Sentencing of Terrorism Offences after 9/11: A Comparative Review of Early Case Law

Robert DIAB*

ABSTRACT ............................................................................................................. 349

INTRODUCTION ............................................................................................ 349

I. TERRORISM SENTENCING IN CANADA PRIOR TO 2001 .............. 351

II. THE IMPETUS FOR NEW ANTI-TERROR LAW IN CANADA, THE
    UK, AND AUSTRALIA AFTER 9/11 ...................................................... 351

III. THE NEW CANADIAN FRAMEWORK FOR TERRORISM
    SENTENCING ...................................................................................... 353

IV. CANADIAN SENTENCING DECISIONS UNDER THE ANTI-
    TERRORISM ACT ........................................................................... 356

A. KHWAJA ................................................................................................. 357

B. AMARA, GAYA, KHALID, DIRIE, AND AHMAD .................... 363
   i. AMARA ............................................................................................. 363
   ii. GAYA ............................................................................................... 364
   iii. KHALID ............................................................................................ 365
   iv. AHMAD ............................................................................................ 366
   v. DIRIE ................................................................................................. 367

C. NAMOUH................................................................................................. 369

* Assistant Professor, Faculty of Law, Thompson Rivers University; LLB, LLM, PhD candidate, Faculty of Law, the University of British Columbia. I would like to thank the anonymous reviewer of this volume for a detailed critique of an earlier draft, and for many helpful suggestions for revision. I would also like to thank the participants of the CIAJ conference in October of 2011 for their feedback, including Justice Douglas Rutherford, Judge Claude Leblond, Marlys Edward, and Lyne Décarie.
D. Discussion of issues arising from the Canadian cases ...... 370

V. Evolving approaches to sentencing for terrorism in the UK ............................................................................................................ 372

VI. Recent approaches to sentencing for terrorism in Australia ........................................................................................................... 375

VII. Points to draw from a comparison of the three regimes .. 379

Conclusion............................................................................................................. 380
ABSTRACT

This paper provides an overview of an emerging jurisprudence on terrorism sentencing under post-9/11 law in Canada, the UK, and Australia. It seeks to advance three objectives. One is to highlight similarities and differences in approach among these jurisdictions. Another is to lend context to a set of Ontario Court of Appeal decisions calling for stiffer sentences, and to show why future sentences may often be longer as a result—but not always. Finally, the paper seeks to demonstrate how prosecutorial discretion on sentence limits can result in widely divergent outcomes at both the high and low end of the spectrum of culpability.

INTRODUCTION

Since 9/11, few topics have received more attention from legal scholars and jurists than counter-terror law and policy. Yet very little has been said about sentencing in particular. Now that a first round of terror prosecutions has concluded, lending a better sense of how a new sentencing framework has been applied, a host of issues have surfaced.

This paper explores these issues by surveying the Criminal Code framework for terror sentencing put in place after 9/11, and the early

---


2 Criminal Code, RSC 1985, c C-46 [Criminal Code or Code].
cases that apply it. It then attempts to gain insight into the Canadian framework by drawing a comparison with recent approaches to terror sentencing in the United Kingdom and Australia.

In each of these jurisdictions, courts have placed emphasis on the principles of deterrence and denunciation. As a result, even where an offender’s involvement in a serious plot has been limited, or where the plot has been thwarted early, courts have imposed a life sentence or a lengthy custodial term. The Canadian framework is somewhat distinct, however, by virtue of the combined operation of a series of factors. These include maximum sentences for offences such as participation in or facilitating terrorism; the need to consider conflicting principles such as rehabilitation and deterrence; credit for pre-trial custody; and limits on parole ineligibility periods.

Given these factors, recent appellate decisions calling for more emphasis on deterrence and denunciation may often result in longer sentences in future cases—but not always. A further factor worth noting is that Canada’s framework affords the Crown broad discretion in prosecutorial approaches, including the possibility of circumventing maximum sentences for terrorism offences that are shorter than life, and seeking a life sentence instead. In ways to be explored below, the exercise of this discretion can lead to a wide range of outcomes. As a result, in many cases, whether a sentence seems too high or low will depend at least as much on the Crown’s approach as it does on the court’s response.

---

3 See e.g. R v Khawaja, [2009] 248 CCC (3d) 233 (Ont SC) [Khawaja (Trial)], var’d 2010 ONCA 862, 103 OR (3d) 321, 273 CCC (3d) 415 [Khawaja (Appeal)]; R v Ahmad, 2010 ONSC 5874; R v Khalid, (2009) Brampton Registry No.: 2025/07, Ont SC [(Khalid, (Trial))], var’d 2010 ONCA 861, 103 OR (3d) 600, 266 CCC (3d) 105 [Khalid (Appeal)]; R v Gaya, 2010 ONSC 434, 255 CCC (3d) 419 [Gaya (Trial)], var’d 2010 ONCA 860, 266 CCC (3d) 428 [Gaya (Appeal)]; R v Dirie, 2009 CanLII 58598 (Ont SC). This paper also refers briefly to R v Durrani, (2010) Brampton Registry No.: 2025/07, Ont SC; R v Ansari, (2010) Brampton Registry No.: 2025/07, Ont SC; R v James, (2010) Brampton Registry No.: 2025/07, Ont SC (all three are noted in R v Ahmad, 2010 ONSC 5874 at paras 67–69). See also the British Columbia Supreme Court’s decision in R v Thambithurai, (14 May 2010) Vancouver Registry No.: 24958 (a 6-month custodial sentence for funding terror), aff’d Thambithurai, 2011 BCCA 137.

4 See discussion below of Khawaja (Appeal), ibid; Khalid (Appeal), ibid.
I. TERRORISM SENTENCING IN CANADA PRIOR TO 2001

Before the Anti-terrorism Act was passed in December of 2001, acts associated with terror were prosecuted under a range of offences in the Criminal Code. These included murder, hijacking, possessing or using explosives, or unlawfully causing bodily harm or death. The Code also captured the conspiracy or attempt to carry out acts amounting to terrorism, or the effort to assist in them before or after the fact. The range of penalties included life without parole for 25 years in the case of murder, and up to life for hijacking. Possession of an explosive substance with intent to cause serious bodily harm or death carried a maximum life sentence, as did conspiracy to commit murder. While these provisions still apply in terror prosecutions, their function is now amended in ways to be explored below.

II. THE IMPETUS FOR NEW ANTI-TERROR LAW IN CANADA, THE UK, AND AUSTRALIA AFTER 9/11

A primary impetus for passing new counter-terror law in the wake of 9/11 was United Nations Security Council Resolution 1373, adopted on September 28, 2001. This called on member states to reform criminal law regimes to “[e]nsure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice.” It also called on states to

---

6 Criminal Code, supra note 2, ss 230 (murder); 76 (hijacking); 81–82 (explosives); 269 (unlawfully causing bodily harm); and 222(5) (unlawfully causing death). See also Roach, ibid at 152 for a more extensive catalogue of offences and applicable Code provisions.
7 Criminal Code, ibid ss 465 (conspiracy); 24 (attempt); 21(1), 22 (assistance).
8 Ibid s 76.
9 Ibid s 81(2)(a).
10 Ibid s 465(1)(a).
12 Resolution 1373, ibid s 2(e).
establish “terrorist acts … as serious criminal offences in domestic laws” and to ensure that “the punishment duly reflects the seriousness such terrorist acts.” 13 Two and a half months later, Canada enacted the Anti-terrorism Act, which inserted a chapter on terrorism offences into the Criminal Code. The United Kingdom added to its Terrorism Act 2000 14 by passing the Anti-terrorism, Crime and Security Act 2001, 15 followed by a series of other statutes over the course of the decade. 16 Australia enacted the Security Legislation Amendment (Terrorism) Act 2002, and other laws. 17 These new laws offered new possibilities for prosecuting and punishing acts of terror, turning on an expansive statutory definition of “terrorism.”

As Kent Roach has noted, many states, including Canada and Australia, drew on the definition of terrorism in the UK Terrorism Act, 2000 as a precedent. 18 The UK Act defines terrorism as any act involving violence, serious damage to property, or risk to public safety that is “designed to influence the government or to intimidate the public and … [is done] for the purpose of advancing a political, religious or ideological cause.” 19 The definition of a “terrorist activity” created by Canada’s Anti-terrorism Act requires a similar connection between violence and the intention of “intimidating the public … or compelling a person, a government or a domestic or an international organization to do or to refrain from doing any act.” 20 It also requires that the activity be

---

13 Ibid.
14 (UK), c 11.
15 (UK), c 24.
16 See e.g. Criminal Justice Act 2003 (UK), c 44; Prevention of Terrorism Act 2005 (UK), c 2; Terrorism Act 2006 (UK), c 11; Counter-terrorism Act 2008 (UK), c 28; and the Terrorist Asset-Freezing (Temporary Provisions) Act 2010 (UK), c 2.
19 Terrorism Act 2000, supra note 14 s 1.
20 Criminal Code, supra note 2 s 83.01(1). A similar definition is found in Australia’s Security Legislation Act, supra note 17, Schedule 1, Part 5.3, Division 100. See Roach, “Sources and Trends,” supra note 11 at 243 on the differences between British, Canadian, and Australian definitions.
committed “in whole or in part for a political, religious or ideological purpose, objective or cause.”

III. THE NEW CANADIAN FRAMEWORK FOR TERRORISM SENTENCING

The Anti-terrorism Act altered Canada’s framework for terror sentencing in various ways. One was to include a series of new terrorism offences. Among them are the offences of participating in a terrorist group or facilitating its terrorist activity; instructing or directing others to engage in terrorism; and financing or providing property for terrorism.

Participating in and funding terror carry ten-year maximum sentences; for facilitating, the maximum is fourteen years. However, a key provision of the Anti-terrorism Act allows for these limits to be circumvented. It asserts broadly that notwithstanding any other provision of the Code “a person convicted of an indictable offence, other than an offence for which a sentence of imprisonment for life is imposed as a minimum punishment” is liable to receive a life sentence if “the act or omission constituting the offence also constitutes a terrorist activity.” In other words, if the Crown wishes to seek a life sentence for participating or facilitating, or any other indictable offense amounting to a terrorist activity, it may do so, provided the accused is given notice before entering a plea. A further provision imposes a maximum life sentence for committing any indictable offence in association with, or for the benefit of, a terrorist group.

The Act also stipulates that where multiple sentences for terrorism offences are imposed, aside from one of life imprisonment, the sentences

---

21 The constitutional validity of this aspect of the definition was upheld in Khawaja (Appeal), supra note 3 at paras 95–117.
22 Criminal Code, ss 83.18–83.19.
23 Ibid s 83.21.
24 Ibid s 83.02. Various commentators have explored the constitutional and criminological merits of these new offences: see the contributions noted, supra note 1.
25 Criminal Code, ibid ss 83.02, 83.18(1), 83.19(1).
26 Ibid s 83.27. I am indebted to the anonymous referee of this paper for pointing out this possibility.
27 Ibid s 83.27(2).
28 Ibid s 83.2.
are to be served consecutively. Notably, the government chose not to impose mandatory minimum sentences for any terrorism offences.

The Anti-terrorism Act also amended section 718.2 the Criminal Code, which deems certain facts to be aggravating circumstances at sentencing. The section now calls for an increase in sentence where there is “evidence that the offence was a terrorism offence.” This amendment calls attention to the fact that while deterrence and denunciation have been primary considerations in terrorism cases, it is also necessary to consider other sentencing principles in the Code. Courts must therefore observe the principle that “where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh.” A sentence must also be tailored to the varying degrees of responsibility for an offence. Similarly, in striving to impose a “just sanction,” it is open to the court to craft a sentence that has, as one of its objectives, the rehabilitation of the offender. The implications of this possible conflict of principles are explored further below.

None of the penalty provisions in the terrorism chapter of the Criminal Code speak to the question of parole eligibility. Section 743.6(1.2), however, states that where an offender is sentenced for a terrorism offence, the court shall order that the portion of the sentence that must be served before the offender may be released on full parole is one half of the sentence or ten years, whichever is less, unless the court is satisfied, having regard to the circumstances of the commission of the offence and the character and circumstances of the offender, that the expression of society’s denunciation of the offence and the objectives of specific and general deterrence would be adequately

---

29 Ibid s 83.26.
30 Roach, September 11, supra note 1 at 46, suggests that mandatory minimum sentences for terrorism offences would likely have survived a Charter challenge (as cruel and unusual punishment), given the Supreme Court of Canada’s deference to Parliament on the mandatory minimum at issue in R v Morrisey, 2000 SCC 39, [2000] 2 SCR 90.
31 Criminal Code, supra note 2 s 718.2(a)(v).
32 Ibid s 718.2(c).
33 Ibid s 718.1: the Code’s “fundamental principle” of sentencing is that: “A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.”
34 Ibid s 718(d).
served by a period of parole ineligibility determined in accordance with the *Corrections and Conditional Release Act*.

There are several points to note here. First, the section raises the period of parole ineligibility from what it would be otherwise—i.e. from either one-third of the sentence or seven years, whichever is shorter, to one-half or ten years. Second, this is a discretionary provision. It will likely be followed in most cases. However, the court may avoid imposing an additional parole ineligibility period if the enumerated principles of sentencing can be adequately addressed otherwise.

Third, the practical operation of the section can entail shorter non-parole periods than is suggested on first reading. If a life sentence is imposed, the non-parole period of ten years is calculated from the time of arrest or detention, not sentencing. Where a determinate sentence is imposed, an offender will likely receive credit for pre-trial custody.

Often this credit will account for a significant portion of the sentence; however, the non-parole period will apply only to the portion remaining to be served. In *R v Dirie*, for example, the offender was sentenced to two years of a notional seven-year sentence (having received five years’ credit for roughly 2.5 years in pre-trial custody). The non-parole period is

---

35 Provision for the shorter non-parole period is found in the *Corrections and Conditional Release Act*, SC 1992, c 20, s 120. The rule does not apply in the case of a mandatory life sentence.

36 The discretion not to impose a longer non-parole period was exercised in both *v Gaya* (Trial), *supra* note 3 at paras 129–136, and *Khalid* (Trial), *supra* note 3. In each case, Durno J found that a shorter parole period was consistent with the direction provided in *Criminal Code* s 743.6(2), which states: “[f]or greater certainty, the paramount principles which are to guide the court under this section are denunciation and specific or general deterrence, with rehabilitation of the offender, in all cases, being subordinate to these paramount principles.” At para 130 of *Gaya*, Durno J noted that “[t]he offender bears the burden of establishing on the balance of probabilities that the named objectives can be adequately served by the standard parole eligibility.” Durno J held that Gaya had satisfied this burden in part on the basis of his limited role in the plot, and that Khalid had done so partly based on his not appearing to pose a continuing danger. The Ontario Court of Appeal overturned the shorter non-parole period in both cases: *Gaya* (Appeal), *supra* note 3; *Khalid* (Appeal), *supra* note 3.

37 This is due to the operation of the *Criminal Code*, *supra* note 2 s 746. See e.g. *R v Amara*, 2010 ONSC 441, [2010] OJ No 181 [Amara (Trial)], aff’d 2010 ONCA 858, 266 CCC (3d) 422 [Amara (Appeal)]; *R c Namouh*, 2010 QCCQ 943, 74 CR (6th) 376 in which life sentences were imposed.

38 This is provided for in s 719(3) of the *Code*. Recent amendments to this provision are discussed below.

39 *Dirie*, *supra* note 3 at para 73.
only one year. Finally, the section speaks only of “full parole,” not lesser forms of release, such as weekend or day parole.\footnote{Under section 119(1)(c) of the 

Corrections and Conditional Release Act, supra note 35, an offender subject to an order under section 743.6 of the Code would be eligible for day parole six months prior to their eligibility for full parole.}

The larger significance of this section is to suggest that in even the most serious of terrorism cases (short of where a murder conviction is obtained), the parole ineligibility period will be no longer than 10 years, and it could be much shorter if the period is calculated from the time of detention as opposed to sentencing.

In summary, the new sentencing framework would seem to fulfill the UN Security Council’s call for stiffer punishments for terrorism offences. But in ways to be seen, it also allows for relatively short sentences for marginal figures involved in serious plots, and for shorter non-parole periods for longer sentences. This is in part a consequence of the fact that terror sentencing unfolds within a larger sentencing framework in Canadian law.

\section{Canadian Sentencing Decisions under the \textit{Anti-Terrorism Act}}

The early cases highlight a central conundrum for judges: how to address the many competing considerations on sentencing in the \textit{Criminal Code}.\footnote{See cases supra note 3.} Courts must strive to place an emphasis on deterrence and denunciation while also factoring in varying degrees of culpability and the possibility of rehabilitation.\footnote{\textit{Criminal Code, supra} note 2 ss 718.1, 718.2.} Multiple convictions for terrorism offences call for consecutive sentences, yet a global sentence should not be “unduly long or harsh.”\footnote{\textit{Ibid} s 718.2(c).} The Ontario Court of Appeal has sought to provide some direction on each of these points, suggesting the likelihood of longer sentences in the future. Yet, for reasons that can be gleaned from the early cases, the length of future sentences will also be shaped in large part by Crown elections with respect to maximum sentences and—in terms of time actually served—the function of parole eligibility provisions and credit for pre-trial custody.
A. Khawaja

The first prosecution and sentencing under the new Code framework was *R v Khawaja*. The accused was a 25-year old Ottawa resident who, in 2002, formed an association with a group of extremists in the UK and Pakistan. His involvement involved travel to London and Lahore, where he briefly attended a training camp. He also gave members money and access to his parents’ apartment in Pakistan. In addition to this, before the group was arrested in March 2004, Khawaja worked on the prototype of a remote-detonation explosive device he called the “hifidigimonster.” He agreed to build roughly 30 of them for the group’s use in the UK or elsewhere.

Principal members of the London group were found in possession of 600 kilograms of ammonium nitrate-rich fertilizer, along with maps of the UK’s national utility grid. In the prosecution of Khawaja’s UK co-conspirators, these materials were found to form part of a specific plot to set off explosions at targets in central London (the “fertilizer bomb plot”). Wiretap evidence raised questions about the extent of Khawaja’s knowledge of this plot, given that he participated in discussions of targets that included airports and nightclubs, and fuel, water, and energy utilities. Following a search of Khawaja’s Ottawa home, police seized various electronic components, two semi-automatic military rifles, 640 rounds of ammunition, documents relating to violent jihad, and $10,300 in cash.

A large part of Khawaja’s defence consisted of the claim that he lacked knowledge of the fertilizer bomb plot, and that his primary intention was to assist the group in their involvement with insurgents in Afghanistan. Rutherford J had a reasonable doubt about Khawaja’s knowledge of the fertilizer plot, but convicted him on six counts of terror-related offences. The most serious was that of intending to cause an explosion endangering life, and doing so in association with a terrorist group.44

Notably, Rutherford J suggested that in convicting Khawaja for these offences, he was culpable for more than simply an intent to assist

---

44 *Ibid* ss 81(1), 83.2 (the latter carrying a life maximum). The remaining offences were participating in a terrorist group (for receiving training) (s 83.18(1); 10 year maximum); funding terror (ss 83.01(1), 83.21(1); a life maximum); making property available to facilitate a terrorist activity (ss 83.01(1), 83.03(a); a 10-year maximum); participating in a terrorist activity (meetings in the UK relating to bomb-building) (ss 83.01(1), 83.18; a 10-year maximum); and facilitating a terrorist activity (ss 83.01(1), 83.19; a 14-year maximum).
with the group’s plans in Afghanistan. In building the bomb, “Khawaja’s activity was directed at assisting his terrorist associates in a way that could only result in serious injury, death and destruction to people and property somewhere.” 45 This could include London or the UK: “On the evidence, it is unclear what he knew or anticipated as to where they would be used, or that Khawaja even cared where they would be used. His Emir or leader asked him to provide them and he agreed. There is no suggestion that he would exercise any control over their deployment once he placed them in Khyam’s possession.” 46

The Crown sought a life sentence for building a bomb and funding terror, and close to the maximum on the remaining counts. The defence argued for a total sentence of 7.5 years; or, with double credit for pre-trial custody, a sentence of time served. The court imposed a global sentence of a further 10.5 years, without apportioning a specific amount of credit for pre-trial custody. 47 Parole non-eligibility was set at five years. 48

Both Crown and defence appealed the sentence. The Ontario Court of Appeal’s decision in this case, together with its reasons in R v Khalid, are currently the leading authorities on terror sentencing in Canada. 49 On this basis, Rutherford J’s initial sentence is worth canvassing briefly, for the context it lends to both the appellate decision and sentences imposed in other cases.

Mitigating circumstances considered by Rutherford J included Khawaja’s age, lack of a criminal record, and conduct in prison. While Rutherford J held that the emphasis in terror cases should be placed on “denunciation, deterrence, and protection of the public,” 50 he also noted that “the potential for rehabilitation … cannot be overlooked.” 51 In this case, however, he found that “the Court knows virtually nothing about [Khawaja’s] potential for reformation, of any sense of responsibility or of

45 Khawaja (Trial), supra note 3 at para 4.
46 Ibid.
47 Khawaja received four years for bomb-building in association with a terrorist group; two years each for participation in the training camp, providing funding, and making property available; and three months for participating in discussions relating to terrorism activity in the UK and facilitating those activities (Ibid, at para 54).
48 Ibid, supra note 3 at para 55.
49 Khawaja (Appeal), supra note 3; Khalid (Appeal), supra note 3.
50 Khawaja (Trial), supra note 3 at para 24.
51 Ibid at para 26.
any remorse he may feel for his criminal conduct, or of the likelihood of his re-offending.” Khawaja had not testified, would not be interviewed for the pre-sentence report, and made no statement at sentencing. The court treated the uncertainty about remorse and rehabilitative prospects as a neutral factor.

The analysis also turned on an assessment of Khawaja’s degree of responsibility. The court dismissed the suggestion that Khawaja’s lack of knowledge of the specific intent to use the “hifidigimonster” in the fertilizer bomb plot was a mitigating factor. The detonators were clearly “intended to unleash fireworks at other as yet unspecified places in aid of the jihad.” Nor was it mitigating that the “hifidigimonster” was said to be “amateurish” and needed more work. Khawaja’s culpability was serious; just how serious was the issue.

The Crown urged the court to consider Khawaja’s culpability to be comparable to that of his UK co-conspirators who received life sentences in R v Khyam. Rutherford J declined to do so on the basis that Khawaja was “a willing helper and supporter, but Khyam, Amin, Akbar, Garcia and Mahmood were away out in front of [him] in terms of their determination to bring death, destruction and terror to innocent people.” Yet, apart from noting Khawaja’s lack of specific knowledge of the fertilizer plot, Rutherford J did not expand upon this assertion.

The direction in 718.2(c) of the Code, calling for a global sentence that is not “unduly long or harsh,” posed a further challenge—given the requirement for consecutive sentences in section 83.26. Rutherford J interpreted the one section as a constraint upon the other. To support this reading, he drew upon Lamer CJ’s dicta in the Supreme Court of Canada’s decision in R v M (CA), to the effect that “[w]hether under the rubric of the ‘totality principle’ or a more generalized principle of proportionality, Canadian courts have been reluctant to impose single and

---

52 Ibid at para 27.
53 Ibid at para 32.
54 Rutherford J noted, at para 33, ibid, that Khawaja’s “device, as seized, would not do the job, although it would take only minor modifications to change that.”
56 Khawaja (Trial), supra note 3 at para 37.
57 Khawaja’s UK co-conspirators, apart from Khyam, also lacked knowledge of the specifics.
58 [1996] 1 SCR 500 [M(CA)].
consecutive fixed-term sentences beyond 20 years.” Rutherford J therefore implied that where consecutive sentences are imposed for terror offences, they should not exceed that ceiling.

On appeal, Khawaja’s sentence on count 1 (bomb-building in association with a terror group) was raised from four years to life without parole for ten years. The period of the remaining counts was raised from 6 to 24 years, to be served concurrently. The court allowed the Crown’s appeal on the basis of both specific errors in the decision below and an error in the “overall approach” to the sentencing of terrorism offences.

The first of the specific errors pertained to the distinction between Khawaja’s culpability and that of his UK co-conspirators. The claim that the latter were “way out in front” in their determination to bring death and destruction was “not borne out by the record.” The record, including the emails cited in the trial decision, attests to a deep “commitment to violent Jihad” and a “willingness to do anything and go anywhere to promote violent Jihad.” The court conjectured that Rutherford J might have meant that Khawaja’s UK associates were closer to realizing their plans, but if so this was irrelevant. His level of determination was comparable, and thus also his “degree of moral blameworthiness.”

A more serious error was treating the lack of evidence of remorse as a neutral factor. On the contrary, in the court’s view, “the absence of any evidence of the appellant’s remorse or of his prospects for reformation should have been treated as a significant indicator of his present and future dangerousness.” Without “convincing evidence” that violent Jihad has been repudiated, a terrorism offender “continues to pose a serious threat to society and is likely to do so for the indefinite future.”

Even where the offender does repudiate terror, the court was clear to state that rehabilitation remains relevant in terror sentencing but that its import is “significantly reduced in this context given the unique nature of the crime of terrorism.”

---

59 Ibid at para 43, cited in Khawaja (Trial), supra note 3 at para 39.
60 Khawaja (Appeal), supra note 48 at para 192.
61 Ibid at para 194.
62 Ibid.
63 Ibid at para 196.
64 Ibid at para 200.
65 Ibid.
66 Ibid at para 201.
A third error pertained to Rutherford J’s resolution of the apparent conflict between sections 83.26 (consecutive sentences) and 718.2(c) (not unduly long). Rutherford J read M(CA) to stand for the proposition that 20 years marks a notional benchmark for what is “unduly long or harsh” in section 718.2(c), one that would apply to the directive to impose consecutive sentences in section 83.26. The appellate court held that this reading runs contrary to the holding in M(CA), and also belies the intention of including section 83.26 in the terror sentencing framework. In M(CA), the Supreme Court of Canada confirmed the validity of a 25-year global sentence that consisted of shorter consecutive terms. It found that despite the tendency in recent years for courts not to exceed the 20-year mark, neither the Code nor the Charter’s protection against cruel and unusual punishment precluded this. The Court of Appeal in Khawaja explored M(CA) at some length to ground the assertion that section 83.26 “reflects Parliament’s intention that the general principle of totality must be moderated or altered in the case of terrorism-related crimes … the customary upper range for consecutive fixed-term sentences will not be applicable.”

Turning to the larger error of “overall approach,” the court set out three more general grounds on which the sentence below was “manifestly unfit. The sentence failed to reflect the “enormity” of the crime:

Terrorism, in our view, is in a special category of crime and must be treated as such. When the terrorist activity, to the knowledge of the offender, is designed to or is likely to result in the indiscriminate injury and killing of innocent human beings, sentences exceeding 20 years, up to and including life imprisonment, should not be viewed as exceptional.

---

67 M(CA) preceded the inclusion of the directive in section 718.2 to avoid “unduly long or harsh” global sentences, but it considered the issue in light of the requirement that global sentences be “just and appropriate” in accordance with the older section 717. At para 72, Lamer CJ stated: “I see no reason why numerical sentences in Canada ought to be de facto limited at 20 years as a matter of judicial habit or convention. Whether a fixed-term sentence beyond 20 years is imposed as a sentence for a single offence where life imprisonment is available but not imposed, or as a cumulative sentence for multiple offences where life imprisonment is not available, there is no a priori ceiling on fixed-term sentences under the Code.”


69 Ibid at para 238. The judgment contains this qualification at para 220: “In advocating this sentencing approach to terrorist-related activity that, to the offender’s knowledge, is designed to or is likely to result in the indiscriminate killing of human beings, we are not suggesting that there will never be cases of that nature for which the
The sentence also “failed to adequately reflect the continuing danger the offender presents to society,” based on the absence of evidence of remorse.\textsuperscript{70} Finally, the principle of deterrence requires that terrorism “must be dealt with in the severest of terms.”\textsuperscript{71}

The court’s imposition of a life sentence in \textit{Khawaja}, and the call for lengthier sentences as a norm in terror sentencing, is certainly significant. It suggests that Canadian cases will be brought into closer conformity with UK and Australian decisions, with their emphasis on deterrence and denunciation as primary principles. Yet the potential impact of the \textit{Khawaja} appeal should not be overstated. Depending on how the Crown chooses to proceed, maximum sentences for participating in or facilitating terror, coupled with credit for pre-trial custody, may preclude sentences in the range considered here.\textsuperscript{72} A further disparity remains in the area of parole ineligibility.

Following Rutherford’s J’s sentence, Khawaja was eligible for full parole five years after sentencing. Where a life sentence is imposed, however, section 746.2(c) dates the beginning of a 10-year parole ineligibility period to the time of arrest. As a result, given Khawaja’s close to five years of pre-trial custody, his parole ineligibility on appeal is virtually unchanged. Thus, the \textit{de facto} custodial term in this case might prove to be much shorter than those imposed in comparable UK and Australian cases. For example, Khawaja’s co-conspirators in the UK (excluding Khyam), received life sentences with parole ineligibility periods ranging from 17.5 to 20 years from the date of sentencing. In the Australian case of \textit{R v Elomar},\textsuperscript{73} the conspirators amassed weapons, bomb-building materials and contemplated various targets, without settling upon any in particular at the time the plot was foiled. There was also a reasonable doubt as to a deliberate intention to cause casualties. Sentences ranged from 23 to 28 years, with non-parole periods ranging from 17 to 21 years.

---

\textsuperscript{70} \textit{Ibid} at para 239.

\textsuperscript{71} \textit{Ibid} at para 246.

\textsuperscript{72} See e.g. \textit{Dirie, supra note 3; Ahmad, supra note 3.}

\textsuperscript{73} [2010] NSWSC 10.
B. AMARA, GAYA, KHALID, DIRIE, AND AHMAD

These cases concern a group known as the “Toronto 18.” In the fall of 2005, Ahmad and Amara, then only 20, formed an association with a view to setting up a terrorist training camp in Washago, a rural town outside of Toronto. Possible targets included CSIS’s headquarters and the CBC building in Toronto, Parliament, military bases, and a nuclear power plant. Ahmad played a leadership role at this stage, recruiting 13 other young men to the group. A camp was held in December, where Ahmad showed videos encouraging violent jihad and gave a motivational speech. In March of 2006, Ahmad and Amara had a falling out, splitting the group in two. Amara’s group developed a more specific terror plot, and took further steps to its fulfillment. A number of convictions have followed the arrest of members of both groups in June 2006.

I. AMARA

Amara’s sentence is the longest of the group and his culpability is clearly the most serious. Following the split with Ahmad, Amara had developed a remote detonation device and coordinated his smaller groups’ collection of materials, including large amounts of ammonium nitrate. They conspired to bomb the Toronto Stock Exchange, a CSIS building, and a military headquarters in November of 2006. Their goal was to persuade Canada to withdraw its forces from Afghanistan. At the time of their arrest, Amara and other members were removing bomb-making materials from storage. Equipment relating to bomb-making was seized from Amara’s home, along with ammunition and $12,000 in cash.

Amara pleaded guilty to two counts: participating in a terrorist group and intending to cause an explosion endangering life, in association with a terrorist group. The Crown sought the maximum sentence on each count: 10 years and life, respectively; defence proposed a total of 18 years. Durno J imposed a life sentence for the bomb plot and 21 months for participation, giving seven-year’s credit for pre-trial custody. The non-parole period imposed was 10 years from the time of his arrest, or six years and 3.5 months from sentencing.

In arriving at the sentence, Durno J accorded some weight to the evidence of a psychiatrist as to Amara’s positive progress in custody, his

74 See the factual summary in Ahmad, supra note 3.
75 Contrary to Criminal Code, ss 83.81(1), 83(1)(a), 83.2 respectively.
acceptance of responsibility, and “strong willingness to change his attitudes and behaviours.”

This was coupled with the offender’s guilty plea, lengthy statement of remorse at sentencing, his age, lack of a criminal record, and his being a husband and father of a young family. Aggravating factors included the planned and deliberate nature of the crime, Amara’s leadership role and active recruiting of others, and the use of firearms. Above all, it was a “terrorist offence,” one in which “there is no dispute that what would have occurred was multiple death and injuries.” Durno J described this as among “the most serious kind of terrorism imaginable.” The devices were not “amateur” in nature, nor the larger plot “inevitably doomed to failure.” In short, Amara was “the leader and directing mind of a plot that would have resulted in the most horrific crime Canada has ever seen.”

Applying the principles set out in Khawaja and Khalid, the Court of Appeal upheld the life sentence.

II. GAYA

Saad Gaya was a member of Amara’s group for roughly a month in the summer of 2006. Eighteen at the time of the offence, Gaya pleaded guilty to intending to cause an explosion endangering life, and doing so in association with a terrorist group. He knowingly contributed to the group’s activity, but had limited knowledge of the larger plot. He was tasked with finding a place to store three tons of ammonium nitrate. Gaya had provided a statement to police, was remorseful, and took full responsibility for the offence. Giving him 7.5 years’ credit for roughly three years and eight months of pre-trial custody, Durno J imposed a further 4.5-year sentence (with parole eligibility at one-third of this sentence).

---

76 Amara (Trial), supra note 37 at para 59.
77 Ibid at para 102.
78 Ibid at para 141.
79 Ibid at para 143.
80 Ibid at para 145.
81 Amara (Appeal), supra note 37.
82 Contrary to ss 81(1), 83.2 of the Criminal Code.
83 At a pre-trial hearing, Durno J found that Gaya was “wilfully blind that it was likely that the explosion(s) would cause serious death or bodily harm.” Gaya (Trial), supra note 3 at para 3.
84 On this shorter parole period, see supra note 36.
Assessing Gaya’s culpability, Durno J emphasized that he was “not the prime mover in the plot. He did not know all the details of the plan. He took detailed orders. He did not give them…. He did not know anything about bomb making.” Gaya’s rehabilitative prospects, his experience in custody, and with the trial led Durno J to conclude that “he has already be specifically deterred and is not a continuing danger to the public.”

The Court of Appeal raised Gaya’s 12-year sentence to 18 years, extending the remaining term of 4.5 years to 10.5 years. It also set the non-parole period at half the remaining custodial term: five years and three months. The initial sentence “did not adequately reflect the unique nature of terrorism-related crimes, nor did it adequately reflect the enormity of the respondent’s crime and the role he played in it.”

### III. Khalid

Khalid’s case is similar to Gaya’s but more pertinent due to the way it highlights a tension in terror sentencing between a high degree of culpability and often compelling mitigating circumstances. In particular, like Gaya, Khalid was a youthful offender with bright prospects (a 19-year old university student) and no criminal record. He was remorseful and appeared to pose no continuing danger. Yet his culpability was greater. While he admitted to being a member of the bomb plot, he claimed not know that the planned explosions would cause death or bodily harm. In an earlier decision, he was found to have been wilfully blind of this fact, but unaware that he was intended to drive a van containing a bomb to one of the targets. He pleaded guilty to intending to cause an explosion endangering life, and doing so in association with a terrorist group.

The seriousness of the offence called for a term in the range of 18 to 20 years as suggested by the Crown, but due to the mitigating factors,
Durno J held that a shorter term was appropriate. Khalid was sentenced to 14 years, with 7-years’ credit for 39 months of pre-trial custody, and no order was imposed for a longer non-parole period under section 743.6(1.2).

As in Gaya, the Court of Appeal found that the sentence “did not adequately reflect the enormity of the respondent’s crime and the significant part he played in it.” Mitigating factors had been overemphasized. In the Court of Appeal’s view, “were it not for the mitigating features that serve to reduce the length of sentence, the respondent would most certainly have been a candidate for a life sentence.” Although Khalid’s remorse may have been sincere, he continued to minimize his involvement, and despite the findings of a psychiatrist, the danger he continued to pose was indeterminate. A longer sentence for first time young adult offenders in this context was also found to be necessary for the purposes of general deterrence, given the “sad truth … that young home-grown terrorists with no criminal antecedents have become a reality.” The sentence was raised from 14 to 20 years, or from 7 to 13 years remaining, with a non-parole of half this term imposed under section 743.6(1.2).

IV. AHMAD

After thirteen days of trial before a jury, Ahmad pleaded guilty to participation in a terrorist group, importing firearms on the group’s behalf, and knowingly instructing six others to carry out an activity for the benefit of the group. The Crown had not sought a life sentence, given the offender’s guilty plea, youth, and lack of a criminal record. Dawson J imposed a 16-year sentence, giving eight years and nine months’ credit for pre-trial custody. This left seven years and three months to be served, with parole ineligibility set at half that time.

Dawson J characterized Ahmad’s culpability, after the split with Amara, to be limited. He sought to gather firearms and held a further “amateurish” training camp. Ahmad was, in the words of an informant, “an exaggerator who had talked a good game … but had not been able to

---

91 Khalid (Appeal), ibid at para 32.
92 Ibid at para 36.
93 Ibid at para 47.
94 Contrary Criminal Code, ss 81.18, 103, 83.2, 83.21 respectively.
develop any real operational capability." He was also remorseful. Yet this was an act of terrorism and a crime of prejudice on religious grounds. As a leader, Ahmad was also “substantially responsible for virtually ruining the lives of a number of other young men.”

The judgment concluded with an attempt to distinguish Ahmad’s sentence from those imposed against other members of the Toronto 18. Outcomes for three of the offenders who pleaded guilty to participating in Ahmad’s group—Durrani, James, and Ansari—are worth noting. Sentences ranged from 6.5 to 7.5 years. But with each of them receiving credit for spending roughly three and a half years in pre-trial custody, they were sentenced to serve only a further day in custody. These are at the lowest end of the Canadian range (for involvement in plots to cause bodily harm or death), yet they are still higher than sentences imposed for peripheral figures involved in UK and Australian plots. However, it should be noted that the actual time served by these three offenders is among the shortest periods served for conduct of this nature in all three jurisdictions.

V. DIRIE

R v Dirie involved a highly unusual set of facts. But it provides a sense of how maximum penalties and parole eligibility can shape a sentence in this area in significant ways. Dirie was an associate of Ahmad, acting with the intent of aiding Ahmad’s emerging terrorist group. In August of 2005, Dirie, then in his early twenties, was arrested

95 Ahmad, supra note 3 at para 14.
96 Ibid at para 56.
97 Ibid at paras 66 to 70. With the maximum penalty for participation being 10 years, these sentences were in the middle range. The conduct in at least one of these cases was well beyond the de minimus range. Significantly, Durrani’s second bail review indicated that his involvement in the plot was serious enough to justify his continued detention in accordance with s 515(10)(c) of the Code: R v Durrani, [2008] OJ 5949 (QL). Among the circumstances Hill J noted at para 144 were Durrani’s attendance at training camps with Ahmad in Ramara and Rockwood Ontario, at which he used a firearm and, in the latter case, “took charge of several aspects of the camp”; his having worked closely with Ahmad at various stages; and his comments about bomb-building and his willingness to die to advance the group’s goals.

upon attempting to re-enter Canada from Buffalo, New York, with two loaded semi-automatic weapons taped to his thigh, along with two other handguns and several rounds of ammunition on his person. He was sentenced to two years on counts of possessing and importing firearms. At the time of that prosecution, authorities were unaware of his association with Ahmad, or that the purpose of his action was to assist in a terrorist group. While in prison for the weapons charges, Dirie continued to assume a leading role in the group by communicating with various persons inside and outside the prison, including Ahmad.99

In June 2006, while still in prison serving his sentence on the weapons charges, Dirie was arrested and charged with participating in a terrorist group.100 Following a guilty plea, counsel presented a joint submission that in addition to the two years for the weapons offences, a further seven years was appropriate for participation. The only issue was how much credit to grant for pre-trial custody on the new charge. The period in question began from the time that Dirie’s mandatory release on the earlier sentence would have occurred, in February of 2007. Some 861 days of the following 2.5 years to sentencing were spent in solitary confinement. Dirie received two for one credit for this period, leaving only a further two years to be served—with parole eligibility after only a year.

Durno J was doubtful of the offender’s prospects for rehabilitation, but offered a sound argument for the validity of a sentence that would entail only two further years of custody—for an offence that involved express intentions to commit mass murder. “The maximum sentence permitted by Parliament for this offence is 10 years” he noted, “and with the two year sentence [Dirie] has already received, the effective nine year sentence for all his conduct is appropriate.”101

The sentence is anomalous, in relation to both other Canadian cases and those in the UK and Australia. Its outcome turned on its peculiar facts. Yet, it does still serve to demonstrate how serious conduct might lead to a relatively short custodial term, given the operation of maximum sentences and non-parole provisions. Thus, even if Dirie

99 Dirie, supra note 3 at para 25 (An agreed statement of facts in the sentencing for the subsequent terrorism charges noted that “one of the group’s objectives was to facilitate or carry out violent acts that would cause death or serious bodily harm to persons” at para 25).

100 Contrary to s 83.18 of the Criminal Code.

101 Dirie, supra note 3 at para 35.
serves the full sentence, he will have spent a total of six years in custody—at least two of which involved continuing participation in a terrorist group. (A fact scenario not likely to be repeated).

C. **Namouh**

*R c Namouh*\(^{102}\) is a decision of Leblond, JCQ of the Court of Québec involving the second life-sentence imposed under the new law. Namouh, in his mid-thirties, had struck an association with a European terror group called the “Global Islamic Media Front,” and expressed his willingness to conduct a suicide bombing on its behalf. The group sought to persuade the German and Austrian governments to withdraw soldiers from Afghanistan by publishing an “open letter” video that threatened to carry out terrorist attacks. (This was found by the court to be both an act of terrorism and an act of extortion.) The group was also associated with a group in Gaza that had kidnapped and held hostage an English journalist, Alan Johnston.

Namouh helped to disseminate the “open letter” video, and to create and distribute other material. He also helped facilitate covert communications with members of the group over the Internet. Following a trial, he was convicted and sentenced to life for conspiracy to discharge an explosive device in a public place with the intent to cause serious bodily harm or death;\(^{103}\) four years for participation; eight for facilitation and eight for extortion in association with a terrorist group.\(^{104}\)

Among the aggravating factors were that it was a crime motivated by hate based on race, ethnicity and religion; that mass murder was the objective of Namouh’s online activity; that he was known, in online forums, to be a particularly zealous and diligent member; that he occupied an important place in the group; and that he was unrepentant. Leblond JCQ distinguished the offender’s circumstances from those in *Amara* by asserting that in Namouh’s case, “there are no mitigating circumstances. The accused does not have the excuse of his youth. There are no signs of a possible rehabilitation. He remains dangerous. He must be separated

---

\(^{102}\) *Namouh*, supra note 37.

\(^{103}\) Contrary to *Criminal Code*, ss 431.2(2), 465(1)(c); *Namouh*, *ibid* at para 102.

\(^{104}\) The counts in question were contrary to ss 83.81, 83.19, 83.2, 346 of the *Criminal Code*, *ibid*. At paragraph 102 of *Namouh*, *ibid*, Leblond JCQ found that the attempt to persuade Germany and Austria to remove soldiers from Afghanistan constituted extortion.
from society. We do not know for that matter when, if ever, he will cease to be a danger.”

The parole ineligibility period of the concurrent 20-year sentence was 10 years, beginning from the time of arrest, or roughly seven years from sentencing.

D. DISCUSSION OF ISSUES ARISING FROM THE CANADIAN CASES

The cases demonstrate that courts will seek to emphasize the principles of deterrence and denunciation, but also that other aspects of Canada’s sentencing framework play an important part in shaping outcomes at both ends of the spectrum of culpability. At the lower end, the range includes 6.5 years (or time served after roughly 3.5 years in pre-trial custody) for less central members of the Toronto 18, to the 20 years (10.5 before parole eligibility) imposed in Gaya. In each of these sentences, courts took account of the principle of rehabilitation and of various mitigating factors.

Among the more serious cases—Khawaja, Amara, Dirie, Ahmad, and Namouh—the sentences range from between nine years in Dirie (or six after credit) to life. But notably, the parole ineligibility periods attaching to the life sentences—10 years from time of arrest—are relatively short compared to those imposed in roughly analogous UK and Australian decisions.

To be clear, a life sentence with a relatively short non-parole period is not to be mistaken for a short sentence. Parole eligibility does not make a sentence any shorter. Thus, in one important sense, the fact that life sentences were imposed in Khawaja, Amara and Namouh proves that Canada has successfully instituted a framework in which the penalty for terrorism offences “duly reflects the seriousness” of the crime—as the UN Security Council had mandated in 2001.

Yet this should be qualified by two further points. One is that a survey of the Canadian cases demonstrates that for some offenders significantly involved in serious terror plots, a wide range of outcomes is still possible (e.g., Khalid, Dirie, Ahmad). This is due in part to factors that include credit for pre-trial custody, maximum sentences (or Crown elections), and the need to balance opposing principles of sentencing.

---

105 Namouh, supra note 37 at para 96.
Perhaps the most important of these factors, however, is the scope for Crown discretion. As noted earlier, section 83.27 of the Criminal Code allows the Crown, upon notice, to seek a life sentence for any indictable offence where “the act or omission constituting the offence also constitutes a terrorist activity.” The Crown can thus circumvent the 10 and 14-year limits for participation and facilitation, and other maximum penalties. In practice, this suggests a wide range of possible outcomes for offenders who play a significant role in serious plots. For example, had the investigation in Dirie unfolded otherwise, with the full extent of Dirie’s involvement in a terrorist group known to the Crown earlier on, the Crown might have sought, and the court might have imposed, a much longer sentence. The point here is that the outcome in Dirie was arguably shaped more by the Crown’s prosecutorial approach than it was with the court’s emphasis on deterrence and denunciation. Thus, in future cases, conduct as serious as that in Dirie may well result in a much longer sentence. And yet, where this does not occur, the reasons for it may well be in the public interest. For example, it may seem prudent to the Crown to seek a shorter sentence as part of a plea agreement to obtain relevant testimony in other cases, and so forth.

A second point to note relates to recent changes to the rules on giving credit for time served. Bill C-25, which became the Truth In Sentencing Act, SC 2009, c 29, amends the rules, but not radically. A significant degree of credit for pre-trial custody can still be granted. Before the amendment, section 719(3) of the Criminal Code allowed courts the discretion to “take into account any time spent in custody by the person as a result of the offence.” The Supreme Court of Canada in R v Wust106 held that courts must credit offenders for pre-trial custody, but provided no strict formula for doing so.107 Two days’ credit for each day spent in pre-trial custody was common. The Truth in Sentencing Act amended section 719(3) to limit the credit to be accorded for each day of pre-trial custody to one day—but section 719(3.1) allows the sentencing judge to give up to one and a half days’ credit if the offender has not been detained pending trial due either to a breach of bail or to concerns with respect to their criminal record and “if the circumstances justify it.” The Code is silent on what these circumstances might include.

All of the cases reviewed here precede the enactment of the Truth in Sentencing Act’s amendments to the Criminal Code, but if it did apply,
the impact would be marginal. Dirie’s nine year sentence, for example, would have been 18 months to two years longer, and Ahmad’s 16 year sentence between two and three years longer.

In summary, the Ontario Court of Appeal’s recent decisions in Khawaja and Khalid will likely result in longer sentences, with slightly less credit being granted for pre-trial custody. Yet a significant variation in outcomes at both ends of the spectrum is still possible.

A comparison of Canadian approaches to those of the UK and Australia lends further insight into the factors that help to shape outcomes in the Canadian context.

V. EVOLVING APPROACHES TO SENTENCING FOR TERRORISM IN THE UK

As is the case in Canada, terrorism prosecutions in the UK are premised upon a combination of a similar set of new offences, along with older offences such as conspiracy to commit murder or to cause an explosion. Among the new offences introduced by the UK’s Terrorism Act 2000 are those of being a member or supporter of a terrorist organization, funding terror, and possessing an article for a terrorist purpose. Penalties range from a maximum of six months imprisonment (for a summary conviction offence), to life imprisonment. Notably, the UK Parliament, like its Canadian counterpart, has avoided the imposition of mandatory sentences for terrorism offences.

While terror prosecutions in Canada and the UK bear similarities, approaches to sentencing are distinct. In particular, a clear break is marked from both the Canadian framework and earlier UK jurisprudence.

---

108 Conspiracy to murder carries a maximum life sentence under section 3(2) of the Criminal Law Act 1977 (UK), c 45. Conspiracy to cause an explosion carries a maximum life sentence under the Explosive Substances Act 1883 (UK), 46 & 47 Vict, c 3, s 1. The principal convictions in three recent Canadian cases have also involved Criminal Code offences that predate the Anti-terrorism Act—in Khawaja, building an explosive device to endanger lives, ss 81(1)(a), 81(1)(d); in Amara, s 81(1)(a); and in Namouh, conspiracy to cause an explosion, s 465(1)(c).

109 Supra note 19.

110 Ibid ss 11, 12.

111 Ibid s 15.

112 Ibid s 57; this was initially a ten year maximum but amended to fifteen years by the Terrorism Act 2006 (UK), c 11, s 13(1).
by the 2007 ruling of the Court of Appeal for England and Wales in *R v Barot*.\(^{113}\) Prior to *Barot*, UK decisions for a terrorist conspiracy to commit murder ranged from 30 to 45 years.\(^{114}\) Terrorist conspiracies to cause an explosion endangering life ranged from 20 to 35 years.\(^{115}\)

The ceiling would be raised with *Barot*. This case concerned the appeal of one of eight members of a terrorist group that had conspired to carry out four attacks. The most serious involved the use of three limousines containing propane gas cylinders and remotely controlled explosive devices. These were to be used in an underground parkade of an office building, with a view to causing hundreds of casualties. Receiving a life sentence with a 40-year non-parole period, *Barot* appealed on the basis that the conspiracy had been foiled.

On appeal, Lord Phillips CJ held that longer sentences should be imposed in terrorism cases as a consequence to amendments in the *Criminal Justice Act 2003*, which sets out new guidelines for parole ineligibility for murder, indicating that where the seriousness of the offence is “exceptionally high” (defined in part as “a murder done for the purpose of advancing a political, religious or ideological cause”), a “whole life order” is appropriate.\(^{116}\) Where the seriousness is “particularly high” (defined in part as “a murder involving the use of a firearm or explosive”), the starting point is 30 years.\(^{117}\)

Lord Phillips CJ held that the “effect of [schedule] 21 has been to increase significantly the minimum terms being imposed for the most serious murders,” and by implication, for attempted murder and conspiracy.\(^{118}\) Setting out a general framework, he stated that “a life sentence with a minimum term of forty 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

---

118 *Barot*, supra note 113 at para 57.
physical harm,” while for conspiracy or acts that “fall short of an attempt,” the sentence would be lower. Barot’s life sentence was appropriate given the intent of the conspiracy—“mass murder of innocent citizens on a massive scale”—but given the uncertainty that any of the four conspiracies would move beyond the planning stages, parole ineligibility was reduced from 40 to 30 years.

Barot was followed in the UK’s most serious terrorism case, *R v Ibrahim*, which involved the failed London bombing attempt that took place two weeks after the attacks on July 7, 2005. Detonators in the backpacks of all four of the offenders entering the subway failed at the last moment. All four received life sentences with non-parole periods of 40 years.

Other cases that have applied the Barot framework include *R v Jalil*, which concerned Barot’s four co-accused (charged with conspiracy to cause an explosion endangering life, with sentences ranging from 15 to 25 years); *R v Asiedu* (an accomplice in the failed London plot who abandoned his bomb in bushes moments before the intended attack, receiving a sentence of 33 years imprisonment); and the UK companion case to the matter involving Momin Khawaja, *Khyam* (life, with non-parole periods from 17.5 or 20 years). Following Barot, UK sentencing decisions suggest the likelihood of a life sentence in cases involving a conspiracy to commit murder, and roughly 20 or more years for causing an explosion endangering life. The non-parole periods have tended to range from 20 to 40 years, depending on the degree of culpability and viability of the plot.

Sentences for a host of other, less serious terror-related offences under the new laws explored above have entailed shorter custodial terms. This is due in part to lower maximum sentences in the legislation, but also with the court’s inclination to accord greater weight to mitigating factors. In *R v Rahman*, appeals against six- and four-year sentences for

---

119 Ibid at para 60.
120 Ibid at para 64.
122 Ibid.
125 Supra note 55.
disseminating terrorist publications were reduced to 5.5 and two years. In *R v Sherif*, various sentences were reduced for a group of offenders peripherally involved in the failed bombing of the London subway on July 21, 2005. The lowest of the sentences imposed at trial—three and four years—were upheld, as were maximum sentences handed down for some offenses (such as five years for failure to disclose information about a terrorist activity).

In summary, UK terror sentencing, following *Barot*, has entailed longer custodial periods for principal offenders in serious plots, and shorter sentences for marginal figures in less serious plots. Yet even the shorter sentences are generally not as short as in the less serious Canadian cases.

**VI. RECENT APPROACHES TO SENTENCING FOR TERRORISM IN AUSTRALIA**

Following 9/11, various terror-related offences were added to part 5.3 of Australia’s *Criminal Code*. The *Code* also includes a definition of terrorism modeled after that set out in the UK’s *Terrorism Act 2000*. New offences capture the act of possessing a thing connected with preparation for or assistance in a terrorist act (with a maximum 15-year penalty); collecting or making a document with the same connection (a maximum of 15 years); and the catchall provision,

---

128 Ibid.
130 Subsections 100.1(1)–(2) of the *Code* (Aust) defines terrorism as an action causing, among other things, “serious harm that is physical harm to a person” or “serious damage to property” with the intention “of advancing a political, religious or ideological cause” or of “coercing, or influencing by intimidation, the government of the Commonwealth or a State … or intimidating the public.” Exceptions are made in subsection 100.1(3) for political dissent, protest, and strike actions not intended to cause physical harm or death.
131 *Criminal Code* (Aust) s 101.4.
132 Ibid s 101.5.
doing any act in preparation for, or planning, a terrorist act (a maximum of life). In a manner analogous to Canada’s facilitation and participation provisions, the Australian Code requires, for each of these offences, only a generalized knowledge or intent in relation to a terrorist act.

General guidelines for the sentencing of criminal offences in the Australian context are found in section 16A of the Crimes Act 1914. Courts are required to consider the nature of the offence and the offender’s culpability, along with his or her remorse and rehabilitative prospects. In terrorism cases, however, the courts have asserted the need to subordinate these factors in favour of an emphasis upon the principles of general deterrence and protection of the community. Australian law also notably lacks a provision analogous to Canada’s totality principle, codified in section 718.2(c) of the Criminal Code. This precludes Canadian courts from imposing a set of consecutive sentences that is “unduly long or harsh.” In the absence of an equivalent provision, Australian judges have demonstrated greater flexibility than their Canadian counterparts in emphasizing deterrence or concerns about public safety above other principles of sentencing.

Differences between Canadian and Australian law on parole eligibility are also notable. Section 19AG of Australia’s Crimes Act, 1914 imposes a minimum parole ineligibility period of three quarters of the “aggregate” sentence imposed for certain offences, including the “terrorism offences” set out in Part 5.3 of the Code (Aust) among others. This is to say that where concurrent sentences are imposed, the

---

133 Ibid s 101.6.
134 See e.g. ibid s 101.6(2) (“a person commits an offence … even if: (a) a terrorist act does not occur; or the person’s act is not done in preparation for … a specific terrorist act”).
135 Crimes Act 1914 (Cth), s 16A.
136 See e.g. Sharrouf, supra note 98; Mulahalilovic, supra note 98; R v Touma, [2008] NSWSC 1475. The role that “protection of the community” plays as a distinct consideration in terrorism sentencing is explored by Spigelman CJ in R v Lodhi, [2007] NSWCCA 360 at paras 93–110 [Lodhi (Appeal)].
137 The closest equivalent is likely section 16B of the Crimes Act 1914 (Cth), which requires the court to consider “any sentence already imposed on the person by the court or another court.”
138 Crimes Act 1914 (Cth), s 19AG(1)–(2).
aggregate sentence would refer to the longest of them; where consecutive sentences are imposed, it would refer to the total sentence.\textsuperscript{139} 

The leading sentencing case under post-9/11 law in Australia is the New South Wales Court of Appeal decision in \textit{Lodhi}.\textsuperscript{140} With the intention of carrying out a bombing, Lodhi collected maps of the Australian electrical supply system and made efforts to obtain explosives. He was convicted of collecting a document, possessing a thing, and doing a thing—all in preparation for a terrorist act.\textsuperscript{141} At sentencing, Whealy J noted that at the time of arrest, the choice of bomber, the area to be bombed, and the method of carrying out the bombing had not been decided.\textsuperscript{142} Yet Lodhi’s culpability was still significant. The court imposed concurrent 10-year sentences on the counts of possessing a thing and collecting a document, and 20 years for doing a thing in preparation. Parole ineligibility was set at 15 years.

Lodhi’s sentence was upheld on appeal. Spigelman CJ and Price J offered separate but concurring reasons, while Barr J dissented. For Spigelman CJ, the sentence was justified despite the fact that the appellant “did not go beyond collecting materials for future use.”\textsuperscript{143} The intent was inherently serious, and the appellant had “not resiled from the extremist intention with which these acts were performed.”\textsuperscript{144} Price J was careful to distinguish between the concept of an offence that imposes liability at an earlier stage of a terrorist conspiracy and the objective seriousness of the conduct at issue. “It does not follow,” he wrote, “that as long as the preparatory acts relied upon to constitute the offences are in their infancy criminal culpability must necessarily be low.”\textsuperscript{145}

Among the more serious cases that have followed \textit{Lodhi} are the decisions in \textit{Touma},\textsuperscript{146} \textit{Benbrika},\textsuperscript{147} and \textit{Elomar}.\textsuperscript{148} Touma was a

\textsuperscript{139} See \textit{Crimes Act 1914} (Cth), s 16. On the application of this provision, see \textit{Touma}, supra note 136 at para 155.

\textsuperscript{140} \textit{Lodhi} (Appeal), supra note 136.

\textsuperscript{141} Contrary to \textit{Criminal Code} (Aust) ss 101.4, 101.5, 101.6.

\textsuperscript{142} \textit{R v Lodhi} [2006] NSWSC 691 at para 26 [\textit{Lodhi} (Trial)].

\textsuperscript{143} \textit{Lodhi} (Appeal), supra note 136 at para 83.

\textsuperscript{144} \textit{Ibid}.

\textsuperscript{145} \textit{Ibid} para 229.

\textsuperscript{146} Supra note 136.

\textsuperscript{147} \textit{R v Benbrika}, [2009] VSC 21 [\textit{Benbrika}].

\textsuperscript{148} \textit{Elomar}, supra note 73.
principal of a group of nine others in a 2005 plot. He had acquired ammunition and attempted to build a bomb, but a doubt remained about his intent to target humans. Given the guilty plea and resilement from extremist views, a sentence of 18 years and nine months was warranted, discounted to 14 years, with a non-parole period of 10 years and six months.

*Benbrika* dealt with the sentencing of seven offenders involved in activities that occurred between 2003 and 2005. Benbrika spoke at various mosques and community centres, in an effort to recruit members to his group. With a view to staging a bombing, he raised funds and organized a training camp. Given the seriousness of the conduct, coupled with Benbrika’s lingering extremist views, the trial judge, Bongiorno J, held that deterrence and incapacitation were primary considerations.\(^{149}\) For the principal count of leading the group, Benbrika received a 15-year sentence, with a non-parole period of 12 years, which the Victorian Court of Appeal has upheld.\(^{150}\) Yet the Court of Appeal also lowered the sentences for some of the less-culpable members—for counts of membership and providing resources—to terms that ranged from eight to four years and six months. As noted above, these sentences represent a lower range than that imposed against analogously marginal offenders in Canada’s Toronto 18 cases.

The most recent of the Australian cases, *Elomar*,\(^{151}\) involved the longest custodial terms thus far imposed in Australia under post-9/11 law. The group had stockpiled firearms and explosives, and members attended two camps. The intent was to carry out bombings at unspecified locations. Each offender was convicted of preparation of a terrorist act.\(^{152}\) The Crown did not seek life sentences, given the failure to establish an intent to kill.\(^{153}\) Yet Whealy J accepted the Crown’s assertion that the conspiracy “clearly encompassed in the mind of each of the offenders a real risk of danger to human life.”\(^{154}\) Sentences ranged from 28 to 23 years, with non-parole periods ranging from 21 to 17 years.

---

\(^{149}\) *Benbrika, supra* note 147 at para 85.

\(^{150}\) *Ibid* at para 85, aff’d [2010] VSCA 281. The Court of Appeal did, however, slightly reduce the sentence on one of the lesser counts (membership), due to a concern about overlap.

\(^{151}\) *Supra* note 73.

\(^{152}\) Contrary to 101.6 of the *Criminal Code* (Aust), carrying a maximum life sentence.

\(^{153}\) *Elomar, supra* note 73 at para 65.

\(^{154}\) *Ibid.*
Cases at the lower end include the decisions in Mulahalilovic,\textsuperscript{155} Sharrouf,\textsuperscript{156} Kent,\textsuperscript{157} and Khazaal.\textsuperscript{158} Mulahalilovic dealt with an offender who acquired a firearm for “O,” a person with extremist sympathies. Whealy J found the extent of Mulahalilovic’s culpability to consist in his recklessness as to the possible terrorist use of the ammunition. He imposed a sentence of four years and eight months, with a non-parole period of three and a half years. Sharrouf concerned the acquisition of various clocks and batteries for a terrorist group. In imposing a sentence of five years and three months, and parole ineligibility at just under four years, Whealy J held that the seriousness of the offence was mitigated by the offender’s schizophrenia.\textsuperscript{159} Kent dealt with the charges of being member of a terrorist group and making a document likely to facilitate terrorist acts.\textsuperscript{160} An aggregate sentence of 5.5 years was imposed, with a non-parole period of three years and nine months. Khazaal was a more serious terrorist document case, involving the production and dissemination of a book titled “Provisions on the Rules of Jihad.” The offender’s lack of remorse and efforts to minimize the seriousness of his actions were further considerations in imposing a sentence of 12 years, with a non-parole period of nine years.

In summary, at the higher end of the spectrum, Australian courts may not have imposed a life sentence, but as the cases demonstrate, courts have the capacity to impose, and generally tend to impose, longer determinate custodial terms with longer non-parole periods than in Canada.

VII. POINTS TO DRAW FROM A COMPARISON OF THE THREE REGIMES

At the higher end of the spectrum in all three jurisdictions, courts have emphasized deterrence and denunciation by imposing lengthy custodial terms, though Canadian non-parole periods have been much shorter. Thus, where both the sentences and non-parole periods were long

\textsuperscript{155} Mulahalilovic, supra note 98.
\textsuperscript{156} Sharrouf, supra note 98.
\textsuperscript{157} R v Kent, [2009] VSC 375.
\textsuperscript{158} R v Khazaal, [2009] NSWSC 1015.
\textsuperscript{159} Sharrouf, supra note 98, para 61.
\textsuperscript{160} Contrary to ss 101.5 and 102.3 of the Criminal Code, each carrying maximum penalties of 10 years.
in the UK decisions in *Ibrahim* (life, 40 years without parole) and *Khyam* (life, 20 years without non-parole) and the Australian case of *Elomar* (28 years, 21 without parole), the sentences alone were comparably long in *Khawaja* (life, five years without parole computed from, sentencing) and in both *Ahmad* and *Namouh* (life; six and seven years without parole, computed from sentencing).\footnote{Ibrahim, supra note 121; Khyam, supra note 55; Elomar, supra note 73; Khawaja, supra note 3; Ahmad, supra note 3; Namouh, supra note 37.}

At the lower end of the spectrum, courts in all three jurisdictions have imposed shorter sentences for those peripherally involved in serious plots, with Australian courts imposing the shortest.\footnote{See e.g. Mulahalilovic, supra note 98; Sharrouf, supra note 136.} Yet, as noted, while some of the sentences at the lower range of the Canadian cases were not as short as those in the Australian cases, the actual period served was relatively short (3.5 years *Durrani, James, and Ansari*).\footnote{Durrani, supra note 3; James, supra note 3; Ansari, supra note 3.}

The comparison highlights two further points of a general nature about Canada’s approach to terror sentencing. One is that given the courts’ emphasis on deterrence and denunciation, life sentences or lengthy determinate sentences may be likely in the future despite the presence of mitigating circumstances, such as age, a lack of knowledge of the specifics of the plot at issue, or a repudiation of terror.\footnote{Kent Roach makes this observation with respect to *Khawaja, Ahmad*, and *Namouh* in (“Sentencing Terrorists” (2011) 57 Crim LQ 1).}

Another point is that prosecutorial discretion about how to proceed will, in some cases, allow for a wider range of outcomes than may be possible in comparable UK or Australian decisions. This is due in part to the lack of an equivalent provision in UK or Australian law to section 83.27 in Canada’s *Criminal Code*. It is also due to the combined function of other facets of Canada’s sentencing regime, including competing principles of sentencing, non-parole periods, and maximum sentences (where they might apply).

**Conclusion**

The first round of sentencing cases for terrorism offences in Canada has offered a good sense of what to expect in the future. As with the approach in the UK and Australia, Canadian courts will tend to
impose lengthy sentences for serious offenders, but with relatively shorter non-parole periods. In some cases, life sentences will be imposed where only lengthy determinate sentences might have been imposed in Australia or the UK. Yet, at the lower end of the Canadian spectrum, marginal members of serious plots may continue to receive relatively short sentences, with release after three or four years of custody, most of which in pre-trial. The merits of any penalty imposed in future Canadian cases will depend on a consideration of a wide range of criteria. This includes an assessment of how competing principles of sentencing were applied, how much credit for pre-trial custody was granted, and how the Crown elected to proceed.