

## Sentencing terrorism offences: no harm intended?

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In July 2018, Naa'imur Zakariyah Rahman was found guilty of preparing terrorist acts contrary to section 5(1)(a) of the Terrorism Act 2006.<sup>1</sup> The offence requires a person to have the intention to “commit acts of terrorism” and to “engage in any conduct in preparation for giving effect to his intention.”<sup>2</sup> Rahman had plotted to attack 10 Downing Street and kill the Prime Minister with improvised explosive devices (IEDs). Unbeknownst to Rahman, two of his contacts were security service operatives and the IEDs were fake. Rahman also pleaded guilty to engaging in preparatory acts with the intention of assisting others to commit acts of terrorism contrary to section 5(1)(b) of the 2006 Act.<sup>3</sup> Mr Justice Haddon-Cave, the trial and sentencing judge, concluded that Rahman was dangerous.<sup>4</sup> For the preparation offence, the judge imposed a sentence of life imprisonment with a minimum term of 30 years' imprisonment, and a concurrent sentence of six years' imprisonment for the offence of assisting others.<sup>5</sup> In arriving at these sentences, the judge applied the Sentencing Council's new *Definitive Guideline for Terrorism Offences*.<sup>6</sup> In this article, I examine the Guideline, its application in *Rahman*, and in particular, the Guideline's approach to assessing harm.<sup>7</sup>

The assessment of harm is central to arriving at an appropriate sentence under the Terrorism Offences Guideline, and across sentencing.<sup>8</sup> In essence, when applying guidelines, the sentencing court first determines the seriousness of the offence by reference to harm and culpability.<sup>9</sup> The more harmful the offence and the more culpable the offender, the more serious it is and, thus, the higher the starting point and category range for sentencing will be. The court will then consider other factors, to include aggravation and mitigation, and guilty pleas, before it arrives at a sentence.<sup>10</sup> Both for the Terrorism Offences Guideline and more generally, the assessment of harm is so important because it occurs so early in the sentencing process. It can set the parameters within which the offender is likely to be sentenced. Indeed, the Sentencing Guidelines Council provided that the assessment of seriousness – to which harm is central – is important to determine if sentencing thresholds have been crossed, what type of sentence is appropriate, and is a “key factor” for determining the length of a custodial sentence.<sup>11</sup>

Assessing harm is perhaps easiest when a tangible harm occurs, be it a broken nose or a broken window. However, the preparation of terrorist acts offence does not require any harm, tangible or intangible, to be completed. This type of offence has been described as “pre-inchoate” because a person commits it even before they would be liable for an inchoate offence such as an attempt.<sup>12</sup> This creates a problem: the preparation offence does not require a harm, but sentencing for it requires an assessment of harm. As a solution, the Sentencing Council proposed to allow the level of harm for the preparation offence to be assessed by a proxy, intent: “Once the court has determined the level of culpability the next step is to consider the harm caused *or intended* to be caused by the offence.”<sup>13</sup> (emphasis added) One can, of course, intend to cause serious harm even when no harm is caused.<sup>14</sup> Preparation of terrorist acts is a paradigm example of this. The Sentencing Council rightly went on to clarify, “the most serious level of harm that could be caused by this [preparation] offence is the endangerment of life.”<sup>15</sup> The Council explained where harm is done, another offence, such as murder, is likely to be charged.<sup>16</sup> This caused or intended approach to harm was adopted for most offences in the Draft Guideline. The approach to harm for each offence in the Draft and Definitive Guidelines is set out in a table below.

Following consultation, the Sentencing Council turned from its intent-based approach to assess risk of harm instead. The following example, that I provided, was relied on by the Council.

If the Council want to retain reference to ‘harm’ in how they structure the seriousness of these offences, the approach in the guidelines could be improved through reference to the likelihood of harm occurring. An incidence of a pre-inchoate offence seems more serious if it is substantially more likely to lead to harm than an otherwise similar incidence of the offence. Yet the guideline does not allow for these more serious incidences to be recognised when harm is assessed. By way of example, Terrorist A intends to cause serious loss of life and has prepared a plan that will almost certainly cause this result if it is executed. Terrorist B, with the same intent, has created a plan that may or may not be actionable, and if actioned it is unlikely to cause a loss of life. If harm is to be assessed by intended harm only, then the guidelines could not distinguish between Terrorists A and B.<sup>17</sup>

Agreeing with the argument, the Sentencing Council concluded as follows in their response to consultation:

The benefit of considering likelihood of harm is that it ensures a more appropriate sentence for an offender who may have fallen into a high category of culpability on the basis that they had a clear intention and had embarked on a terrorist plan, but where the reality is that they are not capable or their plans are not credible and the likelihood of them successfully carrying out an attack is very small.<sup>18</sup>

Once amended, the Guideline for the preparation offence reads: “Harm is assessed based on the type of harm risked and the likelihood of that harm being caused. When considering the likelihood of harm, the court should consider the viability of any plan.”<sup>19</sup> Importantly, and problematically, the Definitive Guideline for section 5 not only included reference to viability and risk, but dropped consideration of harm intended altogether. Category one harm encompasses those offences where multiple deaths were risked and were very likely to eventuate. At the other end of the spectrum, category three applies where death is not very likely; there is a risk of widespread damage to property or economic interests; there is a risk of substantial impact to civic infrastructure; or other cases not falling in a higher category.

We can now return to *Rahman*. Rahman is the type of offender the Sentencing Council appear to have had in mind when they shifted from an intent-based to a risk-based approach to harm. The involvement of security service operatives and Rahman’s reliance on inert “IEDs” meant that there was not a credible threat and he was not capable of bringing his plan into effect. Mindful of the Definitive Guideline’s focus on risk of harm, the defence counsel, Mr Bajwa QC, submitted that Rahman’s offence was one of low harm.<sup>20</sup> The court did not adopt this submission. It is worth setting out Mr Justice Hadden-Cave’s approach to harm for the preparation offence in full.

I reject Mr Bajwa QC’s submissions and his narrow construction of the Guideline. His reference to ‘actual’ risk represents a gloss on the Guideline. The fact that Rahman was supplied by ‘Shaq’ with dummy improvised explosive devices and pepper spray which were inert is irrelevant to the legal analysis of the level of ‘harm’. It is the harm *intended* by the offender that is relevant, *i.e.* the level of harm that the defendant intended to cause judged from his perspective as to what he knew or believed at the time. If Mr Bajwa QC’s narrow construction is correct, it would logically disentitle the courts from

imposing appropriate sentences in cases where covert operations by the security services interdict terrorist operations before harm was caused (which, by definition, is every s.5 case). This cannot be correct and, in my view, was plainly not the intention of the authors of the Guideline.<sup>21</sup>

In consequence, the judge classified the preparation offence as one of high harm as opposed to low harm. This classification had a substantial effect on the starting point for sentencing. For a section 5 offence of high culpability and high harm, the starting point is life imprisonment (with a minimum term of 35 years' custody). The category range is life imprisonment with a minimum term of 30 to 40 years. By comparison, the starting point for sentencing the offence with high culpability and low harm is 16 years' custody. The category range is 12-20 years' custody. There is, in effect, a difference of a 54-year determinate sentence between the two starting points.<sup>22</sup>

In light of the above analysis of the Draft and Definitive Guidelines, the approach to harm in *Rahman*, and in consequence the chosen starting point, is to be doubted. Contrary to the judgment, the fact the IED was inert is relevant to the level of harm because the Definitive Guideline for section 5 is structured around risk. In addition, the Sentencing Council did intend to distinguish cases with no risk of harm from those with a significant risk thereof. This should be clear from the above quotations from the response to consultation and the Definitive Guideline.

Three wider points can now be made. First, whether right or wrong, the approach the court took to the preparation offence may be of more general significance. As shown in the table below, the intent-based approach to harm central to the Draft Guideline was largely dropped in the Definitive Guideline. In addition, the Guidelines for the preparation offence and four other offences are now explicitly based on risk of harm.

<b>Offence(s)</b>	<b>Approach to harm in the Draft Guideline.</b>	<b>Approach to harm in the Definitive Guideline.</b>
Preparation of terrorist acts (Terrorism Act 2006 s.5)	Caused or intended.	Type of harm risked and the likelihood.
Explosive substances (terrorism only) (Explosive Substances Act 1883 ss.2-3).	Caused or intended.	Type of harm risked and the likelihood.
Encouragement of terrorism (Terrorism Act 2006 ss.1-2)	Caused or intended.	No overarching description.
Proscribed organisations - membership (Terrorism Act 2000 s.11)	Caused or intended (but then states harm is not to be assessed).	No assessment of harm.
Proscribed organisations -support (Terrorism Act 2000 s.12)	Caused or intended.	No overarching description, but listed factors relate to harm caused or risked.
Funding terrorism (Terrorism Act 2000 ss.15-18)	Caused or intended.	No overarching description, but listed factors relate to harm caused or risked.

Failure to disclose information about acts of terrorism (Terrorism Act 2000 Act s.38B)	Caused or intended.	No overarching description, but listed factors relate to harm intended or risked.
Possession for terrorist purposes (Terrorism Act 2000 s.57)	Caused, intended or risked.	Type of harm risked and the likelihood.
Collection of terrorist information (Terrorism Act 2000 s.58)	Caused, intended or risked.	Type of harm risked and the likelihood, and harm intended.

Secondly, one can understand why Mr Justice Haddon-Cave placed significant weight on the harm intended. Leaving aside the approach in the Guideline, it seems beyond debate that a plot to attack 10 Downing Street and to kill the Prime Minister is serious. What is more, it seems right that where two people commit the same offence, but offender A intended more harm than offender B, offender A's offence is more serious. It does not appear that the Definitive Guideline allows for this difference in seriousness to be reflected in sentencing for every offence. The section 5 Guideline is preceded by the following: "The court should determine the offence category with reference *only* to the factors listed in the tables below."<sup>23</sup> (original emphasis) The Guideline removed consideration of harm intended as a harm factor. Harm intended could also not be considered when assessing culpability. For the section 5 offence, the assessment of culpability is remarkably limited. It is based only on how significant a role the offender played in the preparatory activity.<sup>24</sup>

There is a further issue with the removal of harm intended as a seriousness factor in the Definitive Guideline. Section 143(1) of the Criminal and Justice Act 2003 provides that when a court considers the seriousness, "of any offence" it must "consider the offender's culpability in committing the offence and any harm which the offence caused, was intended to cause or might foreseeably have caused."<sup>25</sup> The section does not appear to have been considered in *Rahman*. Yet the problem it presents is clear. How can a court fulfil its duties under section 143 – which obligate consideration of harm intended – and follow the Terrorism Offences Guideline which excludes consideration of harm intended?

A sentencing court has the power to depart from a sentencing guideline where it would be "contrary to the interests of justice" to follow it.<sup>26</sup> At first glance it may appear that a court would not have to depart from the Guideline to impose a sentence that appropriately considered the level of harm the offender intended when they committed a preparation offence. The Guideline for the offence contains a wide range of sentences and it does not constitute a departure for the court to impose a sentence available within a guideline, even if it falls outside the range provided for the category of offence at issue.<sup>27</sup> Yet it would constitute a procedural departure from the Guideline because the harm and culpability factors of relevance are limited "only" to those listed in the Guideline. As such, a sentencing court would have to be of the view that it would be contrary to the interests of justice to sentence without consideration of harm intended. If a court was of this view, it would in effect increase or decrease the sentence based on an approach to assessing seriousness – harm intended – that was explicitly considered and excluded by the Sentencing Council. In other words, such a departure would not be a downward or upward shift based on exceptional circumstances, it would be to label the approach adopted in the Definitive Guidelines as unjust.

Thirdly, even if we accept that harm intended is relevant to seriousness, a question remains as to whether it should be classed as a culpability or harm factor. Harm intended is listed as a

harm factor in section 121 of the Coroners and Justice Act 2009. The section provides that the Sentencing Council is to “have regard to the desirability” of guidelines that “when reasonably practicable” refer to “harm caused, or intended to be caused or which might foreseeably have been caused”. Yet can an offence be described fairly as one of serious harm when no harm was caused and when no harm was risked? It would perhaps be more accurate to frame harm intended as a culpability factor. This was the approach of the Sentencing Guidelines Council in the *Overarching Principles: Seriousness Guideline*.<sup>28</sup> The Seriousness Guideline includes harm caused and harm risked within the assessment of harm, and harm intended as the primary culpability factor.

What is to be done in light of *Rahman* and the wider issues to which it gives rise? An appellate judgment would be valuable to clarify that the Definitive Guideline’s approach to harm for the preparation of terrorist acts offence and other terrorism offences is based on risk of harm, not harm intended. The sentencing of terrorism offence continues to attract national media interest; it is vital that it is done correctly.<sup>29</sup> The total removal of harm intended as a seriousness factor would, however, be hard to reconcile with the structure of the preparation offence and the duty imposed on sentencing courts by section 143 of the Criminal Justice Act 2003. An appellate decision could helpfully clarify that it will in normal circumstances be in the interests of justice to consider harm intended as a culpability factor when sentencing a preparation offence. This approach would respect the Sentencing Council’s decision to remove harm intended as a harm factor, and would align to the divide between harm and culpability in the Seriousness Guideline.<sup>30</sup> This approach would, however, have the significant disadvantage of leaving the Terrorism Offences Guideline itself incomplete and potentially misleading on assessing seriousness. The Sentencing Council may wish to reconsider the Definitive Guideline in light of *Rahman*. The enactment of the Counter-Terrorism and Border Security Act 2019 provides an opportunity for such reconsideration. Section 7 of the Act increases the statutory maxima of numerous terrorism offences,<sup>31</sup> and a Home Office publication indicates the Sentencing Council may amend the Definitive Guideline in light of this.<sup>32</sup> If the Guideline is to be reconsidered, the Council could also usefully reappraise the assessment of harm within it. Both harm risked and harm intended are important to the seriousness of terrorism offences. The Guideline should be amended to allow for consideration of harm intended as a culpability factor.<sup>33</sup>

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<sup>1</sup> *R. v Rahman* Unreported August 31, 2018 Central Criminal Court [1].

<sup>2</sup> It is questionable why the offence uses the plural “acts”. Any issue may be resolved by section 5(2): “It is irrelevant for the purposes of subsection (1) whether the intention and preparations relate to one or more particular acts of terrorism, acts of terrorism of a particular description or acts of terrorism generally.”

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- <sup>3</sup> The charge provides an important reminder of how inchoate terrorism offences can be.
- <sup>4</sup> For further consideration of the assessment of dangerousness and the results of being found dangerous, see Lyndon Harris and Sebastian Walker, “Difficulties with dangerousness: the timing of the assessment of risk - Part 1” [2018] (9) Crim. L.R. 695; Lyndon Harris and Sebastian Walker, “Difficulties with dangerousness: determining the appropriate sentence - Part 2” [2018] Crim. L.R. 782.
- <sup>5</sup> Ancillary orders, forfeiture and notification, were also imposed: *R. v Rahman* Unreported August 31, 2018 Central Criminal Court [50]-[51].
- <sup>6</sup> Sentencing Council, *Terrorism Offences Definitive Guideline* (2018).
- <sup>7</sup> I do not suggest that the criticism made here is the only possible criticism of the Guideline. See also the response letter of the House of Commons Justice Committee, *Draft Sentencing Council Guideline on Terrorism* (2018) HC Paper.746 (Session 2017–19).
- <sup>8</sup> This follows the recommended approach in the Coroners and Justice Act 2008 s.121. Although there is an exception within the Terrorism Offences Guideline. For the offence of membership of a proscribed organisation contrary to the Terrorism Act 2000, s.11, the Guideline states: “There is no variation in the level of harm caused. Membership of any organisation which is concerned in terrorism either through the commission, participation, preparation, promotion or encouragement of terrorism is inherently harmful.” Sentencing Council, *Terrorism Offences Definitive Guideline* (2018), p.24. I leave aside the issue of whether harmful outcomes should affect sentence. For comment, see RA Duff, *Criminal Attempts* (Oxford: OUP 1996) ch.4; Andrew Ashworth, “Attempts” in John Day and David Dolinko (eds) *The Oxford Handbook of philosophy of Criminal Law* (Oxford: OUP 2011) p. 140.
- <sup>9</sup> For a more detailed appraisal of sentencing guidelines, see Andrew Ashworth, *Sentencing and Criminal Justice*, 6th edn (Cambridge: Cambridge University Press, 2015) ch 14.
- <sup>10</sup> As an example, see the steps set out for the preparation offence: Sentencing Council, *Terrorism Offences Definitive Guideline* (2018), pp.5-10.
- <sup>11</sup> Sentencing Guidelines Council, *Overarching Principles: Seriousness Guideline* (December 2004) para 1.3. In addition, a substantial proportion of sentencing appeals relate to the offence being placed in the wrong category range see Andrew Ashworth, “The evolution of English sentencing guidance in 2016” [2017] (7) Crim. L.R. 507, 508-511.
- <sup>12</sup> An attempt, by comparison, must be “more than merely preparatory” as per Criminal Attempts Act 1981, s.1. For discussion of pre-inchoate offences, see Andrew Ashworth and Lucia Zedner, *Preventive Justice* (Oxford: OUP 2014) ch.5.
- <sup>13</sup> Sentencing Council, *Terrorism Guideline Consultation* (October 2017) p.11.
- <sup>14</sup> This approach is in keeping with Coroners and Justice Act 2009, s 121. The section is discussed below.
- <sup>15</sup> Sentencing Council, *Terrorism Guideline Consultation* (October 2017) p.11.
- <sup>16</sup> Sentencing Council, *Terrorism Guideline Consultation* (October 2017) p.11.
- <sup>17</sup> Sentencing Council, *Terrorism Guideline Response to Consultation* (March 2018) p.16.
- <sup>18</sup> Sentencing Council, *Terrorism Guideline Response to Consultation* (March 2018) p.16.
- <sup>19</sup> Sentencing Council, *Terrorism Offences Definitive Guideline* (2018) p.6.
- <sup>20</sup> *R. v Rahman* Unreported August 31, 2018 Central Criminal Court [20].
- <sup>21</sup> *R. v Rahman* Unreported August 31, 2018 Central Criminal Court [21].
- <sup>22</sup> On how life imprisonment differs from determinate sentences, See Andrew Ashworth, *Sentencing and Criminal Justice* (Cambridge: CUP 2015, 6<sup>th</sup> edn) pp.238-241.
- <sup>23</sup> Sentencing Council, *Terrorism Offences Definitive Guideline* (2018), p.6.
- <sup>24</sup> Sentencing Council, *Terrorism Offences Definitive Guideline* (2018), p.6.
- <sup>25</sup> I am grateful to Andrew Ashworth for raising this issue.
- <sup>26</sup> Coroners and Justice Act 2009, s.125(1).
- <sup>27</sup> Coroners and Justice Act 2009, s.125(3). By way of example, the top of the range for a low harm low culpability instances of offence X is a fine, but the guideline allows for a sentence of two years’ imprisonment for high culpability instances of the offence. A sentence of one years’ imprisonment would not be a departure even if given for a low harm low culpability instance of offence X.
- <sup>28</sup> Sentencing Guidelines Council, *Overarching Principles: Seriousness Guideline* (December 2004) paras 1-7-1.8. The Sentencing Council is now working on a new guideline on seriousness.
- <sup>29</sup> See, for instance, coverage of the sentencing of Mohammed Aqib Imran - <https://www.bbc.co.uk/news/uk-england-birmingham-47378084> and of Lewis Ludlow - <https://www.bbc.co.uk/news/uk-england-kent-47466625> [both accessed 7 March 2019].
- <sup>30</sup> I am grateful to Lyndon Harris for proposing an alternative means by which to “square the circle”. Harm intended could be considered as a point of aggravation. I am uncertain as to whether harm intended should be made secondary in this manner given the offence is structured around harm intended.
- <sup>31</sup> For consideration of sentencing and statutory maxima see Rory Kelly, “Reforming maximum sentences and respecting ordinal proportionality” [2018] Crim. L.R. (6) 450.

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<sup>32</sup> Home Office, *Counter-Terrorism and Border Security Act 2019: Sentencing Fact Sheet* (Home Office, 2019).

<sup>33</sup> A broader point of conclusion is that the Council should continue to avail itself of the benefit of full consultation before enacting definitive guidelines. The consultation on the Terrorism Draft Guideline was expedited due to then recent terrorist attacks. With the benefit of hindsight, perhaps we can say there is not only the need for speed when we respond to serious offending, but also rigorous analysis.