THE MODERN LAW REVIEW

CASES

How to Make a Terrorist Out of Nothing

Jacqueline Hodgson and Victor Tadros*

R v *G* concerns the controversial offence of collecting or recording information likely to be useful to a person committing or preparing an act of terrorism. We comment on a number of deficiencies in that judgment and investigate the proper approach that ought to be taken to that offence under the Human Rights Act 1998.

The criminal law of England and Wales is scattered with offences which, in their drafting, are broad and vague to the point of absurdity. One of the worst offenders is section 58(1) of the Terrorism Act 2000 which makes it a criminal offence to collect or make a record of information likely to be useful to a person committing or preparing an act of terrorism or possessing a document or record containing information of that kind.[1] The recent House of Lords case of *R* v *G*[2] is concerned with the interpretation of section 58. It follows a series of decisions in the Court of Appeal which attempt to give the section a suitably constrained meaning. There are many things wrong with this ruling, but perhaps the most shocking is that a person who possesses information for a purpose unconnected with terrorism may nevertheless be quite properly convicted under section 58 of the Terrorism Act.

R v *G* concerned a defendant who gathered various pieces of information, including plans for making bombs and various textbooks containing information relating to explosives. He made notes on how to manufacture explosives. It was also alleged that he drew a plan of a Territorial Army centre, identified the location of the armoury and wrote down plans to attack the centre and kidnap the caretaker. Extremist material containing 'his observations on the waging of Jihad in Great Britain' was found.

G suffered from paranoid schizophrenia, but the defence did not suggest that he might fall within the M'Naghten Rules. In his defence, he claimed that he had gathered the information with the intention of 'winding up' the prison guards. The report of Dr Qurashi, a consultant forensic psychiatrist, suggested that collection of the material was a direct consequence of G's mental illness and the psychotic delusions it produced; G believed that prison officers were whispering through his cell door through the night in order to provoke and antagonise him.[3] Could G be convicted of an offence under section 58(1)?

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1 s 58 existed in similar form relating to acts of terrorism connected to the affairs of Northern Ireland. See the Prevention of Terrorism (Temporary Provisions) Act 1989, s 16B as amended by the Criminal Justice and Public Order Act 1994, s 82.

2 [2009] UKHL 13. This was a unanimous decision. The Appellate Committee's report was prepared by Lord Rodger.

3 Dr Qurashi's report states: 'It is my opinion that G's alleged criminal behaviour, in terms of generating the written material, was indeed a direct consequence of an untreated, severe psychotic illness

Published by Blackwell Publishing, 9600 Garsington Road, Oxford OX4 2DQ, UK and 350 Main Street, Malden, MA 02148, USA

The potential breadth of the offence is evident from the fact that almost anything that is of general use in carrying out our day-to-day activities is also useful to terrorists. Terrorists might need clean clothes, so washing machine instructions are useful to terrorists. Terrorists might need to meet each other, so instructions about public transport are useful to terrorists. It might be advantageous to terrorists in distracting the authorities to appear to have a sense of humour, so joke books might be useful to terrorists.

Section 58(3) creates a defence which is available to those charged under section 58(1). If the defendant had a reasonable excuse for the action or the possession, she will not be convicted of the offence. As is outlined in section 118 of the Act, to use the defence the defendant must adduce evidence which is sufficient to raise an issue with respect to an aspect of the offence, which then triggers an obligation on the prosecution to prove beyond reasonable doubt that the defendant was not entitled to the excuse. In other words, the defendant has an evidential burden placed on her to show that the defence may be available, the satisfaction of which triggers a legal burden on the prosecution that the defence is not available.[4]

Given that the offence is very casually drafted, considerable power is given to the courts in determining the scope of the criminal law in this area. The ambition must be to restrict the implications of this offence in *some* way. But in what way should this be done?

There are three main ways that section 58 might be narrowed though interpretation. First, the courts might specify the *mens rea* requirements for the offence, something about which section 58 is silent. In *R* v *G* it was held that the defendant must be aware of the nature of the information in the document or record. It need not be established by the prosecution that she knew its specific content. The House of Lords indicated that intentionally failing to investigate the nature of the information that one possesses will not vitiate the *mens rea*. This idea must be interpreted carefully to ensure that the *mens rea* is sufficiently circumscribed, but as this aspect of the offence is less controversial we will not comment on it further here. Secondly, the scope of the offence might be limited by providing a more restricted interpretation of the kinds of information that count as 'likely to be useful' to a person committing or preparing an act of terrorism. Thirdly, the scope of the excuse defence might be expanded to reduce the overall scope of liability for the offence. The most obvious way to do this is to take the approach of the Court of Appeal in *R* v *K* and to allow the defence to anyone who cannot be proved to

. . . G's reasons for generating the written material were based on psychotic, deluded reasons. He firmly believed that prison officers were provoking him in an attempt to antagonise him by, for example, standing at his cell door whispering throughout the night. In my experience G is describing an auditory hallucination. He also believed prison officers were "out to get him and kick him" (at paragraph 8.54). This is a paranoid persecutory delusion. G reports that his response was to "provoke" the prison officers who he believed were intentionally provoking him. Therefore, if G had not experienced these psychotic experiences within the prison estate he would not, in my opinion, have generated the offending materials . . .' [2008] EWCA Crim 922 at [12].

4 On the 'reverse burden of proof' created by this defence in relation to Prevention of Terrorism (Temporary Provisions) Act 1989, ss 16A and 16B (the precursors to Terrorism Act 2000, ss 57 and 58) see *R* v *DPP Ex p Kebilene* [2000] 2 AC 326.

have a terrorist intent. Judicial discussion has centred on these latter two possibilities and they provide our main focus.

Interpretation of section 58 will inevitably be politically controversial. On the one hand, there are important questions of liberty and the proper understanding of criminal responsibility that might encourage a narrower interpretation of the provisions. It is also significant that section 58 is not just a criminal offence, but also a terrorist offence; as well as the obvious social and political stigma, there are far-reaching restrictions on the civil liberties of those convicted of terrorist offences. For example, under Part Four of the Counter-Terrorism Act 2008, the police must be informed of the name, address, date of birth, national insurance number and address of those convicted of a range of terrorist offences, including section 58; they must be told of any changes to this information for a period of at least ten years; and in some instances, the police must be informed in advance of the destination and precise dates of any proposed travel outside the UK.[5]

On the other hand, there are important questions of security that might encourage a broader interpretation of the provisions, especially given the emphasis on prevention and disruption in current government policy and legislation.[6] Offences such as this are considered useful to the police as much because they allow disruption of terrorist activities through surveillance, searches and arrests as because they allow prosecutions and convictions. Whether this provides a *legitimate* reason for creating a criminal offence is another question altogether. The creation of section 58 gives the courts the important task of assessing the significance of these values in this context, and given that the provisions are open to wildly different interpretations they have a broad canvas on which to paint.

Section 58 is in no way unique in giving the courts an extensive role in fundamentally shaping the contours of the criminal law. If they are to take on that role, something about which we will express doubts in a moment, it is vitally important that principles are outlined for interpretation in these non-ideal circumstances. What is often said is that a balance must be struck between protecting liberty and promoting security. This is a common feature of political discourse used to justify exceptional measures, the curtailing of freedoms and the attenuation of due process safeguards, but it is not accepted by all. The Joint Committee on Human Rights, for example, expressly rejected this approach,[7] preferring that of the European Commission for Democracy through Law (the Venice Commission) that 'State security and fundamental rights are not competitive values: they are each other's precondition.' We must at least hope that the courts' interpretation can move beyond the simple dichotomising of values.[8]

5 See Counter-Terrorism Act 2008, ss40–53.

6 See, for example, the offences created by the Terrorism Act 2006 and the government's 'prevent' strategy.

7 Joint Committee on Human Rights, *Counter-Terrorism Policy and Human Rights: Prosecution and Pre-Charge Detention (Twenty-fourth Report of Session 2005–06)* (London: The Stationery Office, 2006) 13.

8 For attempts to avoid the vagueness of 'balance' see, for example, A. Ashworth, *Human Rights, Serious Crime and Criminal Procedure* (London: Sweet and Maxwell, 2002); J. Waldron, 'Security and Liberty: The Image of Balance' (2003) 11 *Journal of Political Philosophy* 191; V. Tadros, 'Justice and Terrorism' (2007) 10 *New Criminal Law Review* 658.

WHAT INFORMATION IS LIKELY TO BE OF USE TO TERRORISTS?

One significant question that arose in *R* v *G* is the proper interpretation of the *actus reus* of the offence. The central issue concerns the kind of information that parliament intended to capture in section 58. Following the same reasoning as the Court of Appeal in *K* v *R*,[9] the House of Lords argued, and the Crown accepted, that 'parliament cannot have intended to criminalise the possession of information of a kind which is useful to people for all sorts of everyday purposes and which many members of the public regularly obtain for use, simply because that information could also be useful to someone who was preparing an act of terrorism'.[10]

Of course, parliament *could* have intended that, whilst also displaying some commitment to the importance of liberty: parliament might have intended that possession of all such information would be a criminal offence, but that the scope of the reasonable excuse defence would be so broad that interference with the liberty of citizens would not be endangered.

This view, while possible, is not ideal. Firstly, it is not consistent with the understanding of the provisions which preceded the 2000 Act. The House of Lords interpreted section 58 in the light of Lord Lloyd's *Inquiry into Legislation against Terrorism*, published in 1996.[11] Lord Lloyd's report suggested that the provision was designed to 'catch the possession of information which would typically be of use to terrorists, as opposed to ordinary members of the population'.[12] Lord Lloyd indicated that the section was aimed at those who possess 'targeting lists and similar information, which terrorists are known to collect and use.' While this very brief list of the kinds of thing that the provision is aimed at is not very instructive, it does not include reference to everyday information that might be of use to terrorists.

Secondly, the view is not consistent with the best understanding of the relationship between offences and defences. Offences should only proscribe that which is *prima facie* wrong, or which is normally capable of being condemned on its own.[13] Conduct which is typically completely innocent should not constitute a criminal offence, even if a broad range of defences are available to ensure that unjust convictions are not warranted. In the absence of clear reasons to the contrary, decisions of the court should reflect plausible views about the offence/defence distinction, in which case the decision is right in holding that section 58 does not prohibit possession of *any* information likely to be of use to terrorists.

But while it is right to interpret the phrase 'information likely to be of use to terrorists' in a narrower way than the ordinary meaning of the phrase indicates, it

9 [2008] EWCA Crim 185.

10 *R* v *G* n 2 above at [42].

11 The inquiry considered existing legislation relating to Northern Ireland (including the offences replicated by the Terrorism Act 2000, ss 57 and 58). The government responded with a consultation paper (Legislation Against Terrorism, Cm 4178) in 1998, before then passing the Terrorism Act 2000.

12 *ibid* para 43.

13 For different views, see K. Campbell, 'Offences and Defences' (1982) 2 *Legal Studies* 233; J. Gardner, 'Justifications and Reasons' in A. P. Simester and A. T. H. Smith, *Harm and Culpability* (Oxford: OUP, 1996); V. Tadros, *Criminal Responsibility* (Oxford: OUP, 2005) ch 4; R. A. Duff, *Answering for Crime* (Oxford: Hart Publishing, 2007).

is less obvious what principles ought to guide this narrowing. The House of Lords say three things about this. Firstly, they say that 'the information must, of its very nature, be designed to provide practical assistance to a person committing or preparing an act of terrorism.'[14] Secondly, they say that 'it is not necessary that the information should be useful only to a person committing etc an act of terrorism.'[15] An example to illustrate the latter idea is that information on where to obtain explosives falls within the section even though it might be of use to an ordinary crook in perpetrating a bank robbery. Thirdly, they indicate that extrinsic evidence cannot convert something which is not in its nature designed to provide practical assistance to a person committing or preparing an act of terrorism into something that falls within the section.[16] A train timetable will not fall within the section even if the prosecution had evidence that the timetable was to be used for an act of terrorism.[17]

But this still does not give very clear guidance about the scope of the offence. For one thing, it is not very plausible that the information must have been designed to provide practical assistance to terrorists, and the House of Lords seem not to believe what they say. For example, it is indicated that information such as how to get unauthorised entry into military establishments or government offices would fall within the provision. But this information is not of its very nature designed to provide practical assistance to a person committing or preparing an act of terrorism. The information might be 'designed' for all sorts of reasons: to play a practical joke, to commit another offence, to allow a sexual liaison with a government minister, and so on. Even information about how to make bombs might be designed for military purposes rather than terrorist purposes. Does that information not fall within the provisions for this reason? Is that true even if the information is classified?

It is not at all clear what the House of Lords mean when they say that the information must be designed for a terrorist purpose. That seems in tension with the second thing they say: that the information need not be of use *only* to terrorists. What we can see from this is that relatively little progress has been made in specifying the kind of information that falls within section 58(1).

How could this aspect of the decision have been improved? Perhaps two further things might be important in narrowing the scope of the offence. Firstly, it might be important how easy or difficult it is to get hold of the information. If the provision is intended to capture those whose gathering of material is likely to provide genuine assistance to terrorists, it might be important to know how much trouble the defendant will have saved terrorists by gathering it. Little if any assistance is provided to terrorists by gathering information that they could gather themselves in a matter of minutes.[18]

14 *R* v *G*, n 2 above at [42].
15 *ibid* at [43].
16 *ibid* at [44].
17 That, of course, might fall within another offence, most obviously the Terrorism Act 2006, s 5 which prohibits acts of preparation for terrorism.
18 We should note that a person may be liable as an accessory to a criminal offence even if that person has provided very little assistance to the principal offender. Furthermore, there may be inchoate liability even if no offence is committed (see the Serious Crime Act 2007, ss 44–46). These offences,

Secondly, even if the information need not be of use *only* to terrorists, the range of uses of the information might be thought important. One thing that might distinguish information about bomb-making from train timetables is that train timetables are useful for any purpose for which a person wants to travel, as well as for terrorists who want to blow up trains. Bomb-making instructions, in contrast, are very useful for terrorists but not much use for many other purposes that people tend to have. The more closely related to terrorism the information, the more we might expect a person to be required to provide an explanation for collecting it.[19]

What justifies this approach? By ensuring that a conviction is warranted only if the information is difficult to collect, we ensure that the offence has an *actus reus* that is distinct from the ordinary things that people do every day. That might be important in protecting people's liberty. It is easy to go about one's everyday business without running the risk of liability. Simple browsing on the internet out of curiosity, we might think, should not make a person liable for conviction, or even expose them to a significant risk of conviction. Otherwise, we are perilously close to the chilling idea of a thought crime (or worse, given, as we shall see, that thinking about terrorism is not even a requirement for criminal liability).

This assumes that the intention of parliament in creating the offence is to warrant convictions of those who have terrorist intentions at a very early stage. That interpretation is rejected by the House of Lords. They think that the purpose of the offence is connected simply with the nature of the information rather than with the circumstances of its collection or any purpose that the defendant might have had.[20] It matters not whether the defendant intended to use the information herself, to pass it to others, or if she had no purpose in mind when gathering and retaining the information.

In saying that, they demonstrate that they lack any grasp of what might justify the offence. Though they do not draw this parallel, they effectively treat this offence like the offence of possession of offensive weapons in a public place.[21] It is plausible to require those possessing a knife in a public place, for example, to provide a reasonable excuse for doing so. In that way, we ensure that liberty to buy knives is protected whilst reducing the risk of knives being used criminally.

But it is difficult to justify section 58 on the same basis as the offence of possession of offensive weapons. Whereas widespread possession of knives substantially erodes security against being stabbed,[22] we might doubt that widespread possession of information that anyone can get hold of at any time substantially erodes security against terrorist attacks. If that is right, it suggests that the offence is *really* designed in this way to capture people who are suspected to have a terrorist intent, and to have acted on that intent by gathering information.[23]

it should be noted, have a much tighter *mens rea* requirement than the offence we are concerned with here.

19 A person may, of course, have information about bomb-making for an ordinary criminal but non-terrorist purpose.

20 *R* v *G* n 2 above at [49] and [74–75].

21 Prohibited by the Prevention of Crime Act 1953, s 1(1).

22 For further discussion of this issue, see V. Tadros, 'Crimes and Security' (2008) 71 MLR 940.

23 This might raise considerations from the presumption of innocence, though that is contentious. Contrast V. Tadros and S. Tierney, 'The Presumption of Innocence and the Human Rights Act' (2004) 67 MLR 402, V. Tadros, 'Rethinking the Presumption of Innocence' (2007) 1 *Criminal Law*

Perhaps these are the wrong principles to adopt here. As we said at the outset, any interpretation of these provisions is inevitably politically controversial. The House of Lords have not done enough to outline what principles *they* think are relevant in interpreting the legislation. A consequence of this is that the 'test' that they propose is incoherent.

WHAT EXCUSES COLLECTING THE INFORMATION?

The other significant interpretative question concerns the scope of the defence created by subsection 58(3). What is a reasonable excuse for the gathering of the information? The excuse defence might be thought open to three main lines of interpretation.

Firstly, we might focus on the kinds of excuse that apply generally in determining whether defendants are criminally responsible for their conduct. However, these excuses might be regarded as irrelevant in this context as general excuse defences such as insanity and duress are available in the criminal law.[24]

Secondly, we might focus on justifications. When the term 'excuses' is used in law, it is often used to cover what philosophers of the criminal law term justifications as well as excuses.[25] So we might include within excuses good reasons that the defendant can offer for possessing the information. The normal understanding of this idea is that defendants must offer justifications for conduct only where there is some significant moral reason against doing it; or, more formally, that there is a *pro tanto* reason against doing what she did. If true, she must show that the *pro tanto* reason is counterbalanced by a reason in favour of her conduct.[26] For example, there is a *pro tanto* reason against using another person's fire hydrant, but if this is the only way to put out a fire, the defendant is justified in doing what she did.

But this is probably not the best way to understand the scope of the defence either. For there does not normally seem to be a *pro tanto* reason against mere possession of the relevant information. Possessing the relevant information itself interferes with no-one's interests and hence need not be outweighed by some positive reason. Things might be different where the defendant possesses the information in a way that provides some help to terrorists, making it easier for

and Philosophy 193 and R. A. Duff, *Answering for Crime* n 13 above, ch 9, with P. Roberts, 'Strict Liability and the Presumption of Innocence: An Exposé of Functionalist Assumptions' in A. P. Simester, *Appraising Strict Liability* (Oxford: OUP, 2005) and A. Ashworth, 'Four Threats to the Presumption of Innocence' (2006) 10 *Evidence and Proof* 241.

24 This appears also to be the understanding of the House of Lords, who suggested that unless G fell within the M'Naghten Rules he would not be entitled to the insanity defence. This indicates that there are no special rules of criminal responsibility that apply in this context. Fair enough, it might be thought, although it should be remembered that these excuses are often interpreted quite narrowly in the criminal law, an interpretation that is more appropriate when we are dealing with offences that are more directly connected with harm to others.

25 As is the case in everyday life, on which see M. Baron, 'Excuses, excuses' (2007) 1 *Criminal Law and Philosophy* 21.

26 See, for example, J. Gardner, 'Justifications and Reasons' n 13 above.

them to carry out their attacks. But given the scope of the *actus reus* we take it that this is uncommon in this context.

Rather than a *justification* for possessing the information, what is more plausibly demanded is an *explanation*, one that shows that the possession of the information is unconnected with preparation for acts of terrorism. This is consistent with Lord Lloyd's own interpretation of offences like this. He suggests that where a person is found with materials for bomb making, falling within section 57, the person should be 'required to account to the court for his possession of the articles.' If section 58 is to be understood in the same way, what should be required of the defendant is an explanation of why she had the relevant information.[27]

This idea, we think, motivated the Court of Appeal in *K* v *R*,[28] which was followed by the Court of Appeal in their decision in *R* v *G*. In *K* v *R* it was held that any explanation that showed that the defendant did not have a terrorist intent would be sufficient to amount to an excuse for these purposes. The court said

> [as] for the nature of a 'reasonable excuse', it seems to us that this is simply an explanation that the document or record is possessed for a purpose other than that to assist in the commission or preparation of an act of terrorism. It matters not that that other purpose may infringe some other provision of the criminal or civil law.[29]

This led to the defendant's original conviction being overturned by the Court of Appeal in *R* v *G*. The defendant's motive in possessing the information, winding up the prison officers, may not have been 'morally worthy'. But if that was his motive, it implies that he had no actual connection with terrorism.

It is helpful to consider this idea in the light of the relationship between section 58 and Section 5 of the Terrorism Act 2006. The latter offence proscribes preparing to commit or assist a terrorist act. On this interpretation, the main differences between the section 58 offence and the section 5 offence are twofold. Firstly, section 58 has a more specific *actus reus* than section 5 in that section 5 is committed by *any* act done in furtherance of the terrorist act. Secondly, whereas section 5 places the burden of proving intent to commit or assist acts of terrorism directly on the prosecution without qualification, section 58 requires the defence to raise an issue about lack of intent before the prosecution must prove that there was such intent. In other words, section 5 gives less protection to citizens from conviction with respect to the *actus reus* but greater protection with respect to the *mens rea* where section 58 makes the opposite compromise. There is significant overlap between these offences, but given the piecemeal and haphazard approach to criminalization in the area of terrorism that should come as no surprise.

The House of Lords in *R* v *G* rejected this interpretation of section 58. They suggest that 'the mere fact that the defendant's purpose was not to commit an act of terrorism is neutral'. They justify this on the grounds that the section 58 defence, in contrast with the defence created by section 57 (2), makes no reference to purpose. But surely *that* cannot be right. Surely it makes *some difference* what the

27 Whilst accepting that possession of explosives to rob a bank provides a defence to the s 57 offence, the House of Lords in this case is unwilling to apply the same reasoning to s 58.

28 n 9 above.

29 *ibid* at [15].

defendant's purpose was. Surely what the House of Lords mean is that the fact that the defendant did not have a terrorist purpose is not determinative on its own. Even that seems problematic, though, as it is difficult to justify convicting a person of a terrorist offence if that person lacked any connection to terrorism.

Furthermore, we might question the implications of this interpretation. What of the individual who lacks the status of academic or journalist, but is assisting a researcher working for a civil liberties organisation such as Liberty, scrutinising abuses of power by the state?[30] Or the volunteer for a support group working on the defence of a person charged with terrorist offences? Or someone seeking to demonstrate that material considered unlawful is in fact part of genuine religious teaching? Or what of the person who is simply curious about the workings of terrorist organisations? How do we define the limits of the defence to ensure that the objectives of security-led early intervention are met, without also stifling research and debate?

A further reason the House of Lords offer for rejecting the approach in *K* v *R* is that it would rob the jury of any opportunity to determine whether an excuse is reasonable. This reasoning is fallacious. The approach would prevent the jury from considering whether an excuse is *morally* reasonable. But it would require them to determine whether the defendant had successfully raised an issue about whether she had any connection with terrorism. Surely this fits more comfortably with the objective of the legislation, which is to allow early intervention in order to prevent terrorist activity.

The Court is disparaging in its treatment of defence counsel's hypothetical scenario of the apprentice safe-blower who has a criminal but non-terrorist motive.[31] But it is not difficult to see how similar information might realistically fall within section 58. Terrorists take resilience and security information and mirror it for their own purposes. Details on strategically important sites and how they can be secured might also provide a target list for terrorists. Training in the design and fitting of safety vaults might identify the weaknesses of some models. This information would be of practical assistance to the ordinary bank robber and the would-be terrorist financier alike. Neither of them will have a reasonable excuse under section 58(3). Yet, conviction of a serious terrorist offence is warranted it seems, even if the defendant has proved *beyond reasonable doubt* that she had nothing to do with terrorism.

So what is to limit the scope of this offence, to prevent it from being used to prosecute defendants who possess information or material for criminal (or even simply immoral, and so not 'reasonable') but non-terrorist purposes, where that material would also be of practical assistance to a terrorist? Enter the saviour of poorly drafted criminal offences, prosecutorial discretion – and therefore police discretion. Whilst the circumstances in which the defendant collected, recorded

30 On the 'reverse gaze' of the media on the intelligence services, see R. A. Aldrich, 'Regulation by Revelation? Intelligence, the Media and Transparency' in R. Dover and M. Goodman, (eds), *Known Knowns: British and American Intelligence and the Media* (New York: Columbia University Press, 2009).

31 *R* v G n 2 above, at [78]. Reality is often hardly more believable! See the case cited *ibid* at [81], of the male stripper dressed as a police officer, waiting outside before his act began, who was prosecuted for possession of a truncheon in a public place: *Frame* v *Kennedy* 2008 SCCR 382.

or possessed information are irrelevant to section 58, the circumstances in which they are found are significant in determining whether to charge under that section. Information found in the raid on a suspected terrorist bomb factory will be treated differently from that discovered during a drugs trafficking raid.

However, police officers do not always know what they will find when they carry out a search of premises and so interpretation of information as evidence is not always a straightforward task. How will the aspiring bank robber with radical Islamist friends fare? There is a wealth of literature and case law alerting us to the dangers of case construction, whereby information is interpreted in ways that reinforce initial police suspicion, ignoring evidence that might undermine the case thesis.[32] Miscarriages of justice such as the Birmingham Six, the Guildford Four, the Cardiff Three, Stefan Kiszko[33] and most recently, Sean Hodgson, provide a reminder of the grave consequences of this type of tunnel vision.

The Crown Prosecution Service (and so the DPP whose consent to prosecution of a section 58 offence is required), whilst it is independent of the police, has no authority in the investigation. Consequently, it is dependent on the police case file of evidence in deciding whether to prosecute. In terrorism cases, the police-CPS gap is narrower; a counter-terrorist division within the CPS works alongside the anti-terrorist branch of the Metropolitan police, but again with an advisory rather than a directive function. A variety of factors have the potential to distort the balance of evidence on which the CPS and ultimately the DPP bases the decision to prosecute.

And how should the DPP exercise his or her discretion? Should cases be prosecuted only where there is a clear terrorist connection, or where a terrorist connection is merely suspected? The House of Lords tells us that the circumstances in which the material is possessed and discovered is relevant in the investigation and charge of section 58, but it is of no consequence in determining liability at trial.[34]

IS THE OFFENCE COMPATIBLE WITH ARTICLE 7?

This brings us to our final question: is section 58 satisfactory in the light of our human rights obligations?[35] In particular, is it compatible with Article 7 of the European Convention on Human Rights, which provides protection against retrospective convictions? Article 7 creates an obligation on member states not only to ensure that a person is only convicted of a criminal offence if, at the time of her

32 Eg M. McConville, A. Sanders and R. Leng, *Case for the Prosecution* (London: Routledge, 1991); F. Belloni and J. Hodgson, *Criminal Injustice* (Basingstoke: Macmillan, 2000).

33 All discussed in Belloni and Hodgson, *ibid.*

34 For further problems with the use of prosecutorial discretion to limit the scope of broad offences, see V. Tadros, 'Justice and Terrorism' n 5 above and 'Crimes and Security' n 14 above.

35 This arose in relation to the phrase 'for a purpose connected with' in the Terrorism Act 2000, s 57 in the Court of Appeal decision in *Z and others* v *R* [2008] EWCA 184. In what amounts to a judicial rewriting of that part of the statute, the Court held that 'if section 57 is to have the certainty of meaning that the law requires, it must be interpreted in a way that requires a direct connection between the object possessed and the act of terrorism'. 'For a purpose connected with' became 'he intends it to be used for the purpose of', *ibid* at [29].

conduct, that offence was in force and applied to her, but also to ensure that the law is not so vague as to make it impossible to know in advance what conduct will make her subject to a criminal conviction and punishment. In *SW* v *United Kingdom; CR* v *United Kingdom*[36] the European Court of Human Rights put it in the following way: 'the law must be adequately accessible—an individual must have an indication of the legal rules applicable in a given case—and he must be able to foresee the consequences of his actions, in particular to be able to avoid incurring the sanction of the criminal law.'[37]

What significance does Article 7 have in this context? In *K* v *R*, the defence submitted that section 58 was insufficiently certain both at common law and under the terms of Article 7 of the European Convention on Human Rights. In support of this argument, defence counsel referred to the factual background of the case in which police officers of the anti-terrorist branch were uncertain as to whether possession of two of the three documents that formed part of the eventual prosecution could be charged under section 58;[38] they decided that they could not, but the CPS disagreed and brought the two additional charges at committal stage. In particular, the term 'likely to be of use to' was considered to be unclear, as was the scope of the reasonable excuse defence.

The Court of Appeal thought that section 58 could be interpreted in a way that would provide a sufficient degree of certainty. It held firstly, that a document or record will only fall within section 58 if it is likely to be of practical assistance in the commission or preparation of an act of terrorism, ie it contains 'information of such a nature to raise a reasonable suspicion that it is intended to be used to assist in the preparation or commission of an act of terrorism. It must be information that calls for an explanation' (at [14]). Contextual evidence, such as the defendant's motives in possessing it, cannot bring ordinary information such as an A-Z within the scope of the provision.

Second, the Court held that a reasonable excuse is an explanation that possession of the document or record is not for a terrorist purpose – even if it is for a purpose that infringes some other provision of the criminal or civil law. The Court concluded (at [16]) that this interpretation would render section 58 compatible with Article 7.

Now that the House of Lords in *R* v *G* has declined to follow the judgment in *K* v *R*, compatibility with Article 7 can no longer be considered settled law. Whilst the House in this case accepts that information must be such as calls for an explanation, it does not go as far as requiring the information to be 'of such a nature to raise a reasonable suspicion that it is intended to be used to assist in the preparation or commission of an act of terrorism'. Indeed, as we have said, the purpose of the defendant is described as 'neutral' and the Lords have interpreted the excuse defence in a narrower way than the Court of Appeal did in *K* v *R*. Whilst rejecting the reasoning of *R* v *G*, the Court in this case gives no considera-

36 (1995) 21 EHRR 363.

37 See also the discussion in the House of Lords case *R* v *Rimmington* [2006] 1 AC 459.

38 The appellant was charged with possession of a CD-rom containing a copy of the Al Qaeda training manual, but no charges were initially brought for possession of a text directed to the formation and organisation of Jihad movements, or of a text arguing that all Muslims are under a duty to work towards the establishment of an Islamic State.

tion to the Article 7 argument. Given the extent of the differences in interpretation of what constitutes a reasonable excuse, and the limited guidance that is given to juries in deciding the issue, we doubt that section 58 is now compatible with Article 7.

If that is right, how should the Courts respond to a future human rights challenge? Perhaps they might use section 3 of the Human Rights Act, which requires that legislation should, where possible, be 'read down' in a way that makes it compatible with Convention rights. Adopting this approach and building on *K* v *R* we suggest that the following principles should guide courts.

Firstly, the offence must have an *actus reus* that is more fit for purpose. Collecting or possessing information should be prohibited, we think, only if doing so provides material assistance to terrorists. That is so only if the information is not readily available to anyone who wants to get hold of it. If the information is available simply through a Google search, it is difficult to see that there is any harm in having that information.

Secondly, particularly if the relevant fault requirement is outlined in a defence, the *actus reus* must be restricted to information the collection of which creates a genuine reason to believe that the person has the appropriate link to terrorist activity. Possession of information calls for an explanation, which would justify charging a terrorist offence, only if a substantial proportion of the people who possess that information have a real link to terrorism. Care needs to be taken to ensure that the *actus reus* is not so broad that most of the people who fall within it have nothing to do with terrorism. It is unsatisfactory to rely on prosecutorial discretion to ensure that only the 'right people' are required to provide an explanation for their possession of information.

Thirdly, for terrorist offences it is essential that a link with terrorism is shown. This should be done by introducing a clearer fault requirement which should be restricted to an intention that the material will be used for a terrorist purpose, or at least recklessness that it might be made available to terrorists. If the purpose of the offence is not to prevent assistance to terrorists, but to allow early intervention for the prosecution of people who have terrorist plans, intent is the proper fault requirement. This is essential to reduce the risk that those lacking a connection with terrorism will be convicted of a terrorist offence.

This fault requirement might be introduced either through the *mens rea* of the offence or through a defence which places an evidential burden on the defendant. Placing an evidential burden on the defendant requires the defendant to give evidence at trial where she has collected the relevant information. This becomes easier to justify as the *actus reus* of the offence is narrowed. However, we may still have concerns about inroads into the right of silence at trial that this would make, so it may be better simply to require the prosecution to prove an intention that the information is intended to be used for terrorist purposes. We are undecided on the issue.

But even if this approach provides the best interpretation of the legislation, we wonder whether the courts should make a decision along these lines. There is a real concern that the courts are playing a role to which they are ill suited given their lack of information about the terrorist threat and their inability to hear the relevant sets of interests that people might have in possessing the information controlled by section 58. They may be presented with information concerning the

particular case they are dealing with, but they will not have access to information about the broader range of interests that people might have that will be differently affected by different interpretations of the legislation.

For example, how many people want to possess information about military equipment for legitimate purposes? Perhaps some such people want to scrutinise the extent to which war is conducted in a way that minimises collateral damage, or others are amateur military historians, or still others are thinking of joining the army, or still others want to talk other people out of joining the army. Is it appropriate to charge all those people with a terrorist offence, requiring them to provide evidence as to why they had the information? Is that justified in terms of security given the level of terrorist threat we now face? Courts are hardly well placed to make decisions of that kind.

One central justification for democratic decision-making is its ability to make decisions in a way that is sensitive to a broad range of interests and information. In the light of this, the best approach for the Court of Appeal in *R* v *K* may not have been to 'read down' under section 3, but to have used its powers under section 4 of the Human Rights Act 1998 to declare section 58 incompatible with Article 7 of the ECHR. That would have required parliament to consider with much more care what the appropriate scope of the criminal law in this area is.

Now, it may be argued that it is impermissible for the court to use section 4 of the Human Rights Act 1998 unless it *cannot* use section 3 of the Act to reinterpret the legislation in a way that is compatible with Article 7.[39] This seems to be the implication of section 4(4)(b), which provides that section 4 can be used only if the court is satisfied that 'the primary legislation concerned prevents removal of the incompatibility'.[40] On this view, section 4 can be used only if any interpretation of the legislation that is compatible with Convention rights would be in conflict (in some way or other) with any ordinary meaning of the words of the legislation. If the words of the legislation could *possibly* be given a meaning that is compatible with Convention rights, section 3 rather than section 4 must be used.

We suggest that this interpretation of section 4(4)(b) is too narrow. The primary legislation could 'prevent' the court interpreting the legislation in a way that is compatible with Convention rights by making such an interpretation beyond its competence. Where parliament provides the court with a very broad range of options that would make legislation compatible with Convention rights, and where different options would impact on significant values in very different ways, we might say that it is *impossible for the courts to decide* which option is the right one. This is a kind of *moral* rather than *factual* impossibility.

We think that this latter reading is the preferable one. For if that were not the case courts would *never* be in a position to declare that a very vague provision was incompatible with Article 7: the terms of any vague statute could be

39 In *R* v *A (Complainant's Sexual History)* [2001] 3 All ER 1, the House of Lords stated that a declaration of incompatibility should be made only as a last resort, once the court's powers of interpretation in ensuring Convention compatibility under section 3 have been exhausted.

40 For a discussion of the best understanding of the relationship between sections 3 and 4 of the Human Rights Act 1998, which also invites the courts to be more willing to use section 4 rather than section 3, see C. Gearty, *Principles of Human Rights Adjudication* (Oxford: OUP, 2004) 47–54.

tightened up in one way or another. Such a reading would conflict with the spirit of the Human Rights Act: parliament cannot have intended courts to take on an interpretative role that they are completely incompetent to perform.

This idea has received judicial support from the House of Lords itself in *Ghaidan* v *Godin-Mendoza*.[41] In that case it was held that although section 3 may be used even in cases where any Convention compatible interpretation of the legislation conflicts with the intention of parliament,[42] there are limits in doing this. One limit is that the decision how to interpret the legislation must be within the competence of the courts. In the words of Lord Nicholls of Birkenhead, parliament cannot have 'intended that section 3 should require courts to make decisions for which they are not equipped. There may be several ways of making a provision Convention-compliant, and the choice may involve issues calling for legislative deliberation.'[43]

That is the case here. Parliament has created legislation that could be interpreted in a thousand different ways. The Court of Appeal picked one and the House of Lords another. The implications that these decisions would have for the rights and duties of citizens are profound. If section 4(4)(b) is interpreted in a strict way the courts are invited to pick one of the many possibilities that are compatible with Article 7, guided in part by a set of factual, moral and political judgements. To take that approach would push the court towards the role of legislator, rather than interpreter, which is beyond the function that was envisaged by parliament in enacting section 3 of the 1998 Act. For this reason, we advocate greater use of section 4 in response to Article 7 challenges. This will then (morally, not legally) oblige parliament to rewrite the law in a more appropriate way.

CONCLUSION

At present, the law in this area is in an awful state. We doubt that section 58, as interpreted by the House of Lords is now compatible with Article 7. We hope that it will be subject to a further challenge on that basis. But even if it is deemed compatible with Convention rights that should not lead us to accept the provision. Article 7 provides a very low threshold with respect to the quality of law. Even if section 58 is compatible with Convention rights, that does not make it just.

And a final note of caution. It should be borne in mind that interpretation of section 58 will be crucial for ensuring that the new offence under section 58A, created by section 76 of the Counter- Terrorism Act 2008, which came into force on 19 February 2009, has a proper scope. This makes it an offence to elicit, publish or communicate information about the police, armed forces or intelligence services, where that information is of a kind that is likely to be of use to a person committing or preparing an act of terrorism. There has been some speculation that this will allow the police to prevent people, and especially journalists, from photographing police officers. The importance of photographic and video images of public

41 [2004] UKHL 30.
42 On which, see *R* v *A (No 2)* [2002] 1 AC 45.
43 n 41 above at [33].

demonstrations and their policing has been highlighted recently by the tragic death of Ian Tomlinson at the G20 protests in London in April 2009. The need for certainty in the interpretation and application of the provision has been raised by the Joint Committee for Human Rights (JCHR) in its Report of March 2009.[44]

Relying on the Explanatory Notes to the Bill, the Committee stated that:

> the new offence will only be committed where the information in question is 'such as to raise a reasonable suspicion that it was intended to be used to assist in the preparation or commission of an act of terrorism, and must be of a kind that was likely to provide practical assistant to a person committing or preparing an act of terrorism'.[45]

However, those notes were prepared on the basis of the Court of Appeal decision in *K* v *R*. Even given this narrower interpretation of the relevant provisions, the Committee said the following:

> Legal uncertainty about the reach of criminal offences can have a chilling effect on the activities of journalists and protestors. We therefore recommend that, to eliminate any scope for doubt about the scope of the new offence in section 76 of the Counter Terrorism Act 2008, guidance be issued to the police about the scope of the offence in light of the decision of the Court of Appeal, and specifically addressing concerns about its improper use to prevent photographing or filming police.[46]

What hope for this new offence now?

Hopes, Expectations and Revocable Promises in Proprietary Estoppel

Nick Piška*

This note dicusses the House of Lords' decisions in *Cobbe* v *Yeoman's Row Management Ltd* (*Cobbe*) and *Thorner* v *Major* (*Thorner*) regarding the nature and scope of proprietary estoppel. It considers the historical development of the modern law of proprietary estoppel, the circumstances in which equity will render a promise irrevocable, and the role of context in the ascription of responsibility.

44 Joint Committee on Human Rights, *Demonstrating respect for rights? A human rights approach to policing protest* (7th Report 2008–09) para 94.
45 *ibid*, quoting the Explanatory Notes, para 233.
46 *ibid* para 95.

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