Neutral Citation No: [2023] NICA 83	*Ref:* McC12352
	ICOS No: 19/83239/AO1
*Judgment: approved by the court for handing down (subject to editorial corrections)**	*Delivered:* 27/11/2023 (ex tempore)

IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM BELFAST CROWN COURT

REX

v

FIONNGHUALE PERRY

Mr Desmond Hutton KC and Ms A Macauley (instructed by Phoenix Law) for the Appellant
Mr Robin Steer (instructed by the PPS) for the Crown

Before: McCloskey LJ and Colton J

RULING (ex tempore)

McCLOSKEY LJ

[1] We shall try to draw together some strands fairly expeditiously. It is appropriate to say at the outset that where this is leading to is we just cannot proceed with tomorrow's listing of the appeal against sentence. Notices have to be given to bodies who are entitled to notice. We will ensure a re-listing before the end of this term.

[2] It is further appropriate to spell out just what the terminus is and the reason why I shall elaborate a little is to try to ensure that all of us, that is the legal representatives on the one hand and the bench on the other, are on the same wavelength here. What follows are all provisional observations on the part of the court.

[3] An appropriate starting point is the date of the sentencing itself. We all know that before the court sentenced the appellant in this case, the Supreme Court gave judgment in the case of *R v Morgan and others* (2023) UKSC 14. At first instance the

decision in *Morgan* entered the fray and the trial judge gave certain directions for submissions. Now, developing this brief review of trial events, you need not worry about correcting me if there is a minor detail wrong here or there because there is quite a lot to absorb from voluminous bundles and, as I pointed out at last week's sentence appeal case management listing, the papers are quite scattered and not at all user-friendly.

[4] The sentencing process included an email (at page 875 of the bundle) from the appellant's solicitor which stated that they understood that they were to withhold their submission on the impact of *Morgan* and the new legislation until the PPS submission had been received and so be it. We are not adjudicating on any of that. We have not identified any further direction from the judge subsequently. Again, these are small details which are not particularly significant at this remove. I have not identified any further written submission from either party after that email. This, again, is mere water under the bridge at this stage

[5] We then come to the sentencing judgment itself. This makes explicitly clear that there were issues about the new statutory reforms and the *Morgan* decision and the judge devoted a number of paragraphs to that issue, recording a certain submission on behalf of the appellant, in particular. I do not think he refers to any of the prosecution submissions on these issues and he rejected an argument that the decision in *Morgan* should be distinguished. The judge clearly, from paragraphs 23 and 24 of the judgment, was of the view that the decision in *Morgan* was determinative of such Article 7 issues as were before him.

[6] The precise Article 7 issues that were before the judge are a little unclear, possibly because (subject to correction) we have identified no written submission clearly raising them. We have just got the aforementioned email, that is all. From a combination of the email and what has been further put before this court in written submissions, it is distinctly possible that what the judge says in paragraph 23 of his sentencing judgment reflected, broadly, the sum total of the Article 7 issues raised on behalf of the appellant. That is quite significant because we are going to come to another related issue in just a moment.

[7] Pausing just there, again, these are incomplete observations on the part of the court, designed to ensure that all of us proceed in the most expeditious way possible on these issues. I would ask the parties to take a careful note of all that I say because we are not going to be drawing up another formal Notice or procedural Order here. It is much better to do it this way.

[8] In the indictment, the dates of the alleged offending are 16 September 2015 to 21 February 2018. So, if we stop the clock at that date and ask ourselves what was the next material development in the chronology, the answer is that on 12 April (or 15 November?) 2019, the maximum sentence for the offence in question was increased by Parliament from 10 to 15 years. I think you are all probably aware that the statutory provisions we are looking at here are section 58(4)(a) of the Terrorism

Act (2000) and section 73 of the Counter-Terrorism and Border Security Act (2019). The latter is the provision which increased it from 10 to 15 years.

[9] So far, relatively straightforward. However, this raises an issue which I am not clear the parties have fully considered, in the mind of the court. While it goes no further than that, it potentially has implications for what has to be done in the obligatory Notice to the non-parties.

[10] So that is the first issue to be addressed. Next, the trial and conviction of the appellant materialised and, during that period, there intervened the statutory reforms effected by the 2021 Act and, in particular, the significant changes, those effected to the Criminal Justice (Northern Ireland) Order 2008. Now, there were quite a lot of changes brought about by that development on its own and we will just leave to one side what they all are because we are not here this morning to examine everything in detail. The crucial question is: which of those alterations have, on the appellant's case, violated her rights under Article 7 of the Convention? That is the crucial question.

[11] Standing back, one might say – the word 'might' is emphasised – that there are three particular features of the new sentencing regime which the appellant may be contending infringe her Article 7 rights. F<u>irst,</u> the sentencing court was precluded from punishing her by a suspended sentence. Now, I want to pause there because the words 'the sentencing court' in that formulation are quite important. I want the parties to be thinking very carefully indeed about the actual sentence imposed in this case, what the trial judge actually ordered and what the parameters of his sentence are, as and one of the issues which is emerging before this court is a distinction between what the trial judge actually did in his sentencing order and what the legislation of its own volition and operation will possibly mandate other agencies to do at a later date.

[12] The <u>second</u> feature of the new statutory possibly raising an article 7 issue is the substitution of two thirds of the custodial term for one half of the custodial term in respect of remission of sentence. The <u>third</u> issue which the appellant may be highlighting as being incompatible with her rights under Article 7 of the Convention is the absence of any guarantee that her release will be effected when she has served two thirds of her sentence because her release - and I think it is right to say the terms, that is the licence terms of her release thereafter - will be dependent upon assessments and decisions to be made by the Parole Commissioners, which will not guarantee her release at the two thirds point.

[13] So, I would ask the parties just to bear in mind first of all what I have said about the increased prison term in 2019, postdating the dates of the offending and secondly, the possible distinction between what the judge actually did in his sentencing order (on the one hand) and what the legislation and the new regime themselves will do, via a vis other agencies, at some future date.

[14] That brings us to another question which has been in the mind of the court from the time when we began to look earnestly at the appeal against sentence. We are aware that this court may well have to construe what the judge actually decided/ordered in sentencing the appellant. That issue arises because in pronouncing his sentence the judge did not follow the structural path which the new sentencing regime required him to observe. It will thus be incumbent on this court to examine that issue in due course and we will have to work out for ourselves what the out-workings of that are.

[15] More broadly, we invite the parties to note in the interests of clarity, transparency and expedition this court's <u>provisional</u> assessment of the issues actually formulated in the grounds of appeal. Provisionally, it seems to the court that there are two grounds of appeal of substance. The <u>first</u> is whether the sentencing order of the Crown Court infringed the appellant's rights under Article 7 of the Convention in contravention of the Human Rights Act. The <u>second</u> ground is (while there are two or three particulars) the familiar one of whether the sentence is manifestly excessive.

[16] Now, that is our tentative interpretation of the grounds of appeal, and we hope the parties will derive some benefit from that. The appellant may wish to persuade us that there's more to it than that. If that is the case, then we shall require an amended notice of appeal spelling out with absolute clarity what the appellant wishes to pursue before the court.

[17] And that brings us, then, to the parties' skeleton arguments. In the appellant's skeleton argument from para 85 and following the Article 7 issues are raised. In the prosecution's skeleton argument, these issues are addressed from para 37 but in a very complicated way because there are all sorts of cross references to other documents and other parts of the bundles and that just does not work in any court. We will come back to that presently.

[18] So where does all of this lead? The court at the beginning of the week formulated a notice to the parties drawing attention to Order 120 and Order 121 of the Rules of the Court of Judicature. A response was made. The court is grateful for the expeditious response that it received and the accompanying letter from the appellant's solicitors. I hope the parties have had the opportunity to at least in a preliminary way absorb the court's rejoinder. We have given the parties in our track change revised draft, all the text, all the leads and all the cues that are required to compile the Notice comprehensively and efficiently and, fundamentally, with maximum clarity. So in particular, but not exhaustively, it would not do to simply plead that the issue is Article 15A of the 2008 Order because there is simply far too much in Article 15A and beyond and before in all of these amendments to get away with something as bland as that. Thus, we have composed subparagraphs for completion and there should not be any difficulty at all in understanding where the court is coming from. Therefore, first and foremost, the attention of the appellant's

legal representatives has got to be very heavily focused on what we are asking to be addressed in our draft of the obligatory Notices under the Rules.

[19] Next the following question arises. If there is a human rights compatibility issue which engages the regime of Order 120, then by virtue of Schedule 10 to the Northern Ireland Act 1998 there may ipso facto be a devolution issue, triggering Order 121. That is the way the legislation operates. The reference is Schedule 10, paragraph 51(c) in the Northern Ireland Act (1998). That would mean that two Notices are required and that is why we drew attention to both Order 120 and the Order 121 in our most recent CMD Order. The good news is that they are going to be almost certainly identical.

[20] The parties may benefit from some concluding tentative comments. The Article 7 ECHR jurisprudence of the European Court of Human Rights has one strong central theme among others and that is that one has to examine the earthy, practical realities of the impact of the impugned measure on the appellant and the issue of nexus. This court's focus is on two actors, namely the sentencing judge and the appellant: we will not be conducting a general Article 7 ECHR moot.

[21] So there are some very interesting issues that we have all got to grapple with. I think I have maybe overlooked one, although I have probably hinted at it, and it is the following. In *Morgan and others*, all the defendants were sentenced on X date. On Y date – several years later – the new statutory provisions came into operation. The effect of the new statutory provisions was to expose the defendants to what in simple terms was a more austere sentencing regime. No sentencing of the appellants occurred following the introduction of the new statutory provisions. There was no judicial intervention or activity of any kind. Pure Executive interventions loomed at that stage. These entailed sentence calculations, recalculations, consideration of representations made *et al* - a decision-making process which culminated in a justiciable decision amenable to judicial review challenge. The challenge actually mounted took the form of an appeal against sentence.

[22] The *ratio decidendi* of the case is perfectly clear, namely that the new statutory provisions related to the administrative and procedural outworkings of the sentences that had been proposed before the more austere statutory regime came into operation. I invite you both to think very carefully about that because, to date, it rather seems that both parties were agreed that the decision in *Morgan* was determinative of the Article 7 issues apparently raised at first instance. That is what we got from the email a little opaquely and then from what has been said more recently. We invite the parties to reflect very carefully indeed on whether the decision in *Morgan* <u>is</u> determinative of any of the Article 7 issues which we think are before this court. We have simply highlighted in a purely tentative way three aspects of the new regime which potentially are the Article 7 issues. It <u>may</u> be important to bear in mind a distinction being administrative out-workings in the context of a sentence imposed after the introduction of the new statutory regime and not as in *Morgan* well before it.

[23] Please bear the following in mind also. If it be the case that the sentencing judge was in substance affected in his formulation of the appropriate sentence by only one feature of the new statutory regime, namely his inability to suspend the sentence with the possible consequential impact on the appellant and her Article 7 rights, then a lot of things would follow which are not at all adverse to the appellant. The analysis might be ("might" again being a very big word) that the other two features belong to issues of administrative outworkings. Do they? The analysis might be that they do not really form part of the sentence under challenge at all. Do they or do they not? But in particular, on either of those last two possible scenarios, the appellant will have the full protection of her Article 7 rights as regards each of those features because if the court were to take that route ("if", another big word) the appellant would then inevitably engage the Minister of Justice and the Department of Justice in extensive representations. She would elicit a decision from the Executive one way or another. If the decision were to recognise that those two features of the new statutory regime were indeed incompatible with her Article 7 rights, then she would secure whatever benefit flows from that. Should she fail to secure that decision, we all know what would happen immediately and she would be before a different court well before her two thirds point, making her arguments in that forum.

[24] As already emphasised, all of the foregoing are merely incomplete, provisional thoughts which have occurred to this court as it has sought to grapple with issues which were not entirely apparent until very recently.