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Preparation of Terrorist Acts, Section 5 Terrorism Act 2006: Evidence Required and Sentencing Guidelines

Drafted in the aftermath of the terrorist attacks in London, July 2005 the Terrorism Act 2006 was introduced that included an important section regarding the preparation of terrorist acts. Section 5 of the Act states:

- (1) A person commits an offence if, with the intention of:
 - (a) committing acts of terrorism, or
 - (b) assisting another to commit such acts, he engages in any conduct in preparation for giving effect to his intention.
- (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.
- (3) A person guilty of an offence under this section shall be liable, on conviction on indictment, to imprisonment for life.

As the Court of Appeal observed in *Iqbal and Iqbal* [2010] EWCA Crim 3215, section 5 was enacted to extend the ambit of criminal law in the context of complicated acts of terrorism. As with most terrorism legislation enacted at Westminster, it applies to the whole of the UK not just England and Wales. Where necessary, under section 26 of the 2006 Act it makes separate provisions for search powers for Scotland and Northern Ireland. An important aspect of section 5 is that where investigators gather evidence revealing a person may still be in a preparatory stage, it allows them to consider arresting a suspect at an early stage thereby assisting with the primary aim of counter-terrorism investigations, preventing a terrorist attack from occurring.

Terrorist Causes, Intent and Aggravating Factors

Two important issues related to the section 5 offence have been covered in subsequent court decisions. One related to the terrorists' cause where in *R v C and R* [2016] EWCA Crim 61 the Court of Appeal held that Parliament legislated against all forms of terrorism and does not distinguish between causes or aims. The Court said to do so would be to introduce a new element into the offence. Developing this view in *C and R*, in *R v Mohammad Abdul Kahar and others* [2016] EWCA568 the Court of Appeal held that to distinguish between causes would be: '...invidious in dealing with law enforcement agencies and parties here [in the UK] and abroad, to publicly rank terrorist organisations or causes.'

Due to section 5 carrying a sentence of life imprisonment, a second issue was in relation to the sentencing guidelines. While this is important for the judiciary, especially trial judges, this issue also impacts on those investigating terrorist activities, particularly in relation to evidence gathering. In *Kahar* the Court of Appeal held there are two categories of factors to consider. The first category focuses mainly on the *mens rea* that covers:

1. Preparation of terrorist acts intended to take place wholly or mainly in the UK;
2. Acts of terrorism intended to take place abroad includes those who reach the intended country, those engaged in the preparation of travel, but who do not reach the intended country;
3. Those who provide assistance to others intending to travel with the required intention.

The second category focuses on aggravating factors

that are mainly the *actus reus* elements of the offence that include:

1. The degree of planning, complexity and sophistication involved together with the extent of the offender's commitment to carry out the acts of terrorism;
2. Period of time involved;
3. Depth and extent of the radicalisation of the offender (a significant feature when considering dangerousness), for example, possession of extremist material and/or communication of such views to others;
4. The extent to which the offender has been responsible for indoctrinating or attempting to indoctrinate others and the vulnerability of the target of the indoctrination.

Section 5 Trial Cases' Application of the Sentencing Guidelines

Examining a couple of section 5 case trials illustrate how the courts apply the intent and the aggravating factors when sentencing defendants. In *R v Safiyya Amura Shaikh*, (2020) 3rd July 2020, Shaikh, a Muslim convert, was a supporter of the group Islamic State (IS) who pleaded guilty to the section 5 offence of planning to blow herself up in an improvised explosive device (IED) attack at St. Paul's Cathedral in London, in 2019. Shaikh was considered such a threat that the UK's Security Service (MI5) made her the highest-level priority for investigation resulting in her being subject to a level of surveillance for only the most dangerous potentials attackers.

In sentencing Shaikh, the trial judge, Mr Justice Sweeney, considered the intent, aggravating and mitigating factors. In relation to the aggravating factors, Shaikh stayed at a hotel in the City of London close to St. Paul's Cathedral where she conducted surveillance of St. Paul's that included her taking photographs and video footage of the Cathedral layout and security arrangements. As confirmed from the evidence of undercover officers, who were part of the investigation into Shaikh, whom she befriended, Shaikh stated she intended to plant an IED under St. Paul's dome, the hotel she stayed in and detonate a suicide IED vest intending to kill as many people as possible. During the time she was making the preparations Shaikh posted a video on the social media site, Greenbirds, where #Greenbirds involves social media influencers on Twitter supporting IS, and a video on making a suicide IED vest. She also posted videos on various social media sites, including encrypted sites like Telegram, promoting IS' attacks in the West with the aim of encouraging others to do the same. Among the aggravating factors that Mr Justice Sweeney referred to in sentencing Shaikh included:

1. Recent and repeated possession or accessing extremist material;
2. Communication with other extremists;
3. Use of encrypted communications; and
4. Encouraging others.

Mr Justice Sweeney found sufficient *mens rea* for a section 5 offence was present as Shaikh planned to detonate IED's in St. Paul's Cathedral and the hotel she stayed at. The aggravating factors from her intention revealed the degree of planning, complexity and extent of Shaikh's commitment to carry out the terrorist act. In relation to the possession and use of communications, Shaikh demonstrated the depth and extent of her radicalisation to IS' cause. By using various forms of communication to encourage others to commit acts of terrorism reveals the extent Shaikh was responsible for indoctrinating or attempting to indoctrinate others to IS' cause.

Mitigating factors were considered by Mr Justice Sweeney that included Shaikh having doubts about carrying out the attack but did not know how to stop (revealed to the police during her suspect interview while in police detention following her arrest). Also, Shaikh declared she was 'not well in [her] head', as a result a psychiatric report was forwarded to the court on her behalf. Along with her guilty plea, her mental health and vulnerability were also taken into account as mitigating factors, resulting in a reduction of a third of her sentence. Overall, Mr Justice Sweeney saw the aggravating factors significantly outweighing the mitigating factors, which along with the Pre-Sentence report was sufficient for it to be self-evident that Shaikh was a dangerous offender. She was sentenced to life imprisonment with a minimum term of 14 years' imprisonment.

In *R v Renshaw* (2019) 17th May 2019, Jack Renshaw, a neo-Nazi, had been photographed and video recorded on numerous occasions speaking at the extreme far-right group, National Action's public assemblies held prior to the group's proscription as a terrorist organisation. (Strangely he was found by not guilty of being a member of a proscribed organisation.) Renshaw pleaded guilty to a section 5 offence of preparing an act of terrorism where he intended to kill the MP Rosie Cooper and the police officer who previously investigated him for his involvement related to a sexual offence. The threat was so severe that Rosie Cooper's friends and family encouraged her to stand down from Parliament, but she refused saying she did not want 'tyranny to prevail'. During Renshaw's trial it was revealed that as a child he became interested in Nazi history and beliefs, holding extreme far-right views since the age of 14, in which he became convinced of a Jewish international conspiracy and the UK state was oppressing the white community. As a result, Renshaw called for the eradication of Jews, denied the holocaust occurred during World War Two and, seeing a race war was inevitable, he advocated at public rallies to be prepared to fight that war.

Originally a member of the far-right political party, the British National Party, Renshaw moved to join National Action that became proscribed as a terrorist organisation following the group's expression of support for the murder of the Labour MP Jo Cox in June 2016. Renshaw used open-source media praising Jo Cox's murder in 2017 when he was planning

to replicate Cox's murder with the murder of Rosie Cooper. He saw the MP as committing treason because she represented the Jewish controlled state oppressing the white community and as Rosie Cooper represented a 'false democracy' she deserved to die. While forming the plan, Renshaw openly bragged about it to other National Action members, saying killing Rosie Cooper was necessary because she was a member of the Labour Party and therefore responsible for mass immigration. Aware that she was an active constituency MP, Renshaw planned to kill Rosie Cooper at a social event using a machete to hack at her jugular. In Renshaw's planning he saw the MP as someone easy to get at and a 'logistical target'.

In relation to killing Detective Constable Victoria Henderson, the police officer who investigated him in an earlier investigation for sexual offences for which he was convicted, Renshaw intended to take ordinary members of the public hostage in a public house and demand the presence of the officer. He would then kill her and cause armed police officers who would have been called to the scene to shoot him.

In sentencing Renshaw Mrs Justice McGowan considered the aggravating factors related to section 5. In relation to the degree of planning, as Renshaw planned to murder a serving member of Parliament, it was seen an 'an attack on democracy' and therefore would have been committed for the purpose of advancing a political cause. Evidence was also present that Renshaw was deeply imbued with the Nazi doctrine of the extreme far-right. Mrs Justice McGowan also took this, and the following aggravating factors related to section 5 into account, Renshaw's recent and repeated possession and access to extremist material and his communication with other extremists. As a result, Renshaw received a life sentence having to serve a minimum of twenty years before being considered for release.

How These Cases Can Assist UK Counter-Terrorism Investigators

As emphasised, the aim of counter-terrorism investigations is to prevent terrorist attacks from happening. In essence section 5 means a person can be arrested and convicted for a terrorist attack that has not taken place. In criminal law this situation is not new. Under section 1 Criminal Law Act 1977 the offence of conspiracy occurs where a person agrees with another person to pursue a course of conduct amounting to or involve the commission of an offence or would amount to an offence but for the existence of facts that would render the commission of the offence impossible. Where a person's actions go beyond an agreement, having the intent to commit an offence where that person's action is more than mere preparatory and, as seen with conspiracy, if a person intends to commit an offence even though the facts are such the commission of the offence is impossible, they still commit an offence (section 1 Criminal Attempts Act 1981). In both statutory offences a person can receive a long custodial sentence for an offence

that never occurred. The aim of these offences to allow investigators the power to intervene and prevent an offence from taking place. It is submitted that section 5 is a hybrid of both the above offences as the offence is committed where a person has the intent to commit a terrorist act or engages in conduct in the preparation of this offence.

How cases like *Shaikh* and *Renshaw* assists investigators is in taking cognizance of the aggravating factors applied by the trial judges on receiving a guilty plea or verdict that can in effect direct them to the type and level of evidence required to secure a conviction. As seen in both cases, the prosecution evidence revealed how the defendants were deeply imbued with an extremist narrative. In building a section 5 prosecution case evidence will be required that reveals what extremist material they are downloading and looking at be it in the form of videos and written form, hard copy paraphernalia, possessions linked to extremist causes, who they are communicating with and if the suspect is posting extremist content in various social media platforms (including encrypted sites like WhatsApp or Telegram). One must be careful in determining if such material is evidence related to section 5 if that material is extremist material protected under the right to freedom of expression. What is important here is gathering evidence showing a pattern of behaviour linked to extremist causes. For example, where a suspect is found to be in possession of extreme far-right (neo-Nazi) materials such as swastika flags, an SS dagger or a Nazi uniform, downloads material linked to proscribed groups like National Action or Sonnenkrieg Division and is communicating with and posting content on neo-Nazi or white supremacist group sites, this would provide a pattern of behaviour demonstrating the depth and extent of the radicalisation of a suspect. The same would apply to a suspect imbued with the Islamist ideology linked to groups like Al Qaeda or IS.

As seen in both the *Shaikh* and *Renshaw* cases, the planning was more than simply having an idea, both defendants were considerably involved in planning their respective attacks as they both took active steps to carry out those attacks. Shaikh carried out surveillance of St Paul's Cathedral, including checking the security arrangements at the Cathedral. Ascertaining that Rosie Cooper attended many constituency events, Renshaw planned to attend one of them to gain access to the MP and he bought a machete that he intended to use to kill her. In order to show the degree of planning, complexity and sophistication involved, investigators would be looking for evidence not just of action, but the type of action taken and level of the suspect's intent to commit the act, along with the amount of time the suspect has taken in relation to the planning. This will be important evidence the police must obtain for the Crown Prosecution Service in England and Wales, the Procurator Fiscal in Scotland and the Public Prosecution Service in Northern Ireland to decide if there is sufficient evidence to charge and a prosecution to succeed.

Conclusion

Especially in relation to terrorist activity we see legislative changes introduced to keep pace with changes and developments in terrorists' tactics and section 5 Terrorism Act 2006 is a good example of one of those changes. When drafting the Terrorism Act 2000 it may not have been foreseen how important this offence was, especially in assisting counter-terrorism investigators in taking positive steps in preventing an act of terrorism occurring. As seen, by having a sentence of life imprisonment, this is a serious offence and will be treated by the courts the same way as if a terrorist act occurred. In addition to the appellate court decisions, what is useful in examining the courts' sentencing guidelines for section 5 is how they can be transposed from the courtroom to the streets in guiding counter-terrorism investigators' evidence gathering, allowing them to make a pre-emptive arrest before a terrorist act occurs thereby saving lives and preventing persons suffering serious injury.

Dr David Lowe is a retired police officer and is currently a senior research fellow at Leeds Beckett University's Law School researching terrorism & security, policing and criminal law. He has many publications in this area including his recent books 'Prevent Strategy: Helping the Vulnerable being drawn towards Terrorism or Another Layer of State Surveillance?', 'Terrorism and State Surveillance of Communications' and 'Terrorism: Law and Policy', all published by Routledge. Routledge will be publishing the 2nd edition of his book 'Terrorism Law & Policy: A Comparative Study' in September 2021. David is regularly requested to provide expert commentary to UK national and international mainstream media on issues related to his research areas and provides an expert witness service.