence of article 7(1) ECHR, the *lex gravior* principle. Lord Hughes, delivering the unanimous judgment of the court, defined this principle at (§42):

> "No sentence must be imposed which exceeds that to which the defendant was exposed at the time of committing the offence."

He continued, at (§48):

> "That it is the maximum sentence which matters to lex gravior is the approach which has been consistently adopted. In *Coëme v Belgium* Reports of Judgments and Decisions 2000-VII, p 75, considering the lex gravior rule in article 7, the Strasbourg court held (at para 145) that article 7 required that it be shown that when the offender's act was done there was in force a legal provision making it punishable "and that the punishment imposed did not exceed the limits fixed by that provision." (emphasis supplied). That was the meaning of the expression "penalty … applicable" in article 7. In *R (Uttley) v Secretary of State for the Home Department* [2004] 1 WLR 2278 the House of Lords applied the same approach. All the law lords expressly rejected the contention that that article is concerned with the penalty which "the court could in practice have been expected to impose." As Lord Rodger of Earlsferry pointed out at para 42, that would involve "speculative excursions into the realm of the counterfactual." What matters is the maximum penalty permitted. The same approach was

expressly adopted by the Strasbourg court when application was made to it in that same case: *Uttley v United Kingdom* (Application 36946/03) 29 November 2005. This learning is confirmed in *Scoppola*. At para 95 the court held, citing *Coëme*:

> 'The court must therefore verify that at the time when an accused person performed the act which led to his being prosecuted and convicted there was in force a legal provision which made that act punishable, and that the punishment imposed did not exceed the limits fixed by that provision.' [Emphasis supplied.]

And at para 98 it reiterated the rule that the court, like the commission before it, draws a distinction between a measure that is in substance a penalty and a measure, such as one relating to the regime for early release, which concerns the execution or enforcement of the penalty."

[49] The Divisional Court in *Khan v Justice Secretary* [2020] 1 WLR 3932 rejected a challenge similar to that brought by the applicant in this case to the analogous changes introduced in England and Wales by the Terrorist Offenders (Restriction of Early Release) Act 2020. The court addressed the article 7 ECHR argument in detail at paragraphs 84 – 105. The court first addressed the fundamental question it had to answer (§86):

> "86 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? "The court concluded at (§105):
>
> **'**In the present case the changes wrought by the 2020 Act were changes in the arrangements for early release; they were not changes to the sentence imposed by the sentencing judge. In the absence of a fundamental change of the sort described in *Del RÌo Prada* 58 EHRR 37, a redefinition of the penalty itself, the principle is clear; an amendment by the legislature to the arrangements for early release raises no issue under article 7. A change to those arrangements does not amount to the imposition of a heavier penalty than that applicable at the time the offence was committed. In those circumstances we reject the claim under article 7.'"

This passage arguably encapsulates most clearly the central contention advanced by the Ministry of Justice.

[50] In *Morgan* the Supreme Court recognised and affirmed the foregoing cases in its review of the case law, domestically and in Europe, from paras 78 onwards, before concluding its review with reference to the recent case of *Kupinskyy v Ukraine* (*supra*) and affirming the established distinction between measures constituting a penalty and those representing the execution or enforcement of a penalty:

> **"96** The central proposition outlined in *Uttley* was again confirmed by the ECtHR by its judgment dated 10 November 2022 in *Kupinskyy v Ukraine* 10 November 2022. The ECtHR, at para 47 reiterated "that in its established case law a distinction is drawn between a measure that constitutes in substance a 'penalty' and a measure that concerns the 'execution' or 'enforcement' of a 'penalty.'"
>
> **97** It is therefore clear that there is an established domestic and ECtHR case law which draws a distinction between measures constituting a penalty and those representing the execution or enforcement of a penalty. Furthermore, I consider that changes to the manner of execution of a sentence reflect the principle that "inherent in the whole of the Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights"; see *Soering v United Kingdom*(1989) 11 EHRR 439, 468, para 89. It would be surprising if article 7(1) of the ECHR prohibited the legislature from making changes in relation to the manner of execution or enforcement of a sentence when faced, as here, with what it considered to be compelling policy reasons supporting the change."

The court concluded that the measures governing administration of the sentence and particularly relating to the period in custody to be served before a prisoner would be eligible for potential release and the new requirement for release to be directed by the Parole Commissioners sounded on the execution or enforcement of a penalty and did not alter the penalty imposed by the sentencing court. See para [114]:

> "I have set out the nature and purpose of the measures contained in section 30 of the 2021 Act and article 20A of the 2008 Order. The purpose was to protect the public from terrorist prisoners by confining them for a longer period under their determinate custodial sentences and then only

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

The Article 7 ECHR Ground of Appeal

[51] We have rehearsed above the various features of the new Article 15A regime and have highlighted those provisions of the 2008 Order which do not apply when the new regime is engaged. In what specific respects does the appellant contend that the sentence imposed upon her under appeal to this court infringed her rights under article 7? Her complaint has three components:

(i) A suspended sentence of imprisonment was not an option available to the sentencing court.

(ii) The measurement of the custodial term imposed on the appellant was effected under the "*appropriate custodial term*" provision in Article 15A (7) rather than the "*commensurate with the seriousness of the offence*" criterion in Article 7(2) of the 2008 Order.

(iii) Following her release, the appellant will be subject to a mandatory 12 months licence period.

[52] The skeleton argument of Mr Hutton KC and Ms Macauley contains this passage**:**

> "The appellant submits that the imposition of an Article 15A sentence would be unlawful and that the law applicable at the time of sentence should be adopted. Article 15A was an entirely new sentencing vehicle which had not existed at the time of commission of the offence."

With specific reference to the post – release licence period, it continues:

> "It included an additional period of licence and that additional period of licence was included not as an alternative to custody but as an alternative to liberty. It was not a commensurate sentence but an appropriate one.

> Suspension of sentence. It should not be retroactively applied."

It was submitted on behalf of the appellant that the decision of the House of Lords in *Uttley* is no longer harmonious with the more recent jurisprudence of the ECtHR. This submission is based squarely on the decision of the Grand Chamber in *Maktouf* (digested in paras [46]–[47] above). The latter decision, it is argued, supports the proposition that there is a real possibility that the penalty imposed upon the appellant exceeds that which she could have received under the pre–2021 sentencing model.

[53] It is further argued that at the time of the appellant's offending Article 7 of the 2008 Order "defined the penalty that was 'applicable' to the particular offence." The determination of a sentence in accordance with the Article 7 criterion of "commensurate with the seriousness of the offence" is to be contrasted with the more punitive Article 15A with its twin elements of the new criterion of "appropriate" and the obligatory licence period of one year following release from sentenced custody, coupled with the exclusion of a suspended sentence option. Regarding the latter it is specifically submitted that this:

> "… materially increases the 'minimum' disposal that a court can impose and is akin to the imposition of an increased minimum sentence in the **Maktouf** judgment."

The two contentions at the heart of the appellant's article 7 ECHR challenge are formulated in written argument in these terms:

> "Taken together these provisions result in the Article 15A sentencing vehicle representing a new sentencing vehicle that works materially to an accused's disadvantage retrospectively or carries with it a material risk that this will be the case and offends against the principles espoused by the Grand Chamber in **Maktouf** …
>
> The present case is materially distinguishable from **Uttley** in any event in that **Uttley** was at base a case about the adjustment of licencing conditions within an already announced sentence …
>
> It is not a case relating to the imposition of a 'new' type of sentence and the court would not be bound to follow **Uttley** on its interpretation of article 7 ECHR in preference to the ECtHR …
>
> Therefore, it is submitted, no domestic court should impose an Article 15A sentence [on] an accused for an offence committed prior to commencement of that provision."

[54] The decision in *Maktouf* was considered in *Docherty* where Lord Hughes, delivering the unanimous judgment of the Supreme Court, stated at para [49]:

> "In countries, unlike England, where sentencing laws prescribe a range between a minimum and a maximum, the raising of the minimum has an effect comparable to the raising of the maximum: both constrain the court by creating a more severe regime, thus engaging the rule against lex gravior. Such a situation came before the Strasbourg court in Maktouf v Bosnia & Herzegovina (2014) 58 EHRR 11. The effect of the change was to alter the range for the defendant Maktouf (an accomplice) from 1-15 to 5-20 years. For the defendant Damjanovich (a principal) the range was altered from 5-15 to 10-20. Maktouf was expressly sentenced to the new minimum of five years, but the court could not go below that figure as previously it could have done. Damjanovich was sentenced to 11 years, just one year above the new minimum, and the court was satisfied that if the old range had been treated as governing the case he might well have received less. Accordingly, there were breaches of the lex gravior rule in article 7, although it did not follow that lower sentences ought to have been imposed: that was a matter for the sentencing court. What the Strasbourg court appears to have been contemplating was the possibility that in order to maintain the differential between Damjanovicj and someone else who had committed the same offence but in a less grave manner, the court might have had to raise his sentence a little above the new minimum, thus to leave room below it for the less grave example of similar offending. It was not suggesting that the revision of the minimum prevented a contemporaneous assessment of the gravity of his offence. There was no reason why that assessment should not have been undertaken according to the practice at the time of sentencing, as it appears that it was, and as would occur in England. Thus, the ECtHR was concerned with altered statutory constraints operating on the sentencing court, of which one, the new minimum, might have (but had not necessarily) prevented the court from sentencing as it otherwise would have done. Similar considerations might apply in the present case if IPP was not legitimately available to the judge (as to which see below). But there is nothing in this which is inconsistent with the English practice in relation to historic offences as explained in R v H (J), and no question of either the lex gravior or the lex

> mitior principles requiring the court to undertake the hypothetical exercise of imagining itself sentencing many years ago. That exercise would be both artificial and unjust."

[55] *Maktouf* involved the fusion of a very particular legal and factual matrix. Our analysis of this decision is as follows. In the first place, the sentencing exercise had certain features which are not replicated in that of the present case. There are three such features in particular. The first is that of the mandatory minimum punishment for the offences concerned. The second is that the new post-offending sentencing code brought in a regime which markedly increased the mandatory minimum sentence of imprisonment applicable at the time of the applicants' offending. The third is that the sentencing court had the option of sentencing the applicants under the more lenient earlier Code. As observed by Lord Hughes in *Docherty*, the new Code had an effect comparable to that of increasing the maximum punishment and, further, constrained the sentencing court by establishing a more severe regime. This, succinctly, violated the *lex gravior* principle. In passing, in the abstract it would appear that the ECtHR could have decided the two cases on this basis alone.

[56] Developing this analysis, certain further observations are appropriate. First, there is no indication in the judgment of an intention to depart from, modify or develop the established case law of both the ECtHR and the Commission. Second, the decision is clearly harmonious with the central article 7 ECHR principles rehearsed in para [38] ff above. Recalling what we have stated in para [39], *Maktouf* is a paradigm example of undertaking a concrete assessment of the specific facts, circumstances and legal framework of the case in order to determine whether either offender could have suffered a disadvantage by virtue of the new sentencing regime, in preference to the more limited exercise of abstract comparison of the two sentencing codes under scrutiny. The standard of concrete and effective safeguards shines brightly in the judgment of the ECtHR.

[57] In addition to the foregoing it is of obvious significance that *Maktouf* was considered by the Supreme Court in some detail in *Docherty*. This exercise did not generate any expression of surprise or concern. It was viewed through the prism of the established article 7 ECHR principles In particular, there was no suggestion that *Maktouf* marked a departure from, or modification or expansion of, the previous case law of the ECtHR or House of Lords. Furthermore, the analysis of Lord Hughes recognised the context specific nature of the legal and factual framework of the *Maktouf* decision, which we have highlighted above.

[58] To the foregoing we would add that the principles identified in para [38] ff above were rehearsed without demur or modification by the Supreme Court in *Morgan*. Furthermore, *Uttley* was followed in *Docherty* – see para [48] - and in *Morgan*. Thus there is a clearly identifiable *continuum*. In all three cases these principles were applied as appropriate.

[59] The question for this court, unqualified and unvarnished, is whether a violation of the appellant's rights under article 7 ECHR has been established in any of the respects advanced. It is a paradigm binary question, which can be answered only "yes" or "no" as regards each of the three elements canvassed.

[60] In answering this question, the task of this court is to first identify the governing principles and then apply them to the legal and factual matrix of this appeal. The principles which we propose to apply are rehearsed in our review of the relevant ECtHR, House of Lords and Supreme Court jurisprudence in para [38] ff above. These principles are both clearly formulated and well established. They have featured, in varying ways, in the reasoning of the relevant decisions of the aforementioned courts. Thus, there can be no juridical justification for this court declining to give full effect to them. Applying the prism of section 2 of the Human Rights Act, we consider that the relevant decisions of the ECtHR constitute clear and consistent jurisprudence to which this court must give effect. Applying the different prism of the domestic law doctrine of precedent, we consider that the *ratio decidendi* of the relevant decisions of the House of Lords and Supreme Court enshrines the same principles.

[61] The cornerstone of the appellant's article 7 ECHR ground of appeal is that the decision of the ECtHR in *Maktouf* has developed and expanded the *corpus* of principles considered in para [38] ff above, to her advantage. We consider that the core principle enshrined in article 7(1), second sentence, namely that there will be no infringement of this Convention right where the sentence imposed does not exceed that applicable at the time of the offender's criminality, is unchanged. In the judgement of this court, none of the three suggested incompatibility elements outlined in para [51] above infringes this principle. As regards the second element, this is so even if the statutory construction which this court has exposed in paras [18]-[19] above is incorrect. While the appellant's argument did not formulate the contours of any new, expanded or modified principle, for the combination of reasons rehearsed above we reject the central submission advanced on behalf of the appellant on its merits.

[62] Independent of the foregoing a separate consideration arises. The sentencing judge described the submission that the appellant should be punished by a suspended sentence of imprisonment as "entirely unrealistic." Notably, the judge evidently considered this submission and made this assessment in isolation from the effects of the 2021 Act. There is no hint in his sentencing decision that he rejected this submission because he was bound to do so by reason of the new sentencing regime. Bearing in mind what we have stated in para [26] above, we consider that this must provide a further and free-standing answer to this discrete challenge. Even on the most generous and sympathetic view of the appellant's case, a suspended sentence of imprisonment was at no time a realistic possibility. Thus, the "*real possibility*" test enshrined in *Maktouf (supra*) is manifestly not satisfied.

[63] We consider that having regard particularly to the decision of the ECtHR in *Uttley* the third element of the article 7 ECHR incompatibility advanced must fail on

the further ground that the mandatory post – custody period of 12 months licenced release belongs to the realm of enforcement, or execution, of the article 7 ECHR "penalty", namely the sentence of four years imprisonment. We would refer also to *R (Abedin) v Secretary of State for Justice* [2015] EWHC 782 (Admin) and [2016] EWCA Civ 296, *Abedin v United Kingdom* (Application no 54026/16), *Re Docherty* [2017] 1 WLR 181, *Khan v Secretary of State for Justice* [2020] 1 WLR 3932 and most recently, *Morgan and Others*. This is clearly stated in *Uttley*, where the Strasbourg Court applied the execution/enforcement principle, concluding at p 8:

> "Although, as the Court of Appeal found in the present case, the licence conditions imposed on the applicant on his release after eight years can be considered as "onerous" in the sense that they inevitably limited his freedom of action, they did not form part of the "penalty" within the meaning of Article 7, but were part of the regime by which prisoners could be released before serving the full term of the sentence imposed. "
> [Emphasis added]

We consider that no sensible distinction can be made between the "*regime*" considered in *Uttley* and that to which the appellant will be subjected in the future, namely 12 months supervised licence following completion of her imprisonment term.

[64] Independent of all of the foregoing, the further effect of our analysis beginning in para [38] and continuing to para [62] is that to accede to the appellant's argument would entail the doctrinally impermissible step of disregarding the reasoning in decisions of both the House of Lords and the Supreme Court which this court is bound as a matter of precedent to follow.

[65] The presentation of the appellant's case grouped together all three of the suggested incompatibility features (see [51] above] under the single banner of the *Maktouf* decision, without distinction. It follows that the effect of the foregoing conclusion is that the first ground of appeal is rejected in its entirety.

Second Ground of Appeal: Manifestly Excessive Sentence

[66] The appellant's poor health lies at the heart of the second ground of appeal. There was an abundance of medical evidence at the time of her sentencing. This disclosed a diagnosis of MS and a further diagnosis of malignant melanoma in 2019. These are life limiting conditions. In the earlier medical reports, the MS was described as "relapsing/remitting." In December 2020 her GP advised "the ultimate prognosis is of a serious decline in all areas." A neurological assessment in June 2021 reported evidence of physical, cognitive and mental health symptoms. In February 2022 her speed of cognitive functioning was found to be "extremely reduced." Other reports document a chronic history of anxiety and depression. In March 2023 her GP reported that her condition had become "markedly worse." Various adaptations to her home

had been made. She was described as "seriously debilitated", albeit she continued to work as a bookmaker's shop manager.

[67] The new medical evidence which this court has admitted may be summarised thus. The appellant's GP reports a "marked deterioration in her physical appearance and her mental health" and worsening anxiety. She receives some level of personal assistance and certain adaptations to her prison cell have been made. The progressive nature of her MS is confirmed by the most recent neurological assessment. The new evidence also contains 22 pages of prison medical records generated between May and August 2023. There is no comment by either the GP or the consultant neurologist on these materials.

[68] Examples of sentencing for comparable types of offending can be found in the reported cases. In *R v Lorenc* [1988] NI 96, a case of unlawful possession of documents consisting of three army manuals pertaining to the use of rifles, boobytraps and incendiaries, a sentence of two years imprisonment was reduced to one year on appeal. The court reasoned that having regard to the appellant's minor criminal record which had not entailed any custodial sentences and the trial judge's assessment that he was "an innocent abroad", a sentence of 12 months imprisonment suffices to provide effective discouragement from re-offending.

[69] In *Attorney General References (Nos 5 and 6 of 2009)* [2009] NICA 41, which concerned two sentences referred to the Court of Appeal by the Attorney General, an effective sentence of 12 months imprisonment for offending consisting of the collection and possession of the registration numbers and names and addresses of the registered owners of some 67 vehicles (five counts), coupled with one count of unlawful possession of 40 cartridges, was considered not to be unduly lenient. The two main factors were the six months remand custody which had elapsed, and the new employment secured by the offender. In the second case, a sentence of nine months imprisonment was substituted for one of 12 months suspended for two years for related offending perpetrated by a PSNI civilian employee, the court making specific allowance for early admissions and double jeopardy.

[70] In *R v Hughes* [2016] NICC 13, the offender, a convicted prisoner, received a determinate custodial sentence of two years imprisonment for having in his possession a document containing the names and work locations of eight judges and 16 serving police officers. The two factors which stand out in the sentencing decision are "substantial credit" for an early plea of guilty and positive educational progress in prison. The judge stated that had the offender been convicted following a contested trial, the starting point would have been three to four years imprisonment.

[71] We have also taken note of the sentence of 26 months imprisonment together with a mandatory period of 12 months licensed release in the case of *R v Golaszewski* [2020] EWCA Crim 1831. In addition, we have considered the custodial term of four years and seven months in *R v Hafeez* [2020] EWCA Crim 453 which concerned the generation of an extensive electronic library containing much extremist material

including bomb making recipes, videos of terrorist related murders and instructions on the commission of terrorist attacks.

[72] We have also considered *R v Morgan & others* [2020] NICC 14, where two of the offenders (Blair and Hannaway), in respect of a large number of offences including two offences of collecting information (at counts 14 & 15) in the context of planning terrorist offences with others, were sentenced to a total of five years imprisonment.

[73] There is no sentencing guideline authority for the offence of collecting or making a record of information likely to be useful to a terrorist. It was submitted by the prosecution that the offence may cover a broad range of behaviour with regard to the nature of the information collected, the role played by the offender and the value of the information. Thus, it is submitted that every offence is fact specific.

[74] It is further argued that, consequently, the starting point in other reported cases may be of general assistance only in terms of identifying a range and that the cases considered above are to be viewed through this prism.

[75] We consider that little assistance can be derived from the various cases just summarised. Each is unavoidably fact sensitive. Furthermore, they all predate the significant 2021 sentencing reforms, which evinced in the clearest terms Parliament's intention to introduce a more austere sentencing regime reflecting public concern and revulsion regarding offending of this kind. This is particularly clear from *Morgan and others v Ministry of Justice* [2023] 2 WLR 905, at paras 66–71, reproduced in para [22] above. Thus, we reject the submission that, collectively, the cases concerned establish a relevant identifiable sentencing trend or level of application to the sentencing of the appellant.

[76] Certain well-established sentencing principles fall to be considered in this context. The contours of the doctrine of the manifestly excessive sentence have been examined in certain recent decisions of this court, in particular *R v Ferris* [2020] NICA 60 (supra) at paras [38]–[43]. Brief excerpts from paras [41] and [42] will suffice:

> "The restraint of this court in sentence appeals noted immediately above is manifest in the long-established principle that this court will interfere with a sentence only where of the opinion that it is either manifestly excessive or wrong in principle. Thus s 10(3) of the 1980 Act does not pave the way for a rehearing on the merits.
>
> …
>
> Stated succinctly, the hurdle of establishing on appeal to this court that a sentence is manifestly excessive is one which will not be easily overcome."

[77] In *R v QWL and Others* [2023] NICA 11, this court recognised the potential for the application of mercy in any given sentencing exercise, at para [86]:

> "[86] It has long been recognised in the world of sentencing that there is scope for a merciful disposal. In the jurisdiction of Northern Ireland this is illustrated in *Attorney General's Reference (No 2 of 1993)* [unreported, 28 June 1993]. In that case a suspended sentence of imprisonment was imposed on an offender who had been found guilty by jury verdict of one count of burglary and one of causing grievous bodily harm with intent, committed after he had broken into the home of and physically attacked an elderly man. His sentence was referred, unsuccessfully, by the Attorney General to the Court of Appeal. The factors which combined to merit the assessment that the suspended sentence was an appropriate disposal were the offender's age (21), his clear record and a psychologist's assessment that he was of low intelligence and would be vulnerable in a prison setting."

The arguments on behalf of the appellant pray in aid this passage. However, the analysis does not stop there.

[78] In *R v Wong* [2012] NICA 54 this court stated at para [22]:

> "As this court has made clear on a number of occasions those who facilitate the commission of terrorist crimes must expect deterrent sentences when apprehended."

In cases where a deterrent sentence is considered appropriate personal mitigation is of minimal weight: *R v McKeown and Others* [2013] NICA 63 at para [11].

> "Where a deterrent sentence is required previous good character and circumstances of individual personal mitigation are of comparatively little weight. Secondly, although in this jurisdiction there is no statutory requirement to find exceptional circumstances before suspending a sentence of imprisonment, where a deterrent sentence is imposed it should only be suspended in highly exceptional circumstances as a matter of good sentencing policy."

To similar effect is *R v Lehd* [2021] NICC 4 at para [25] citing *R v Quigg* [1991] 9 NIJB 38 (Hutton LCJ). Furthermore, this court has stated unequivocally that a serious medical condition, even one which is difficult to treat in prison, will not without more

justify a lesser sentence: *R v McDonnell* [2006] NICA 4 and, more recently, *R v Watson* [2022] NICA 71 at para [32].

[79] Most recently, in *Watson* [2022] NICA 71 at para [32] this court quoted Kerr LCJ in *McDonnell* at para [39] containing the following references to *Wynne;*

> "(iii) A serious medical condition, even when it is difficult to treat in prison, will not automatically entitle an offender to a lesser sentence than would otherwise be appropriate (*Wynne*);
>
> …
>
> (iv) We respectfully agree with the approach of the court in that case, but would emphasise that it is important to bear in mind the passage which Rose LJ earlier cited from *R v Wynne* (1994, unreported): 'It is always to be borne in mind that a person who has committed a criminal offence, especially one who has committed a serious criminal offence, cannot expect this or any other court automatically to show such sympathy so as to reduce, or to do away with altogether, a prison sentence purely on the basis of a medical reason. It is only in an exceptional case that an exceptional view can be taken of a sentence properly passed. In this case a proper sentence was passed for a serious offence.'"

The judgment in *Watson* continues at para [33]:

> "[33] We entirely agree with the authors of Archbold 2022 at 5A-78 where they state:
>
> > "This issue appears to be intensely fact-specific; it is suggested that in order to justify a reduction, it is necessary to demonstrate the effect the age/ill health will have on the experience in custody such that it is necessary to reduce the 8 custodial term to preserve some parity with sentences for offences of similar gravity."
>
> We consider that the same principle applies to any justification to suspend a prison sentence rather than reduce it."

[80] The scourge of terrorist offending continues to demand condign punishment in the unsettled and challenging post – conflict world of Northern Ireland. Terrorism in all of its manifestations is fundamentally and irredeemably antithetical to the rule of law.

[81] Concluding, first, we endorse fully all that the sentencing judge stated about the gravity of the appellant's offending. Second, the appellant's culpability was on any showing at an elevated level. Third, the proposition that the appellant fell to be punished by a sentence designed to deter her and others from committing offences of this kind is in our view incontestable. We consider that the sentencing of the appellant was harmonious with the principles rehearsed in the preceding paragraphs. We have no hesitation in dismissing this ground of appeal.

Omnibus Conclusion

[82] For the reasons given:

(i) The first ground of appeal based on article 7 ECHR is dismissed.

(ii) The second ground of appeal, which contends that the appellant's sentence of imprisonment of four years is manifestly excessive, is similarly dismissed.