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Sentencing Terror Offences

A different threat; a different approach, Ali Naseem Bajwa looks at the facts

The United Kingdom has faced a serious terrorist threat for many decades. However, until the attacks in the USA on September 11, 2001, the courts had settled on an approach in terrorist cases that resisted passing life sentences or crushingly long terms of imprisonment. The last decade has seen a marked departure from that approach and the Court of Appeal judgment of *R. v. Barot* provided the foundation for a significant increase in terrorism sentences.

The Pre-9/11 Cases

The old line of authorities for a terrorist conspiracy to commit murder, even mass murder, suggested a sentencing range of between 30 and 45 years' imprisonment. This is illustrated by the cases of *R. v. Al-Banna* (1984) 6 Cr App R(S) 426, (a number of carefully planned assassinations, the stockpiling of weaponry and the attempted murder of the Israeli ambassador; 30 and 35 years' imprisonment), *R. v. Basra* (1989) 11 Cr App R(S) 527, (a conviction following trial for arranging the murder and attempted murder of two political opponents; 35 years' imprisonment) and *R. v. McGonagle and Heffernan* [1996] 1 Cr App R(S) 90, (a conspiracy to cause explosions where the court found clear evidence of an intention to cause "widespread loss of life, injury, destruction and damage"; 23 and 25 years' imprisonment).

The longest sentence for a terrorist attempt to commit mass murder was imposed in *R. v. Hindawi* (1988) 10 Cr App R(S) 104. The appellant persuaded his pregnant girlfriend to carry a bag onto an El-Al aircraft, which, unbeknownst to her, contained a large quantity of explosives and a timing and detonating device. Had the explosive detonated, 370 people would have been killed. The appellant was convicted following a trial. The Court of Appeal upheld a sentence of 45 years' imprisonment, which, because of the release provisions then in force, was equivalent to a minimum term of 15 years' imprisonment, with automatic release after 30 years.

The old line of authorities for a terrorist conspiracy to cause an explosion likely to endanger life, including cases where many deaths were likely or inevitable, suggested a sentencing range of between 20 and 35 years' imprisonment. The leading case was that of *R. v. Martin* [1999] 1 Cr App R(S) 477, in which a member of the provisional IRA was convicted of conspiring with a number of associates to cause explosions at six electricity sub-stations feeding London and other parts of south east England. The court found that the planning was highly sophisticated, the conspirators were reckless as to the number of people who might be killed or injured and the plan would have been likely to succeed but for the intervention of the security services. The Court of Appeal reduced the sentence from 35 to 28 years' imprisonment.

It is important to note that in dealing with terrorist conspiracies to murder or cause explosions likely to endanger life, courts declined to impose a discretionary sentence of life imprisonment, preferring to impose determinate terms of imprisonment.

The case of *R. v. Chapman* [2000] 1 Cr App R 77, establishes that before a court can impose a discretionary life sentence, it must find first, that the offence is very serious and second, there are good grounds for believing that the offender is likely to remain a serious danger to the public for an indeterminate time.

In the case of *R. v. Basra* (*ante*), which concerned a terrorist murder and two attempted murders, the Court of Appeal quashed a sentence of life imprisonment and said:

> "In general it should be said that a life sentence, where it is other than mandatory, as was the case here, is to be reserved for cases where the defendant is someone in respect of whom there is some relevant feature which cannot be determined at the time when the Judge is passing the sentence. The usual example of that will be some mental condition which affects the degree of risk which the release of the defendant into the community will present. Where there is no such imponderable feature, and where the question is simply that of punishment and the necessity to deter others, those matters can be gauged at the time of sentence, and so as a rule an indeterminate sentence will be inappropriate."

In terrorism cases, the courts had taken the view that terrorists, even those guilty of the most serious terrorist offences, were acting not as a result of a defective mental condition but out of a current political, religious or ideological motivation and therefore there was no imponderable feature at the time of sentence which merited the imposition of a sentence of life imprisonment.

The landmark judgment of *R. v. Barot* [2008] 1 Cr App R(S) 247(45), altered considerably the sentencing landscape for terrorist conspiracies to murder and the imposition

of discretionary life sentences and length of terms of imprisonment for terrorism offences in general.

R. v. Barot

Barot pleaded guilty to conspiracy to murder. He was said to be the leader of an Al-Qaida conspiracy to attack prominent buildings in the USA and to carry out an attack or attacks in the UK with, amongst other things, limousines packed with gas cylinders explosives and, possibly, a radioactive dispersal device. The sentencing Judge, Butterfield J, sentenced Barot to life imprisonment with a minimum term of 40 years. Barot appealed against his sentence to the Court of Appeal.

The first significant point in the *Barot* judgment is that the court said that an indeterminate sentence was now appropriate in terrorism cases. Giving the judgment of the court, Phillips LCJ (as he was then) said:

> "The fanaticism that is demonstrated by the current terrorists is undoubtedly different in degree to that shown by sectarian terrorists with which the United Kingdom had become familiar by the time of *Martin*. IRA terrorists were not prepared to blow themselves up for their cause. It is this fanaticism that makes it appropriate to impose indeterminate sentences on today's terrorists, because it will often be impossible to say when, if ever, such terrorists will cease to pose a danger."

The second significant point in *Barot* is that the court said that longer sentences for the most serious terrorist cases were now appropriate. This was so for two reasons: First, terrorism presented a more grave threat than ever before. Phillips LCJ said:

> "This case demonstrates the search by the terrorists for a means of causing death on an even greater scale than results from the destruction of a passenger plane and the events of 9/11 show that this can be achieved."

"An indeterminate sentence was now appropriate in terrorism cases."

Secondly, the effect of sch.21 to the Criminal Justice Act 2003, which sets out the new minimum term starting points for murder offences, has been significantly to increase the minimum terms being imposed for the most serious murders. Therefore, the court concluded that it was, "logical that the sentences for attempted murder or conspiracy to murder should reflect these minimum terms."

The court, in reducing Barot's minimum term from 40 to 30 years, issued the following guidance for terrorism sentencing:

- In approaching the sentence for an inchoate terrorism offence it is appropriate to start by considering the sentence that would have been appropriate had the objective of the offender been achieved;
- a life sentence with a minimum term of 40 years should, save in quite exceptional circumstances, represent the maximum sentence for a terrorist who sets out to achieve mass murder but is not successful in causing any physical harm; and,
- Allowance should also be made for the following factors: a guilty plea, the position of the defendant (a leader should receive a more severe sentence than a follower) and how close the conspiracy was to being attempted or realized (the less sophisticated the plan, the more likely that it would be abandoned or would fail).

Barot Applied

Barot was followed in *R. v. Ibrahim* (2008) 4 All ER 208, which concerned the July 21, 2005 failed London bombings, in upholding sentences of life imprisonment with a minimum term of 40 years. The Court of Appeal declined to distinguish between the conspiracy leaders and followers on the basis that, "[b]y the time each operated the detonator in the device he was carrying, distinctions of any possible significance which might have been drawn between them at any earlier stage in the conspiracy had evaporated."

In line with *Barot*, the court imposed sentences of life imprisonment with minimum terms of 40, 36 and 32 years respectively upon three men convicted of a conspiracy to murder using improvised explosive devices on board a number of trans-Atlantic passenger aircraft (*R. v. Ali*, Woolwich Crown Court, September 7, 2009). If this case did not amount to a "quite exceptional" unsuccessful conspiracy to commit mass murder justifying a minimum term of more than 40 years, it is hard to imagine one that does.

In the *Barot* judgment, the court said that the guidelines in *Martin* "require review". This invitation was taken up in *R. v. Jalil & Ors* (2009) 2 Cr App R(S) 40, in which the court was concerned with Barot's accomplices, who had pleaded guilty to conspiracy to cause explosions likely to endanger life. In upholding sentences of between 15 and 26 years' imprisonment, the Court of Appeal made it clear that *Martin* could no longer be regarded as a guideline case for the sentencing of terrorist offences. Thus, in cases of conspiracy to cause explosions likely to endanger life, there has also been an increase in sentences passed, such as *R. v. Asiedu* (2009) 1 Cr App R (S) 72 (guilty plea by accomplice in the July 21, 2005 failed London bombings - 33 years' imprisonment) and *R. v. Khyam & Ors* (2009) 1 Cr App R(S) 77, (convictions following trial in the "Fertilizer Case"; life imprisonment with minimum terms of between 17-and-a-half and 20 years).

R. v. Rahman & Mohammed

In *R. v. Rahman & Mohammed* (2008) 4 All ER 661, the Court of Appeal gave general guidance in relation to the sentencing for offences of disseminating a terrorist publication contrary to s.2 of the Terrorism Act 2006. Much of the court's guidance can be applied to sentencing for terrorism cases generally.

The court, again headed by Phillips LCJ, held that:

- Offences of disseminating a terrorist publication were capable of varying very widely in seriousness;
- the difference between an offence committed

intentionally or recklessly is likely to have a significant effect on culpability;
- the volume and content of the material disseminated would be relevant to the harm caused, intended or foreseeable;
- where a terrorist had had a change of heart and no longer espoused terrorism, that could constitute mitigation and;
- whilst there is a sentencing need for deterrent sentencing in terrorism cases, if sentences are imposed in this area which are more severe than the case merits, this will be more likely to inflame rather than deter extremism.

Mohammed's sentence for selling extremist material from a market stall but being reckless as to whether acts of terrorism would be encouraged was reduced from four to two years' imprisonment.

New Terrorism Offences

The Terrorism Acts of 2000 and 2006 (TA 2000 and TA 2006) introduced a number of new terrorism offences including, failing to disclose information about a terrorist offence (s.38B, TA 2000), possessing an article or record of information for a terrorist purpose (s.57, TA 2000) or possessing a record of information likely to be useful in committing an act of terrorism (s.58, TA 2000), inciting an act of terrorism overseas (s.59, TA 2000), intentionally or recklessly encouraging an act of terrorism (s.1, TA 2006), disseminating a terrorist publication (s.2, TA 2006), preparing to commit a terrorist offence (s.5, TA 2006) and engaging in terrorism training (ss.6 and 8, TA 2006).

Interestingly, Parliament has not seen fit to criminalize conduct in connection with a non-terrorism criminal offence of failing to disclose information, possessing an article or record of information, incitement overseas, reckless encouragement, disseminating a publication, mere preparation or engaging in training. In short, the same conduct that amounts to a new terrorism offences does not attract culpability in the context of any other area of criminal law. Notwithstanding this fact, substantial custodial sentences can be, and often are, imposed for these new offences and the *Barot* judgment is often cited as supporting the need for severe sentences.

In *Attorney-General's Reference Nos.85-87 (Tsouli & Ors)* (2008) 2 Cr App R(S) 45, the Court of Appeal concluded that it would have expected at first instance a sentence in the range of 16 to 20 years' imprisonment for the lead offender in a case of incitement to commit an act of terrorism contrary to s.59 of the TA 2000, where the offence involved the operation of a large number of web sites inciting acts of terrorist murder, primarily in Iraq.

R. v. Da Costa & Ors (2009) 2 Cr App R(S) 98 concerned, amongst other things, convictions for soliciting to murder in the context of preaching at regular and private Friday meetings between a close circle of associates. The Court of Appeal said that the sentences of seven years' imprisonment in *El-Faisal* and *Abu Hamza* were now out of date since they concerned activity which pre-dated the September 11, 2001 attacks and the judgment in *Barot*. A court would now be thinking of a starting point of 10 years' imprisonment for soliciting to murder.

In *R. v. Tabbakh* [2009] EWCA Crim 464, the Court of Appeal said that eight years' imprisonment was appropriate for a defendant convicted of preparing to commit a terrorism offence contrary to s.5 of the TA 2006, who was in possession of bomb-making instructions and had gone some way towards securing the necessary ingredients.

R. v. Da Costa & Ors (*ante*) involved a number of defendants convicted of providing and attending terrorist training contrary to ss.6 and 8 of the TA 2000. The trial Judge, Pitchers J, said that the starting point following conviction after trial where training had been provided on a number of occasions was one of seven years' imprisonment.

In *R. v. Sherif and Ors* (2009) 2 Cr App R(S) 33, the total sentences imposed upon offenders who assisted or, contrary to s. 38B of the TA 2000, failed to give information about the July 21, 2005 failed London bombings were, in many cases, in excess of 10 years' imprisonment and, in one case, as high as 17 years' imprisonment. The Court of Appeal, in allowing a number of sentence appeals, laid down the following issues of principle:
- The level of criminality will be determined by the seriousness of the terrorist activity about which a defendant has failed to disclose information rather than the extent of the information which could have been disclosed;
- there was nothing wrong in principle with imposing consecutive sentences where there had been a failure to disclose information both before and after the act, although failure to disclose information before the act was the more serious offence; and
- there is always a place for exceptional personal mitigation, including where a person, perhaps vulnerable because of age or a particular relationship with an offender, misguidedly puts loyalty to a family or friend before his or her duty to the public.

The Court of Appeal revised the sentences, primarily under the totality principle, to between six years, nine months' and 13 years' imprisonment. The court also upheld sentences of between three and four years' imprisonment for assisting an offender and failure to disclose information after the event.

In *R. v. Muhammed & Khan* [2009] EWCA Crim 2653, the appellants were convicted following a trial of possessing a terrorist article for a terrorist purpose contrary to s.57 of the TA 2000. K had amassed a collection of terrorist-related documentation comprising thousands of documents and items such as instructions on bomb making, the improvisation of explosives, firearms and other lethal material. M retained a vast amount of material on K's behalf. The Court of Appeal held that K's sentence of 12 years was justified but that M's culpability was at a lesser level than that of K and his sentence could be reduced from 10 to eight years' imprisonment.

Those convicted of the lesser offence of possessing a record of information likely to be useful in committing an act of terrorism contrary to s.58 of the TA 2000 have not escaped severe punishment. In *R. v. Mansha* [2006] EWCA Crim 2051, the appellant had made a record of the name and address of a soldier decorated for gallantry

in Iraq and had written away for information concerning two prominent Jewish men and two Hindu businessmen. The Court of Appeal upheld a sentence of six years' imprisonment and said: "The court must impose such a sentence in order to serve as a deterrent to others and to mark the extreme seriousness of the criminality involved in terrorist activities."

Summary

Does the fact that *some* terrorists are "prepared to blow themselves up for their cause", mean that a different sentencing approach is required in *all* terrorism cases? In my view, there is no reason that non-suicide bombing cases, which form the vast majority of terrorism offences, should not be dealt with according to the old line of authorities. Ironically, a point often overlooked is that *Barot*, the case that marks the watershed moment in the new approach to terrorism sentencing, was *not* a case of terrorists being prepared to blow themselves up for their cause; Barot's detailed terrorist plans did not involve suicide bombing. However, his sentence at first instance of life imprisonment with a minimum term of 40 years following a guilty plea was the equivalent of a determinate sentence of 90-100 years after a trial. This sort of sentence, twice the length of that imposed in *Hindawi*, is a radical sentencing departure for a wholly un-attempted terrorist conspiracy.

If terrorism sentences are more severe than the case merits, is that likely to inflame rather than deter extremism? There is no hard evidence that this is so but there must be that risk. However, in anything other than the least serious terrorist cases, there is no suggestion that courts are concerned about such a risk or prepared to make an allowance for it. This is true even for new terrorism offences, where, somewhat anomalously, conduct which does not attract culpability in any other area of criminal law is, in a terrorism context, often met by a substantial custodial sentence.

Life imprisonment and increasingly long terms of imprisonment, based on the perceived need to punish, incapacitate and deter, are the dominant trends in terrorism sentencing. This has, in part at least, been driven by the highly emotive events in the USA of September 11, 2001 and UK on July 7 and 21, 2005. The judgment of the Court of Appeal in *Barot*, which closely followed those events, was certain to, and duly did, have an "inflationary" effect on sentencing in terrorism offences in general. Now that the shock of those events has, to some extent, faded, this would be a good time to review whether the current approach is necessary and desirable. I am of the opinion that there is considerable room in terrorism sentencing for a more measured assessment of the actual harm caused by the offender and the need to rehabilitate and prevent the spread of extremism.

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