IN THE SUPREME COURT OF NEW ZEALAND

SC 13/2005
[2005] NZSC 26

	BETWEEN	KENNETH CHRISTOPHER MORGAN Appellant
	AND	THE SUPERINTENDENT, RIMUTAKA PRISON Respondent

Hearing: 14 April 2005

Court: Elias CJ, Gault, Blanchard, Tipping and Henry JJ

Counsel: Appellant in Person
A S Butler and B Keith for Respondent

Judgment: 19 May 2005

JUDGMENT OF THE COURT

A. The appellant is granted leave to appeal.

B. The appeal is dismissed.

REASONS

ELIAS CJ

[1] Parliament has enacted by s 6 of the Sentencing Act 2002 that anyone convicted of "an offence in respect of which the penalty has been varied between the

commission of the offence and sentencing" has "the right … to the benefit of the lesser penalty":

> **6. Penal enactments not to have retrospective effect to disadvantage of offender**
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> (1) An offender has the right, if convicted of an offence in respect of which the penalty has been varied between the commission of the offence and sentencing, to the benefit of the lesser penalty.
>
> (2) Subsection (1) applies despite any other enactment or rule of law.

The same right is also enacted in s 25(g) of the New Zealand Bill of Rights Act 1990. To the extent relevant, s 25 provides:

> **25. Minimum standards of criminal procedure-**
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> Everyone who is charged with an offence has, in relation to the determination of the charge, the following minimum rights:
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> …
>
> (g) The right, if convicted of an offence in respect of which the penalty has been varied between the commission of the offence and sentencing, to the benefit of the lesser penalty:
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> …

[2] Kenneth Christopher Morgan is serving a sentence of three years imprisonment imposed after his conviction for cultivating cannabis in November 2002. Between his arrest and trial, the Criminal Justice Act 1985, which then governed both sentencing and release, was repealed and replaced with the Sentencing Act 2002 and the Parole Act 2002.[1] If sentenced under the Criminal Justice Act, Mr Morgan would have been entitled by s 90(1)(b) to release on conditions after serving two-thirds of his sentence, although he would have remained liable to recall for breach of the conditions until three months before his three year sentence expired.[2] Under the Parole Act those sentenced to imprisonment for determinate terms longer than twenty-four months are not entitled to release under that Act until the full terms of their sentences have expired[3] (although they are eligible for earlier release at the discretion of the Parole Board as they were under

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1 The two measures were introduced in the same Bill, but were later separated. Both were enacted on 5 May 2002 and came into effect on 30 June 2002.

2 Sections 107A and 107I Criminal Justice Act 1985.

3 Section 86(2) Parole Act 2002.

the Criminal Justice Act). The difference in the mandatory release provisions amounts to an additional year of detention. Mr Morgan contends on application for habeas corpus that his continued detention at Rimutaka Prison is unlawful because under s 6 of the Sentencing Act he has the right to the benefit of the mandatory release entitlement in place at the time of commission of the offence. If it is applied to him, he would have been released on 19 November 2004.

[3] Mr Morgan was unsuccessful before the High Court[4] and the Court of Appeal.[5] He seeks leave to appeal to this Court. By direction of the Court the leave application has been heard with the argument on the substantive issue. The disposition of the substantive appeal turns on whether the change to Mr Morgan's release entitlement constitutes a "penalty" within the meaning of s 6 of the Sentencing Act. The arguments accepted in the Courts below and repeated on behalf of the respondent in this Court are that retrospectivity of penalty is not engaged here. It is said that:

- early release dates under legislation do not affect the sentence (to which the offender continues to be subject) and are properly regarded as administration of penalty (a term treated on this argument as coextensive with "sentence") rather than as part of the penalty itself.

- section 6 applies only to the case where a maximum sentence provided by law or the range of sentencing options provided by law for an offence is varied between commission of the offence and sentencing. (Here, the sentence available under the Misuse of Drugs Act 1975 has not been varied; it remains a maximum sentence of seven years imprisonment and was not exceeded by the sentence of three years imposed in this case.)

- section 6 of the Sentencing Act 2002, like the former s 4(2) of the Criminal Justice Act 1985 it replaces, is directed at the sentencer and is therefore spent after sentence.

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4 *Morgan v The Superintendent, Rimutaka Prison,* MacKenzie J, HC WN CIV-2004-485-2688, 10 December 2004, (oral judgment).

5 *Morgan v The Superintendent, Rimutaka Prison*, McGrath, Hammond and O'Regan JJ (Hammond J dissenting), CA17/05, 7 March 2005.

On these arguments (which all turn on a strict distinction between sentence and release on conditions), a change in the period of detention before sentence expiry is not a change in penalty. There is discussion in New Zealand cases which is supportive of this approach. No case cited to us is however concerned with loss of a non-discretionary statutory right to release. And the statements of principle have not always been consistently applied. They conflict with some views taken in comparable jurisdictions which have enacted similar protections derived from article 15.1 of the International Covenant on Civil and Political Rights or article 7 of the European Convention on Human Rights.

[4] Although not the basis of the lower Court decisions or developed in written submissions, it is also necessary to consider a refinement of the argument that s 6 is concerned only with variation in the maximum sentence provided by law for an offence. It turns on what Tipping J at para [104] has called the "effective maximum", calculated by deduction of any entitlement to release from detention from the prescribed maximum sentence. Mr Morgan on this approach was entitled to release from detention after serving two-thirds of the maximum prescribed sentence of seven years. Since under the Parole Act Mr Morgan must be released after serving three years (on the expiry date of his sentence), the change in the legislation does not impose a heavier burden upon him because at the date of the offence the penalty to which he was liable was an "effective maximum" of four years and eight months (calculated as two-thirds of the maximum prescribed sentence of seven years). This approach does not insist on a strict division between sentence and release. Rather, it attempts to assess the substance of the punishment to which a prisoner was liable at the date of the offence. But the suggested assessment turns on a combination of the maximum prescribed sentence and the statutory formula for calculating early release then in place, rather than the actual sentence and the statutory formula for calculating early release.

[5] For the reasons which follow I am of the view that it is wrong to characterise release entitlements as matters of "administration" rather than "penalty". Both sentence and release are essential components in identifying the penalty to which an offender is subject. Nor do I consider that release entitlements are immaterial to penalty on the basis that the "penalty" referred to in s 6 of the Sentencing Act and

s 25(g) of the New Zealand Bill of Rights Act is the maximum sentence permitted by the legislation. And I am unable to agree with the modified approach which allows that release entitlements are part of the penalty for an offence but maintains the view that the penalty applicable is the maximum sentence prescribed for the offence, less the early release entitlement (the "effective maximum" approach). I am of the view that these approaches are all inconsistent with s 6 of the Sentencing Act, properly construed.

[6] There is no argument about the meaning of the Parole Act. Part 1 provides for release from detention. By s 8 it applies to all offenders, whether or not sentenced before the Act came into effect. Special transitional arrangements are made in Subpart 4 of Part 1 for offenders who are subject to "pre-cd sentences", defined as sentences of imprisonment "imposed before the commencement date [of the Act]".[6] Those offenders who are detained under long-term pre-cd sentences must be released under s 104 of the Parole Act on their "final release date", as determined by the provisions of the Criminal Justice Act in accordance with s 90.[7] As s 103 explains, "the purpose of section 104 is to provide a special form of release for offenders who are subject to long-term pre-cd sentences and whose release would otherwise be delayed as a result of the operation of subparts 2 and 3". The Parole Act cannot itself be interpreted to give effect to the right expressed in s 25(g) of the New Zealand Bill of Rights Act. Its terms and structure do not admit of the preference required by s 6 of the New Zealand Bill of Rights Act because they cannot fairly be interpreted to confer an entitlement to release under that Act upon an offender sentenced after the commencement date.

[7] That conclusion is not however determinative of the question whether s 6 of the Sentencing Act entitles Mr Morgan to release after he has served two-thirds of his sentence. It is a statutory right which is independent of the Parole Act. If the removal of the entitlement to release which applied by statute at the time of the offence is an increase in penalty, s 6 in its terms applies notwithstanding the absence of an entitlement under the Parole Act. In the same way, a statutory increase in the

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6 Section 4 Parole Act 2002.

7 Sections 4 and 104 Parole Act 2002. Mr Morgan's "final release date" under the Criminal Justice Act was 19 November 2004.

maximum sentence provided for an offence would not remove the s 6 entitlement even though Parliament has clearly intended to replace the earlier penalty. That is what Parliament has provided by s 6. Unless its application is excluded, the courts must give effect to it.

[8] It is not suggested that s 6 has been excluded by the terms of the Parole Act. There is no express provision in the Parole Act that the new provisions as to release are to apply notwithstanding s 6 of the Sentencing Act. We were not referred to anything in the legislative history to suggest that retrospective increase in penalty was intended by Parliament. The preservation of the non-discretionary statutory release entitlement for sentenced prisoners by s 104 of the Parole Act, on the basis explained in s 103 that their release would "otherwise be delayed", indicates appreciation that retrospectivity is engaged in the change and a purpose to avoid such effect in respect of sentenced prisoners. The Sentencing and Parole Acts were introduced in the same Bill and were enacted as a package. They are properly to be viewed as contemporaneous. No question of legislative priority on temporal grounds, such as was considered in *R v Pora,*[8] therefore arises here. It is not convincing to argue, as counsel for the respondent did, that a line must be drawn somewhere when there is reform and that the date of sentence is as good as anywhere. The line drawn by Parliament in s 6 of the Sentencing Act and s 25(g) of the New Zealand Bill of Rights Act 1990, drawing on article 15 of the International Covenant on Civil and Political Rights, is the date of commission of the offence. Section 6(2) directs that s 6(1) is to apply "despite any enactment". The question for the appeal is whether the appellant is entitled to the benefit of these provisions. That turns on whether the loss of the statutory release entitlement is an increased penalty within the meaning of s 6. If it is, there is no occasion to avoid the application of s 6(1).

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8 [2001] 2 NZLR 37.

Do adverse changes in release entitlement before sentence expiry amount to an increase in penalty?

[9] Whether changes to release entitlement or eligibility for parole before the expiry of a sentence affect the penalty to which an offender is liable has been considered in a number of jurisdictions with legislative protections against retrospectivity of penalty. The European Court of Human Rights, in application of article 7(1) of the European Convention (itself based on article 15 of the International Covenant on Civil and Political Rights from which s 6 of the Sentencing Act and s 25(g) of the New Zealand Bill of Rights Act are derived), has stressed that how it is characterised in domestic law cannot be determinative of whether a measure is a "penalty".[9] That approach seems to me to be equally valid in interpretation and application of ss 6 and 25(g), given their international derivation and human rights content. Whether release is characterised in legislation as an aspect of "parole" rather than "sentence" is not therefore determinative of its character as a penalty.

[10] A distinction between a sentence and its administration has been applied in decisions of the High Court in New Zealand in *Norton-Bennett v Attorney-General*[10] and in *Palmer v Superintendent, Auckland Maximum Security Prison.*[11] There are also statements made by members of the Court of Appeal in *Fulcher v Parole Board,*[12] *R v Poumako,*[13] and *R v Pora*[14] which support a wide application of the distinction. Some suggest that release on discretionary parole and the terms of parole are matters of administration, not penalty, in respect of which change adverse to the prisoner is not objectionable on the grounds of retrospectivity. None of the cases is however concerned with the removal of an entitlement to release. None is concerned with the application of s 6 of the Sentencing Act. *Fulcher* dealt with more

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9 *Welch v United Kingdom* (1995) 20 EHRR 247, 262.
10 [1995] 3 NZLR 712 (HC).
11 [1991] 3 NZLR 315 (HC).
12 (1997) 15 CRNZ 222 at 227 per Gault J, at 231 per Henry J, at 243 per Thomas J.
13 [2000] 2 NZLR 695 at 706 per Henry J.
14 [2001] 2 NZLR 37 at 57 per Keith J.

onerous and extended conditions imposed upon early release. In *Poumako* and *Pora* all members of the Court of Appeal accepted (as did the Solicitor-General in arguing the cases for the Crown) that increasing the period of ineligibility for parole was a retrospective penalty.

[11] I am unable to see any distinction in principle between the present case and those concerned with introduction of minimum non-parole periods. If introduction of a minimum non-parole period is properly seen to be a penalty, then so too must the withdrawal of a mandatory entitlement to release before the expiry of the sentence. It cannot matter that one is imposed at sentencing by the judge at the direction of the legislation and the other arises by operation of law under the statute. Indeed, the withdrawal of an entitlement to release is clearly a heavier penalty than the withdrawal of eligibility to be considered for discretionary release. This is not a case like *In re Findlay*[15] where the only expectation of the prisoner was that his case for release on parole would be examined individually in the light of the system operated at the time.[16] Here, the statute set a mandatory release date.

[12] In the United States, article 1 of the Constitution prevents the passage of "ex post facto law".[17] Laws which would inflict "greater punishment" than provided for at the time of the crime, are unconstitutional.[18] Changes to substitute mandatory sentences of 15 years for sentences to a maximum of 15 years have been held to be in breach of the *ex post facto* protection.[19] In *Lynce v Mathias* and in *Weaver v Graham, Governor of Florida*[20] the Supreme Court held that changes to early release provisions altered the punitive consequences for the prisoners affected and were not properly to be regarded as changes in administration within the sentence imposed. In *California Department of Corrections v Morales*[21] a majority of the Supreme Court upheld a statute which enabled the Board of Prison Terms to defer parole hearings for up to three years for those convicted of murder while on parole for an earlier

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15 [1985] AC 318.
16 At 338.
17 U.S. Const. art I, §9, cl.3 and art I, §10, cl.1.
18 *Lynce v Mathis* 519 US 433 (1997).
19 *Lindsey v Washington* 301 US 397 (1937), 401.
20 450 US 24 (1981).
21 514 US 499 (1995).

murder, where the Board gave reasons for its conclusion that there was no reasonable prospect of parole being granted during the period of deferral. The majority considered that the provision did not violate the *ex post facto* clause of the Constitution because the prisoner's indeterminate sentence was not affected and there was no change to the substantive calculation applicable to secure early release. If the statute had changed the substantive calculation for early release (as is the impact of the change in entitlement if applied to Mr Morgan) it would have violated the ex post facto clause. The United States constitutional provisions, as interpreted to prevent increased "punishment", differ from our legislative protection against retrospective penalties. They pre-date article 15 of the International Covenant on Civil and Political Rights. But they draw on the same principles and themselves influenced the adoption of article 15. The United States cases look to the substance of the penal consequences as the punishment or penalty.

[13] In Canada, there is conflicting lower court authority as to whether an increase in parole ineligibility is an increase in "punishment" within s 11(i) of the Canadian Charter of Rights and Freedoms.[22] It was held to be so by the Ontario Court of Appeal in *R v Logan.*[23] There, the minimum period of parole ineligibility between offence and sentence was increased from 20 years to 25 years. The Court of Appeal held that "the period of ineligibility for parole is part of the punishment for the offence, and the appellants are entitled to the benefit of the lesser punishment".[24] The matter does not appear to have arisen for determination in the Supreme Court of Canada. But in *R v M*[25] Lamer CJ discussed the nature of parole generally. The case was concerned with the validity of an appellate court ruling that cumulative determinate sentences could not exceed 25 years. Lamer CJ, while holding that a grant of parole does not alter the sentence, recognised that an offender "enjoys a greater measure of freedom and liberty when the conditions of his or her imprisonment are changed from physical confinement to full parole".[26] He relied

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22 *Berenstein v Canada (National Parole Board)* (1996) 111 FTR 231; *Abel v Edmonton Institute for Women (Director)* 149 CCC (3d) 401; *Caruana v Bath Institution* (2002) 48 CR (5th) 285; *R v Lambert* (1994) 93 CCC (3d) 88; *R v Ferris* (1994) 93 CCC (3d) 497.

23 (1986) 51 CR (3d) 326.

24 At 331.

25 [1996] 1 SCR 500.

26 At para 62.

upon *R v Gamble*[27] as authority for the view that extension of the period of parole ineligibility or denial of parole "may constitute a deprivation of a cognizable liberty interest under s 7 of the Charter",[28] even though the sentence of the prisoner is not spent and continues in effect. Lamer CJ cites with approval in this connection the view of Iacobucci J in *R v Shropshire*[29] that "parole ineligibility is part of the 'punishment' and thereby forms an important element of sentencing policy".[30] This reasoning is helpful in the present context. If withdrawal of a parole entitlement is the deprivation of an interest in liberty and parole ineligibility is part of the "punishment" imposed by law on offenders, they are penalties imposed by law upon the offender, even if the formal sentence imposed by the Court is not spent and the prisoner would remain liable to recall for cause. Such measures are not properly to be seen simply as "administration" of the "penalty", defined narrowly as the sentence which is imposed by the Court. Their substantive effect is penal.

[14] Similar views are to be found in English cases. In *R v Home Secretary, ex parte Pierson*[31] (a case concerning the application of article 6(1) of the European Convention[32]) Lord Steyn treated the Home Secretary's decision to set the earliest date for review of a mandatory life sentence as a decision determining the penal consequences of the sentence. He rejected an argument indistinguishable in substance from that made in the present case:

> Counsel for the Home Secretary argued that the fixing of the tariff cannot be a sentencing exercise because the judge pronounces the only sentence, i.e. one of life imprisonment. This is far too formalistic. In public law the emphasis should be on substance rather than form. This case should also not be decided on a semantic quibble about whether the Home Secretary's function is strictly "a sentencing exercise". The undeniable fact is that in fixing a tariff in an individual case the Home Secretary is making a decision about the punishment of the convicted man.[33]

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27 [1988] 2 SCR 595, 609 and 647.

28 Which provides: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

29 [1995] 4 SCR 227.

30 At para 63.

31 [1998] AC 539.

32 Which provides for the right to a fair and public hearing within reasonable time by an independent and impartial tribunal established by law.

33 At 585.

[15] Similarly, in *R (Anderson) v Home Secretary*[34] the House of Lords held that the setting of a tariff which determined eligibility for parole for a life sentence was, as a matter of reality rather than form, an exercise in establishing the penalty to be imposed on an offender. Lord Bingham, in declining to accept that the setting of the tariff by the Home Secretary was simply "the administrative implementation of a sentence already passed",[35] expressed the view:

> It is clear beyond doubt that the fixing of a convicted murderer's tariff, whether it be for the remainder of his days or for a relatively short time only, involves an assessment of the quantum of punishment he should undergo.[36]

Lord Steyn, too, rejected the argument that the tariff which determined eligibility for parole was merely the administration of a sentence:

> One then asks how a decision of the Home Secretary on the tariff should be classified. Counsel for the Home Secretary submits that the mandatory life sentence is imposed as punishment, which covers the whole of the offender's life subject only to the discretionary power of the Home Secretary to release him. He argues that the setting of a tariff by the Home Secretary is "an administrative procedure" relating to the implementation of the sentence. He contends that it is not the imposition of a sentence for the purposes of article 6(1). This argument sits uneasily, as the European Court of Human Rights pointed out in *Stafford* 35 EHRR 1121, 1132-1133, para 45, with a description of a mandatory life sentence given by counsel for the Home Secretary in the Court of Appeal in *R (Lichniak) v Secretary of State for the Home Department* [2002] QB 296. He submitted that the purpose was:
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> > "to punish the offender by subjecting him to an indeterminate sentence under which he will only be released when he has served the tariff part of his sentence, and when it is considered safe to release him … That is not merely the effect of the sentence, it is the sentence."
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> …A decision fixing the tariff in an individual case is unquestionably a decision about the level of punishment which is appropriate. Mellifluous words cannot hide this reality.[37]

[16] The fact that in *Pierson* the sentence imposed was mandatory life imprisonment is not a material point of distinction from the present case. Here, too, the sentence imposed was one available in law. In both cases, the sentence itself is

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34 [2003] 1 AC 837 (HL).
35 At 878.
36 At 881.
37 At 891-892.

insufficient to describe the penal consequences. In New Zealand under the Criminal Justice Act the penal consequences for determinate long term sentences were set by the combined effect of the sentence imposed by the judge and the legislation as to release (rather than by the sentencing judge and the Home Secretary, as under the United Kingdom mandatory life sentence considered in *Pierson*). But both steps were necessary to identify the penalty to which the offender was liable.

[17] Whether changes to the way in which early release is obtained can constitute a penalty within the meaning of article 7(1) of the European Convention has been the subject of further consideration in two recent decisions of the Privy Council and the House of Lords, *Flynn v Her Majesty's Advocate*,[38] and *R (Uttley) v Secretary of State for the Home Department.*[39] Neither case deals with non-discretionary entitlement to release. *Flynn* concerned changes to the mechanism by which prisoners sentenced to mandatory life imprisonment were considered for parole. Under the previous system (which was changed because of incompatibility with article 6(1) of the European Convention on Human Rights) a Preliminary Review Committee had recommended the date at which the Parole Board should consider parole. That system was replaced by judicial determination of a punishment period required to be served before any Parole Board review. In the cases the subject of the appeal, the effect was that parole consideration was deferred significantly from the date earlier notified by the Preliminary Review Committee. In *Uttley*, the issue was whether more onerous conditions of release constituted an increase in penalty, contrary to article 7.

[18] A range of views appears in the judgments, particularly in *Flynn*. The view that the maximum sentence available to the sentencer is the "penalty" from which an offender is protected from retrospective increase by article 7(1) is expressed most starkly in the judgments of Lord Rodger and Lord Carswell, who sat in both cases. Thus, repeating his reasoning in *Flynn*, Lord Carswell in *Uttley* described the "penalty applicable" in a particular case as "that which a sentencer could have imposed at that time, i.e. the maximum sentence then prescribed by law for the

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[38] 2004 SCCR 281, PC.
[39] [2004] 1 WLR 2278.

particular offence".[40] Since in *Flynn* that was a mandatory sentence of life imprisonment and since in *Uttley* the 12 year term imposed on sentence was within the statutory maximum for rape of life imprisonment, Lord Carswell considered there was no conflict with article 7(1) in either case.

[19] Some of the other statements in the cases are however less sweeping. In *Flynn* Lord Bingham thought that the change would have offended the spirit of article 7[41] and his "grave doubts" were only overcome by his view that the High Court would be entitled to take into account the prisoner's expectations under the old system in fixing the punishment tariff before which eligibility for parole could not be considered.[42] Lord Hope, too, considered that the change was compatible with the Convention (making it unnecessary to disallow the Scottish legislation) only on the basis that it was interpreted to permit the High Court to take into account "the progress that the appellants have already made under the pre-existing system".[43] Stressing the need to look to the substance of the burden imposed, he would have held for the purposes of the Convention guarantee that:

> …the introduction into the system of a new component that had the effect of requiring the adult mandatory life prisoner to serve a longer period in custody than he would be likely to have served under the pre-existing system would constitute a heavier penalty and would, for this reason, be incompatible with the Convention right.[44]

Lord Rodger in *Flynn* considered it significant that, under the old system, there was no limit on the period that could be set before first review of a life prisoner's eligibility for parole. It was therefore not possible to say that the penalty was "heavier", even though consideration of eligibility was likely to have occurred sooner under the old regime: "the appellants are liable to be required to serve a longer period than would have been likely, but not a longer period than would have been competent, before the first review under the previous system".[45] Baroness Hale considered that it was important to look to the substance of the previous arrangement:

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40 *Uttley*, at para 62, citing *Flynn* at para 109.
41 At para 5.
42 At para 7.
43 At para 55.
44 At para 46.
45 At para 85.

> It is completely unrealistic, as the European Court of Human Rights has recognised in *Stafford* (echoing earlier comments in *Weeks v United Kingdom* at 307, paragraph 40), to regard the "penalty … applicable" at the time these murders were committed as a sentence that the offender be imprisoned for the rest of his life. It was a sentence that the offender be imprisoned for such period, up to the end of his life, as the relevant minister would decide, and remain subject to a risk of recall thereafter. There was no statutory minimum period.[46]

[20] In *Uttley*, Lord Phillips held, in agreement with the approach maintained by Lord Carswell, that article 7(1) "will only be infringed if a sentence is imposed on a defendant which constitutes a heavier penalty than that which could have been imposed on the defendant under the law in force at the time that his offence was committed".[47] But he specifically observed:

> …if statutory changes are made to the release regime of those serving mandatory life sentences those changes may affect the severity of the sentence that the law requires. That is not this case. [48]

and

> The remission regime is an integral feature of the sentence of imprisonment. When considering how heavy a penalty has been imposed by the sentence it is necessary to consider the overall effect of the sentence.[49]

[21] Earlier, Lord Phillips had pointed out that a Practice Note issued by the Lord Chief Justice when release on licence was first introduced in 1991 had advised sentencing judges that if the changes introduced could lead to prisoners "actually serving longer in custody than hitherto" (as was the case for short-term sentences), it would be necessary for the sentencing judge to adjust the sentence to have regard to the actual period likely to be served.[50] This was a departure from what the Practice Note described as:

> an axiomatic principle of sentencing policy until now that the court should decide the appropriate sentence in each case without reference to questions of remission or parole.[51]

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46 At para 99.
47 At para 21.
48 At para 21.
49 At para 27.
50 At para 15.
51 At para 15.

Such departure is only explicable if it is accepted that release dates are important elements of penalty. It is convenient to note here that no similar adjustment to sentencing policy was made following the enactment of the Parole Act in New Zealand. It would be inconsistent with New Zealand authority which suggests that sentences are generally to be imposed without consideration of remission or parole.[52]

[22] I consider that release entitlements are integral to the penalty imposed upon an offender. They are not properly to be characterised as matters of administration of penalty. Nor can "penalty" be treated as coextensive with "sentence" where release regimes modify the penal consequences of sentence. "Penalty" should be construed in conformity with the interpretations applied in other jurisdictions with similar domestic enactment of article 15 unless those interpretations are clearly excluded. That is not the case here. I consider that the majority judgment in the Court of Appeal and the decision in the High Court were in error in holding that s 6 of the Sentencing Act had no application to a change in release entitlement. This view is consistent with those expressed by Lord Bingham, Lord Hope, and Baroness Hale in *Flynn*. It accords with the statements made by Lord Phillips in *Uttley* that a release regime is "integral" to the penalty imposed. It is consistent with the approach in the United States that early release provisions are not matters of administration but are part of the penal consequences imposed upon the prisoner. It conforms with the statements of principle in the Canadian Supreme Court cases of *R v M* and *Gamble* that parole ineligibility is part of the punishment of an offender. And it follows the views of the Ontario Court of Appeal in *Logan* that the period of ineligibility for parole is part of the punishment for the offence and that, if altered, the offender is entitled to the benefit of the lesser punishment. Where there is a statutory regime for release from detention, the penalty suffered by the offender is determined both by the actual sentence and the statutory release provision. I do not think it matters whether the change is to a mandatory release entitlement or to eligibility for parole. That is the reality accepted in New Zealand in the minimum non-parole cases of *Poumako* and *Pora* (where the maximum available sentence did not change). It means that s 6 is not properly construed to attach only to an increase in the maximum sentence for

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[52] *R v Stockdale* [1981] 2 NZLR 189 (CA); *R v Roera* [1991] 2 NZLR 44 (CA); and see discussion in *Hall on Sentencing* para I.8.6(a).

an offence. The fact that the maximum sentence prescribed by the Misuse of Drugs Act remains seven years is not fatal to the invocation of s 6. If changes to release entitlements would result in an offender being subject to a heavier penalty than would have applied at the date of the commission of the offence, the lesser penalty must be applied.

Is Mr Morgan subject to a heavier penalty under the Parole Act than was applicable at the time of the offence?

[23] There are statements in *Uttley* by Lord Rodger and Lord Carswell (with whom the other members of the court express general agreement) that article 7(1) is not engaged if there is an adverse change in remission or parole eligibility unless it would not have been competent for the sentencing judge to achieve the same result through imposing a sentence up to the maximum prescribed by the legislation creating the offence.[53] In the case of Mr Morgan, on this argument, there would be no cause for complaint. He will be released, at worst, after serving three years (the term of the sentence imposed) which is within the statutory maximum of seven years with two-thirds remission. This approach treats the "penalty" as a formula determined by the nominal sentence prescribed by statute adjusted by the release entitlement. Since most determinate sentences are well under the statutory maximums prescribed for the worst cases, changes to release entitlements are not likely to result in a heavier penalty on this approach except in the case of those sentenced to mandatory terms of imprisonment or to indeterminate sentences. In such cases, the effective penalty is set by the release entitlement, as the House of Lords in *Home Secretary, ex parte Pierson* and *Anderson* accepted and as seems to have been assumed by the Court of Appeal in *Poumako* and *Pora.* This argument is different from that accepted by the Court of Appeal in the present case and as developed in written submissions in this Court. No authority where the issue was directly in point was cited to us.

[24] The approach is not consistent with the decision of the English Court of Appeal in *R v Sullivan*.[54] There, it was held that a minimum term of imprisonment

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53 At paras 43 and 62.
54 [2004] EWCA Crim 1762.

was a "penalty" within the meaning of article 7(1) of the European Convention.[55] If only the maximum applicable sentence amounted to a penalty for the purposes of assessing detriment, article 7 would not have been engaged.

[25] With respect to those who think otherwise, I am of the view that it is wrong to construe "penalty" in s 6 as the maximum sentence prescribed for an offence, so that s 6 is engaged only where the maximum is extended. The natural meaning of "penalty" is not so limited. The human rights recognised in domestic law to give effect to the International Convention on Civil and Political Rights must be interpreted and applied to ensure that those rights are "practical and effective".[56] Section 6 of the Sentencing Act and s 25(g) of the New Zealand Bill of Rights Act are both to be interpreted in that spirit. "Penalty" is not defined in either by reference to the maximum sentence prescribed for an offence by statute. The language of both differs in that respect significantly from s 4 of the Criminal Justice Act 1985. The former s 4 of the Criminal Justice Act protected against retrospective increase in sentence by reference to "the maximum term of imprisonment or the maximum fine that may be imposed under any enactment on an offender for a particular offence." Section 6 of the Sentencing Act is quite different. It brings the legislation into line with article 15 and s 25(g) of the New Zealand Bill of Rights Act. It is as "completely unrealistic" to regard the penalty that could lawfully have been imposed in this case as seven years imprisonment as Lord Hope and Baroness Hale thought it was to regard the penalty imposed in *Flynn* as imprisonment for the rest of the prisoner's life. A sentence of seven years imprisonment could not lawfully have been imposed on Mr Morgan. It would not have been competent[57] because such a sentence would have been overturned on appeal. Indeed Mr Morgan's three year sentence was substituted by the Court of Appeal for a sentence of four years imposed by the trial Judge, in application of the important structural check of appeal. The right to such appeal is itself recognised by s 25(h) of the New Zealand Bill of Rights Act. What penalties were available as a matter of

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55 At para 23.

56 *Stafford v United Kingdom* (2002) 35 EHRR 1121, 1143; *Coëme v Belgium* Reports of Judgments and Decisions 2000 – VII, 75, at para 145; and see *Flynn* at para 44 per Lord Hope.

57 In the language used by Lord Rodger in *Flynn* at para 85.

law cannot be identified by reference to a nominal maximum, without regard to the substantive and procedural framework within which it is applied. The maximum sentence prescribed was a theoretical possibility only, which was not imposed as a sentence for the offence and could not lawfully have been imposed. To treat the penalty applicable as the maximum prescribed for the general type of offence (even if modified by the early release formula in place at the time of the offence) is to apply the type of reasoning deprecated in *Pierson* and *Anderson* and rejected by the European Court of Human Rights in *Stafford v United Kingdom*[58] and *Weeks v United Kingdom.*[59] It is not consistent with the case law on mandatory sentences and minimum non-parole periods in other jurisdictions. It is inconsistent with the emphasis on substantial effect in the United States. It precludes any realistic assessment of whether a change in release eligibility increases the punishment to which the offender is liable. It effectively substitutes a mandatory prison term for a discretionary one for the purposes of assessing the penalty to which the offender is liable.[60]

[26] The penalty for which Mr Morgan was liable under the legislation in force at the time of the offence was to be detained for two-thirds of the sentence lawfully able to be imposed by the Court up to a statutory maximum of seven years, and to be then at risk of recall for the balance of the term of the sentence. These were the penal consequences for him at the time. The effect of applying the new provisions of the Parole Act to him is to increase his penalty by withdrawing his entitlement to release from detention on conditions after serving two years of his sentence. The increase in penalty is detention for an additional year.

[27] I consider that under s 6 of the Sentencing Act Mr Morgan is entitled to the benefit of the lesser penalty in place at the time of the offence. Section 6 preserves his right to be released on "final release date" calculated in accordance with s 90(1)(b) of the Criminal Justice Act 1985. This approach does not require any rewriting of the provisions of the Parole Act. That Act is not the source of the

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58 (2002) 35 EHRR 32.

59 (1987) 10 EHRR 293.

60 The substitution of a mandatory sentence for a discretionary maximum was to be *ex post facto* penalty in *Lindsey v Washington* 301 US 397 (1937), 401.

entitlement. Section 6 provides the right. I am of the view that no further authority is necessary for application of the lesser penalty but, in any event, s 18 of the Interpretation Act 1999 preserves s 90(1)(b) for the purpose of the calculation of the lesser penalty. The provisions of the Parole Act then apply to Mr Morgan as they would to any other prisoner subject to early release. I would grant leave and allow the appeal.

GAULT J

[28] I would be content to express my agreement with the reasons of Blanchard and Henry JJ. But because the Court is not unanimous, and because we are dealing with the question of the liberty of Mr Morgan, I will add a few brief comments.

[29] Mr Morgan's superficially attractive argument cannot withstand closer scrutiny. He accepted (correctly) that under s 8 of the Parole Act 2002 the release and parole provisions of that Act would apply to his circumstances unless they are excluded by the operation of s 6 of the companion Sentencing Act 2002. That provides that "despite any other enactment or rule of law", "if convicted of an *offence in respect of which the penalty has been varied* between the commission of the offence and sentencing, he is entitled to the lesser penalty" (my emphasis). Section 25(g) of the New Zealand Bill of Rights Act 1990 is in the same terms. Those provisions are directed to variations in the penalty for the offence not to a particular penalty imposed on an individual offender which, of course, could not be varied between the commission of the offence and sentencing.

[30] When Mr Morgan committed the offence of cultivation of cannabis the penalty for that offence under s 9 of the Misuse of Drugs Act 1975 was imprisonment for a term not exceeding seven years. When he was sentenced the penalty for the offence was unchanged.

[31] When the offence was committed, s 90(1)(b) of the Criminal Justice Act 1985 provided that an offender subject to a sentence of imprisonment for a term of more than 12 months must be released after the expiry of two-thirds of the sentence. When Mr Morgan was sentenced s 86(2) of the Parole Act provided, and still

provides, that the release date of a long-term determinate sentence is its sentence expiry date. Neither of those provisions is directed to the penalty in respect of the offence of cannabis cultivation. Each is directed to one of the consequences of imposition of sentences of imprisonment on offenders, and not to the penalty for an offence.

[32] Mr Morgan complains that he is the subject of a harsher sentence because, under the Criminal Justice Act, his final release date for his sentence of three years would have been on the expiry of two years, whereas under the Parole Act, without parole, his release date is at the expiry of three years. That may or may not be harsher. It is difficult to make any accurate comparison between the impact overall of the sentences bearing in mind a different parole regime under the new Act, the range of conditions that could be imposed on final release and vulnerability to recall under the former Act. The legislature cannot have intended comparisons of this kind to be made in respect of each individual offender. That is not what s 6 requires. It is not what article 15 of the International Covenant (affirmed in s 6 and s 25(g)) requires.

[33] I agree with the reasons given by Blanchard, Tipping and Henry JJ for the conclusion that Mr Morgan's circumstances do not come within s 6 and that the clear legislative intention is that the release date provided in s 86 of the Parole Act is to apply. If that were not so it is unclear by what provisions the various aspects of the sentence, such as parole, would be managed.

[34] On the view I take s 6 of the Sentencing Act does not reach Mr Morgan’s situation. It does not, in his case, override the provisions of the Parole Act and does not therefore make his continued imprisonment unlawful.

[35] I would grant leave but dismiss the appeal.

BLANCHARD J

[36] In September 2001 Mr Morgan committed the crime of cultivation of cannabis. The maximum sentence for such a crime was, and remains, a term of

imprisonment for seven years. In January 2003 Mr Morgan was sentenced. After a reduction on appeal, his sentence was three years. At the time the crime was committed Part VI of the Criminal Justice Act 1985 was in force, containing the legislative provisions governing parole. In accordance with s 90(1)(b) a person who received a three year sentence for the type of crime committed by Mr Morgan was entitled to be released, subject to conditions[61] and the possibility of recall,[62] after serving two-thirds of the sentence. So, if sentenced to three years imprisonment in September 2001, Mr Morgan could have expected to be released after two years.

[37] But before Mr Morgan was actually sentenced in January 2003 Part VI was repealed and replaced by the Parole Act 2002, passed in conjunction with the Sentencing Act 2002, both having been before Parliament in the same Bill. These new Acts commenced on 30 June 2002.

[38] Section 6 of the Sentencing Act provides:

> **6 Penal enactments not to have retrospective effect to disadvantage of offender**
>
> (1) An offender has the right, if convicted of an offence in respect of which the penalty has been varied between the commission of the offence and sentencing, to the benefit of the lesser penalty.
>
> (2) Subsection (1) applies despite any other enactment or rule of law.

[39] But s 86(2) of the Parole Act, dealing with long-term determinate sentences (i.e. for a fixed term of more than 24 months), provides that the release date is the sentence expiry date, namely the date on which the offender has served the full term and therefore ceases to be subject to the sentence.[63] Accordingly the Parole Act requires that Mr Morgan should serve the whole of his three year sentence in prison unless the New Zealand Parole Board decides to release him on parole, which it is empowered to do after his parole eligibility date[64] (in Mr Morgan's case, one-third of his sentence)[65] or earlier in exceptional circumstances.[66]

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61 Section 107A Criminal Justice Act.
62 Section 107I Criminal Justice Act.
63 Sections 4 and 82(1) Parole Act.
64 Section 20 Parole Act.
65 Section 84(1).
66 Section 25.

[40] Mr Morgan has applied for a writ of habeas corpus. It is his contention that he was entitled to be released, after serving two-thirds of his sentence, on 19 November 2004 and that he is now being illegally detained. He says that, for the purposes of s 6 of the Sentencing Act, s 90(1)(b) of the Criminal Justice Act marked out the extent of the "penalty" to which he was subject if sentenced to three years imprisonment in September 2001, i.e. that s 86(2) of the Parole Act imposes a greater penalty as a result of a variation in penalty between the commission of the offence and his sentencing; and that s 6 gives him the right to the benefit of the lesser penalty. In effect, he says that s 6 of the Sentencing Act overrides the parole and release provisions of the Parole Act.

The judgments below

[41] In an oral judgment delivered on 10 December 2004 in the High Court at Wellington,[67] MacKenzie J found that the position under the Parole Act was clear. The Act distinguished between sentences imposed before and after its commencement. It was the date of imposition of sentence, rather than the date of offending which was relevant. The Judge referred to the distinction drawn in *Fulcher v Parole Board*[68] between imposition and administration of sentences. He considered that s 6 of the Sentencing Act did not apply and that the principle against retroactivity which he saw as to some extent inherent in s 6 and in s 25(g) of the New Zealand Bill of Rights Act 1990 was not offended by the provisions which were clear in the Parole Act.

[42] The judgment of the majority in the Court of Appeal was delivered by McGrath J.[69] In the view of the majority, s 25(g) is addressed only to judicial acts of sentencing and not to the administrative regime for early release. Parliament appeared not to have seen it necessary to apply the principle against retrospectivity to the area of administration of sentences including early release. After discussing a

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67 *Morgan v Superintendent, Rimutaka Prison* HC WN CIV-2004-485-2688, 10 December 2004, (oral judgment).

68 (1997) 15 CRNZ 222.

69 CA17/05, 7 March 2005 (McGrath, Hammond & O'Regan JJ).

recent decision of the House of Lords, which is extensively referred to later in this judgment, and academic commentary in which it is said that article 7(1) of the European Convention, whose relevance will later appear, does not prevent any retroactive alteration in the law or practice concerning parole or conditional release,[70] McGrath J said that the variation before Mr Morgan was sentenced was to the manner in which he was to serve his sentence of imprisonment rather than to the separate matter of the sentence itself. What had been varied was not the penalty for the offence. The ordinary meaning of ss 86(2) and 82(1) of the Parole Act must apply.

[43] In dissenting, Hammond J said that the distinction between sentence and administration was a sound and necessary one but could only be pressed so far or real (and quite inappropriate) injustice would result. The term required to be actually served was not a matter of administration but integral to the actual sentence. It had nothing to do with remission or terms of service.

The application for leave

[44] Thus unsuccessful in the High Court and the Court of Appeal, Mr Morgan sought leave on 31 March 2005 to appeal to this Court against the refusal of the writ. Consistently with the requirements of s 9(1) of the Habeas Corpus Act 2001, that an application for habeas corpus must be given precedence over all other matters before the High Court, this Court directed that leave would be determined together with the substantive appeal. The hearing took place with urgency on 14 April.

The statutory and convention provisions

[45] I begin with the Parole Act provisions. They are very clear. They leave no room for any continued resort to Part VI of the 1985 Act. There are, for example, no transitional provisions preserving the role of the parole authorities under that Act or allowing the New Zealand Parole Board, established under s 108, to make a direct application of that Act. Instead, the Parole Act contains, in subpart 4, a number of

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[70] Harris, O'Boyle and Warbrick, *Law of the European Convention on Human Rights* (1995) at 281.

provisions mandating how sentences imposed before its commencement date ("pre-cd sentences") are to be administered by the new board. Persons subject to pre-cd sentences have their own special regime with rules corresponding to those previously found in Part VI.

[46] Section 104 deals with the final release of persons serving pre-cd sentences. Parliament has taken the trouble to provide, in s 103, an explanation of the purpose of s 104. It is to provide "a special form of release for offenders who are subject to long-term pre-cd sentences and whose release would otherwise be delayed as a result of the operation of subparts 2 and 3". Those subparts are the general provisions governing release and sentence calculation for persons who are not serving pre-cd sentences, i.e for those sentenced after the commencement of the Act. Section 103(2) provides:

> (2) By way of explanation, the effect of section 104 is that, if it applies to an offender, the Board is obliged to release the offender on parole at his or her final release date, but the offender is subject to release conditions, and is liable to recall until his or her statutory release date.

[47] Section 104(1) requires that an offender who is detained under a long-term pre-cd sentence must be released on his or her final release date and s 105 directs that this must be determined under s 91 of the 1985 Act, which in turn requires a determination in accordance with s 90 of that Act, including subs (1)(b), i.e release of an offender serving a sentence of imprisonment for a fixed term of more than 12 months, not being a sentence for a serious violent offence, after the expiry of two -thirds of the sentence. Such persons serving pre-cd sentences therefore suffer no disadvantage from the replacement of Part VI by the Parole Act.

[48] It is noticeable that whenever the transitional regime for pre-cd sentences requires a reference back to Part VI of the 1985 Act for the purpose of making a determination that is done in a very specific and limited manner. There is, as I have already indicated, no general preservation of Part VI for any purpose.

[49] Section 8(1) applies Part 1 of the Act (ss 6 to 107 – parole and other release from detention) to all offenders. Subsection (2) directs that every decision about, or in any way relating to, the release of an offender that is made after the

commencement date must be made under Part 1 "unless specifically provided otherwise". Therefore any decision concerning release conditions or recall from release of prisoners sentenced, like Mr Morgan, after the commencement date has to be made under Part 1. There is an exception, already mentioned, for those serving pre-cd sentences but none for those sentenced after the Act commenced.

[50] In my view, in making an exception only for pre-cd sentences, Parliament has signalled its intention to impose the different regime established under the new Act upon all those sentenced after it commenced. The fairness of imposing the new regime in the case of those who offended before it commenced, particularly for those who offended before it was enacted, may be debated, but the provisions of the Parole Act providing for a separate regime for pre cd, as compared with post-cd sentences, are in my view so plain that it cannot as a matter of proper statutory construction be said that people in Mr Morgan's position have been overlooked. For any person sentenced after the commencement of the Parole Act the rules in subparts 2 and 3 of Part 1 of that Act are to apply, including s 86(2), making the release date of a long-term determinate sentence its sentence expiry date, regardless of when the crime was committed.

[51] Mr Morgan, who presented his submissions himself with considerable ability, seemed to appreciate that the Parole Act provisions would be difficult to surmount and that the success of his appeal depended upon whether "penalty" in s 6 of the Sentencing Act could be read as extending to the release date provision in s 86(2) of the companion Act. If so, s 6 could be taken to override s 86(2), and pre-cd release dates would have to apply to some post-cd sentences, despite there being no such direction in this carefully drawn statute.

[52] In s 6 there was a departure from the corresponding provision in the Criminal Justice Act 1985 where subss (1) and (2) of s 4 provided:

> **4 Penal enactments not to have retrospective effect to disadvantage of offender**
>
> (1) Notwithstanding any other enactment or rule of law to the contrary, where the maximum term of imprisonment or the maximum fine that may be imposed under any enactment on an offender for a particular offence is altered between the time when the offender commits the offence and the

> time when sentence is to be passed, the maximum term of imprisonment or the maximum fine that may be imposed on the offender for the offence shall be either—
>
> > (a) The maximum term or the maximum fine that could have been imposed at the time of the offence, where that maximum has subsequently been increased; or
> >
> > (b) The maximum term or the maximum fine that can be imposed on the day on which sentence is to be passed, where that maximum is less than that prescribed at the time of the offence.
>
> (2) Without limiting subsection (1) of this section, except as provided in sections 152(1) and 155(1) of this Act but notwithstanding any other enactment or rule of law to the contrary, no court shall have power, on the conviction of an offender of any offence, to impose any sentence or make any order in the nature of a penalty that it could not have imposed on or made against the offender at the time of the commission of the offence, except with the offender's consent.

[53] A provision in this form had been first inserted into New Zealand's sentencing and parole legislation, as subss (2) and (3) of s 43B of the Criminal Justice Act 1954, by s 22 of the Criminal Justice Amendment Act 1980. In moving the introduction of the Bill, the Minister of Justice, the Hon J K McLay, said that on 28 December 1978 New Zealand had ratified the International Covenant on Civil and Political Rights (ICCPR). He gave this explanation:

> Article 15 also provides that an offender shall not be liable to a higher penalty than that which could be imposed at the time the offence was committed. Thus, if an offender commits an offence today that is punishable by a maximum fine of $200, but the maximum is increased to $500 before he comes up for sentence, article 15 requires that he should be liable only for a maximum of $200. Current New Zealand case law does not agree with this proposition. There is a long-standing authority to the effect that an increased penalty can be imposed validly in respect of an offence committed before the increased penalties come into force. The effect of subsection (2) of the proposed new section 43B is to overrule our current case law and bring it into line with article 15.[71]

[54] The text of article 15(1) is, in relevant part, as follows:

> Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed.

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[71] (1979) 427 NZPD 4153, 8 November.

Almost exactly the same words appear in article 7(1) of the European Convention on Human Rights.[72]

[55] Section 43B was brought forward into the 1986 Act, as s 4, with only minor amendments. Then the New Zealand Bill of Rights Act 1990 was passed. Its long title states that it is an Act "[t]o affirm New Zealand's commitment" to the ICCPR. Section 25(g) provides:

> **25 Minimum standards of criminal procedure**
>
> Everyone who is charged with an offence has, in relation to the determination of the charge, the following minimum rights:
>
> …
>
> (g) The right, if convicted of an offence in respect of which the penalty has been varied between the commission of the offence and sentencing, to the benefit of the lesser penalty:

[56] Section 6 of the Sentencing Act adopts the same language as s 25(g). Both speak of the benefit of the lesser penalty but there is no reason to suppose that the right conferred on an offender is any different from that in article 15(1).

[57] Another point should be made about the language of s 6 of the Sentencing Act. It can only be read as referring to the maximum penalty which the law allowed to be imposed at the relevant time for the generic crime. So, in the case of cultivation of cannabis, it is referring to the maximum penalty of seven years. It cannot sensibly read as referring to the particular sentence for the offending of a particular offender because that is not something capable of being varied between commission and sentence. Individual sentences are imposed only on sentencing. This interpretation finds support in recent decisions of the Privy Council and the House of Lords on article 7(1) of the European Convention to which I now turn.

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[72] The word "when" is omitted in article 7(1).

Flynn

[58] *Flynn v Her Majesty's Advocate*[73] was a "devolution" appeal to the Privy Council from Scotland. It involved the rights under article 7(1) of the European Convention of four prisoners sentenced to mandatory life imprisonment before a statutory amendment in 2001 made to the time at which life prisoners would be considered for parole. Previously a body called the Preliminary Review Committee had made recommendations in relation to each of these prisoners, accepted by the Scottish Executive, that the Parole Board should at a specified time review the prisoner's case. Each appellant therefore had a prospect of review at that future time. The effect of the amending legislation in 2001 was to cancel these arrangements. The cases were instead referred to the High Court which made orders specifying the number of years which the prisoner must serve in prison as a punishment for his offence before any Parole Board review. In each case that had resulted in a postponement of any consideration for parole beyond the date previously accepted by the executive and notified to the prisoner. In one case the postponement was for as much as 13½ years. The question in *Flynn* was whether this constituted a "heavier penalty" incompatible with article 7(1). The Privy Council held unanimously that High Court judges should take account of the dates already notified under the previous system for Parole Board hearings. But their Lordships disagreed about whether there would otherwise be a breach of article 7(1).

[59] Lord Hope of Craighead said that it was wrong to regard a sentence of life imprisonment as a sentence that the prisoner be imprisoned for life because it was never anticipated that prisoners serving mandatory life sentences would in fact stay in prison for life, save in exceptional circumstances. The European Court had previously said that the tariff, which reflects the individual circumstances of the offence and the offender, represented the element of punishment.[74] The system which was in place for deciding on the length of time the prisoner was to spend in custody for the purposes of punishment and his release following its expiry was itself

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[73] [2004] UKPC D1; 2004 SCCR 281.
[74] *Stafford v United Kingdom* (2002) 35 EHRR 1121.

part of the life sentence. It was part of the applicable penalty. Baroness Hale of Richmond agreed.

[60] Lord Rodger of Earlsferry and Lord Carswell took a different view on the question of compatibility. Lord Rodger was prepared to treat the prisoner as having a vested legal right concerning his review date. But, nonetheless, His Lordship found that there was no breach of article 7(1). The prisoners were liable to be required to serve a longer period than would have been likely under the previous system of review, but not a longer period than would have been competent before the first review under that system.[75]

[61] Lord Carswell was also prepared to accept that the process of reference to the Parole Board could be regarded as fixing the punishment period. He considered, however, that the meaning of article 7(1) was that the penalty which was applicable at the time the offence was committed was "that which a sentencer could have imposed at that time", i.e. the maximum sentence then prescribed by law for the particular offence.[76] He went on:

> The object of the provision appears to have been to prevent a sentence being imposed which could not have been imposed at the time of the offence, because the maximum was then lower. One may see the operation of this principle clearly in the case of indecent assault on a woman, the maximum sentence for which was increased from two years to ten years by the Sexual Offences Act 1985. Persons convicted after that Act came into operation of indecent assaults committed before that date could not be sentenced to the longer period of imprisonment. It seems to me that other interpretations fail to give due effect to the reference in article 7(1) to the time when the offence was committed, not when sentence was passed.
>
> At the time when the offence in each of the cases before us was committed the only sentence which it was open to the court to impose, as judges constantly said when sentencing for murder, was imprisonment for life. If that was the penalty "applicable" at that time, then no disposition since then has brought about any increase in it.[77]

[62] Lord Bingham of Cornhill did not find it necessary to express a concluded view on breach of article 7 but such indications as he gave suggest that his position would have been more aligned with that of Lord Hope than with Lord Rodger.

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75 At para 85.
76 At para 109.
77 At paras 109-110.

Uttley

[63] Some four months later a similar question reached the House of Lords in *R (Uttley) v Secretary of State for the Home Department*[78] in which Lord Rodger, Baroness Hale and Lord Carswell sat with Lord Steyn and Lord Phillips of Worth Matravers. The issue was whether a legislative change by which conditions of release were imposed on long term prisoners upon their release after serving two-thirds of their sentence constituted a heavier penalty. Mr Uttley had committed rapes and other indecencies in or before 1983, when the maximum sentence for rape was life imprisonment, but was not convicted and sentenced for his crimes until 1995, after the legislative change, when he was given a total sentence of 12 years imprisonment. This was a cumulative sentence of 11 years for the rapes and one year for distributing an indecent photograph of a child, for which the maximum sentence at both dates was three years imprisonment.

[64] Lord Phillips pointed out that had Mr Uttley been sentenced to 12 years imprisonment under the old regime he would, subject to good behaviour, have been released on remission after serving two-thirds of his sentence, which would then have expired. Under the new regime he was released at the same time but on licence for a further year. He was under supervision and there were certain restrictions on his freedom. He was also at risk of recall during the one year period should he fail to observe the conditions. As well, if he committed a further imprisonable offence at any time before the 12 year term expired, the court dealing with that offence would be entitled to add all or part of the outstanding period of his 12 year sentence to any new sentence imposed.

[65] Lord Phillips said that he found it unnecessary to decide whether a sentence of 12 years imprisonment under the new regime constituted a heavier penalty than a 12 year sentence under the old regime. He referred to a *Practice Statement (Crime: Sentencing)*,[79] issued by the Lord Chief Justice when the amending legislation came into force, requiring sentencing judges to have regard to the actual period likely to be served and to the risk of offenders serving substantially longer under the new regime.

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[78] [2004] 1 WLR 2278.
[79] [1992] 1 WLR 948.

Lord Phillips considered that it was not material to the issue before the House whether or not, in the case of Mr Uttley, the trial Judge had actually reduced a sentence in order to reflect the extent to which the release conditions were more onerous. The important question, he said, was whether it was open to him to do so. But his Lordship considered that the point determinative of the appeal against Mr Uttley was the meaning of "applicable" in article 7(1). He quoted the following passage from a decision of European Court of Human Rights in *Coëme v Belgium* which had not been cited to the Privy Council in *Flynn*:

> The court must therefore verify that at the time when an accused person performed the act which lead to his being prosecuted and convicted there was in force a legal provision which made that punishable, and that the punishment imposed did not exceed the limits fixed by that provision.[80]

[66] Lord Phillips said that this lent strong support to the opinions as to the meaning of "applicable" expressed by Lord Rodger and Lord Carswell in *Flynn*. It followed that article 7(1) would only be infringed if a sentence was imposed on a defendant which constituted a heavier penalty than that which *could* have been imposed on the defendant under the law in force at the time that his offence was committed. He added, however, that if statutory changes were made to the release regime of those serving mandatory life sentences those changes might affect the severity of the sentence that the law required. But that was not this case. The maximum sentence which could be imposed for rape at the time Mr Uttley committed the rapes for which he was convicted was life imprisonment. That was the "applicable" penalty for the purposes of article 7(1). The sentence of 12 years imprisonment would seem, manifestly, a less heavy penalty than life imprisonment.

[67] Later in his speech Lord Phillips commented that the remission regime is an integral feature of the sentence of imprisonment and that in considering how heavy a penalty had been imposed it was necessary to consider the overall effect of the sentence. A sentence of 12 years imprisonment, with release on licence after serving two-thirds, was a less heavy penalty than a sentence of 12 years imprisonment, all of which had to be served. But he immediately returned to the point that he had been making earlier:

> The sentence of 12 years imprisonment, with release on licence after serving 8 years, imposed on the respondent under the new regime, was a less heavy penalty than a sentence of 15 years, with unconditional release after ten years, which could have been imposed on him under the old regime, and manifestly less severe than the sentence of life imprisonment which could have been imposed on him under that regime.[81]

[68] Lord Carswell adhered to the views he had expressed in *Flynn*. He concluded:

> The maximum sentence for rape, the most serious of the offences committed by the respondent, was imprisonment for life both before and after 1983 and so remains. A court sentencing the respondent before 1983 could if it thought fit have imposed imprisonment for life or for a term very much longer than 12 years. It is in my opinion impossible to regard a sentence of 12 years, even with the new element of a licence, as a heavier penalty than that which could have been imposed at the time when the offence was committed.[82]

[69] Lord Rodger agreed with both of these speeches and added some observations of his own. He pointed out that in 1983 the court could have imposed a heavier sentence that it did on each count – life imprisonment for the rapes and three years, rather than the one year actually imposed, for the indecent photographs of a child.[83] He said that, for the purposes of article 7(1), the proper comparison was between the penalties which the court imposed for the offences in 1995 and the penalties which the legislature prescribed for those offences when they were committed around 1983.[84] The cumulative penalty of 12 years which the court imposed was not heavier than the maximum sentence which the law would have permitted it to pass for the same offences at the time they were committed. Accordingly, Lord Rodger said, there was no breach of article 7(1). He interpreted "applicable" as referring to the penalties which the law authorised a court to impose at the time of the offences. He added that the purpose of article 7(1) was not to ensure that the offender was punished in exactly the same way as he would have been at the time of the offence but to ensure that he was not punished more heavily than the relevant law passed by the legislature would have permitted at that time:

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80 Reports of Judgments and Decisions 2000 – VII, p 75 at para 145.
81 At para 28.
82 At para 65.
83 At para 34.
84 At para 38.

> So long as the court keeps within the range laid down by the legislature at the time of the offence, it can choose the sentence which it considers most appropriate. The principle of legality is respected.[85]

In the case of Mr Uttley, there had been no change in the relevant penalties which the law permitted a court to impose. In referring to "relevant penalties" Lord Rodger was including the maximum three year penalty for the lesser offending.[86]

[70] Lord Rodger's speech concludes:

> The very worst that could have happened to him under the 1991 Act was that he would have required to serve the whole of his 12 year sentence in gaol. Happily for him, that has not in fact happened. But, even if it had, he would still have spent only 12 years in prison - which is well within the limits of the penalty that was allowed by law for the three rapes and many other offences at the time when he committed them. There is no violation of article 7(1).[87]

[71] Baroness Hale agreed that there had not been a heavier penalty. She gave her explanation of the apparent incompatibility of this conclusion with her opinion in *Flynn*. She said that the court did not have to make a comparison between the sentence the offender would have received if sentenced shortly after he committed the offence and the sentence the court was now minded to impose. She too referred with approval to the passage quoted above from *Coëme v Belgium*. She added that article 7 was not limited to sentences prescribed by the law which created the offence. She said it could also apply to "additional penalties applied to that offence by other legislation".[88] She referred to *Welch v United Kingdom*[89] in which the European Court had found a breach of article 7(1) where proceeds of crime confiscation legislation had been applied retrospectively. Baroness Hale said that the maximum duration of the sentence of imprisonment might not be the only factor. There might be changes in the essential quality or character of the sentence which made it unquestionably more severe. Her Ladyship gave as examples a sentence of hard labour, the automatic conversion of a sentence of imprisonment into a sentence of transportation and the replacement for juvenile offenders of committal to the care

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85 At para 42.

86 The calculation of the release date at two-thirds was made on the aggregate of the sentences of 11 years and one year.

87 At para 43.

88 At para 46.

89 (1995) 20 EHRR 247.

of a local authority with determinate prison detention. The present case, Baroness Hale said, was concerned with a sentence of imprisonment which could have been of any duration up to life imprisonment:

> I am persuaded that a change in the arrangements for determining how much of that time is actually spent in prison and how much in the community does not make the penalty heavier than it previously was. A longer term of imprisonment was always available.[90]

[72] Lord Steyn merely expressed his agreement with opinions of Lord Phillips, Lord Rodger and Lord Carswell.

North American authorities

[73] The Canadian case law does not take a distinctly different position. The decision of the Ontario Court of Appeal in *R v Logan*[91] involved an increase in the non-parole period specified by a statute for a life sentence. A provision prescribing a maximum period of 20 years was changed to prescribe a fixed period of 25 years. Application of that increase in respect of an earlier offence was held to be inconsistent with a Charter provision[92] which gives a person charged with an offence the right to the benefit of the lesser punishment where the punishment has been varied between the commission of the offence and sentencing. It is at least arguable that if such a change were to occur in this country there would be the same inconsistency with s 25(g) in the case of a prior offender being sentenced after the change.

[74] Other Canadian cases on s 11(i) more directly in point are all at first instance and reveal an even balance on whether an increase in the period to be served in prison results in a heavier punishment.[93]

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90 At para 48.

91 (1986) 51 CR (3d) 326.

92 Section 11(i) of the Canadian Charter of Rights and Freedoms.

93 *R v Lambert* (1994) 93 CCC (3d) 88; *Berenstein v Canada (National Parole Board)* (1996) 111 FTR 231; *Abel v Edmonton Institution for Women (Director)* (2000) 149 CCC (3d) 401 and *Caruana v Bath Institution* (2002) 18 CR (5th) 285.

[75] The constitution of the United States contains a prohibition against any "ex post facto law".[94] This forbids the enactment of any law which imposes a punishment for an act which was not punishable at the time it was committed or imposes additional punishment to that then prescribed.[95] A provision which changes the quantum of punishment can therefore be constitutionally applied to an offender in the United States only if it is not to his or her detriment.[96]

[76] The concept of punishment appears to bear a broader meaning in North American jurisprudence than the European courts have given to penalty and, of course, the constitutional position in those jurisdictions is not comparable with that in New Zealand.

Conclusions

[77] Section 6 of the Bill of Rights requires that whenever an enactment can be given a meaning which is consistent with the rights and freedoms in the Bill of Rights, in this instance in s 25(g), that meaning is to be preferred to any other meaning. But s 86(2) and the other relevant provisions of the Parole Act exhibit, in my view, a legislative intention too plain to be readily amenable to any reading which would assist Mr Morgan, such as might be able to be given under the constitutional and charter provisions in North America where the striking down or overriding of legislation by the courts is permitted. This observation assumes a possible inconsistency between s 25(g) and s 86(2). But that is not so. The natural reading of s 25(g), and the greater weight of authority on the convention provisions which are reflected in it, is that "penalty" means the maximum penalty which a court could have imposed under the previous sentencing regime. Whatever concerns some of the Law Lords may have had in *Flynn*, a fair reading of the speeches in *Uttley* is that, because a greater determinate or indeterminate penalty had been available under the former regime, the sentence Mr Uttley received was not a "heavier penalty." If Mr Uttley previously could not have been sentenced to more than 12 years with

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94 U.S. Const. art I, §9, cl.3 and art I, §10, cl.1.
95 *Cummings v Missouri* 4 Wall 277, 325-326 (1867), cited in *Weaver v Graham* 450 US 24 (1981).
96 *Weaver v Graham* 450 US 24 (1981).

unconditional release after eight years he would have received a heavier sentence when release conditions were imposed upon him. But in fact he could at the time of his offending have received a much heavier penalty – a 15 year term with release only after 10 years is the example given by Lord Phillips.

[78] The decision in *Uttley* derives support from the European case law mentioned by their Lordships and appears consistent with further such cases to which we have been referred.[97] The authority to which Mr Morgan especially drew our attention, *Welch v United Kingdom*,[98] is readily distinguishable for it involved the retrospective application of an entirely new form of penalty, namely confiscation of assets derived from the criminal offending. It was in the same category as the examples of heavier penalties given by Baroness Hale.

[79] I can see no possible distinction between the convention provisions and s 25(g) based on the word "applicable" which appears in the former. It seems to me that s 25(g) and s 6 are both referring to the maximum penalty which is applicable for the particular offence. It may be possible to read the expression "lesser penalty" as encompassing the effective maximum penalty and thereby to factor in the release date previously applicable for someone who received the maximum penalty. I prefer, however, not to express a concluded position on that matter as it is unnecessary for the decision in this case. If Mr Morgan is required to serve the entire term of three years in prison, in accordance with s 86(2), his sentence of three years will see him released in a lesser period than the effective maximum of four years eight months which could have applied for the offence he committed prior to the enactment of the Sentencing Act and the Parole Act. So whether "penalty" means in his case seven years or four years eight months is of no moment to him. The right guaranteed to him under s 25(g), and confirmed in s 6, to the benefit of the lesser penalty has not been infringed.

[80] I would therefore grant leave to appeal but dismiss the appeal.

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97 *Hogben v United Kingdom* (1986) 46 DR 231; *Grava v Italie,* Requete No 43522/98, 10 July 2003.

98 (1995) 20 EHRR 247.

TIPPING J

[81] The appellant, Mr Morgan, is serving a sentence of three years imprisonment for cultivating cannabis. This offence was committed in September 2001. His sentence, which has an effective commencement date of 20 November 2002, was imposed on 14 January 2003, after the coming into force of the Sentencing Act 2002 and the Parole Act 2002 on 30 June 2002. The warrant signed by the sentencing Judge authorised Mr Morgan's detention in a penal institution for three years, ie until 19 November 2005. There is nothing in the Parole Act which gives Mr Morgan any right to be released earlier than the expiry of his three year term. Hence his present detention is prima facie lawful in terms of the warrant upon which the respondent, the Superintendent of Rimutaka Prison, relies.

[82] Mr Morgan nevertheless seeks to demonstrate that his continued detention is unlawful. He contends that he now has, and from 19 November 2004 has had, a right to immediate release. He invokes the right contained in s 6(1) of the Sentencing Act, claiming that his continued detention constitutes a breach of that right. Section 6 provides:

> **6 Penal enactments not to have retrospective effect to disadvantage of offender**
>
> (1) An offender has the right, if convicted of an offence in respect of which the penalty has been varied between the commission of the offence and sentencing, to the benefit of the lesser penalty.
>
> (2) Subsection (1) applies despite any other enactment or rule of law.

[83] Mr Morgan's argument is based on the proposition that had he been sentenced under the legislative regime which prevailed at the time he committed the offence in September 2001, he would have been entitled to release after having served two-thirds of his sentence, ie on 19 November 2004, at which point he would have served two out of the three years imposed. Mr Morgan submits that as a consequence of the new legislative regime introduced by the Parole Act, the penalty imposed upon him is harsher than that which he would have suffered under the old regime. The three year sentence, had it been imposed under the old regime, would effectively have amounted to a sentence of two years imprisonment whereas, under

the new regime, three years means three years. This is because he has no right to earlier release, only a right to be considered for parole which has so far not borne fruit. It is of the essence of Mr Morgan's argument that the word "penalty" in s 6(1) of the Sentencing Act has a meaning consistent with the conclusion for which he contends.

[84] Although his argument was attractively and succinctly presented, I find myself unable to accept Mr Morgan's contention that his continued detention is unlawful. The point turns entirely on the correct construction of s 6(1). Mr Morgan accepts that unless s 6(1) is construed as he suggests, his application for a writ of habeas corpus must fail. He also quite rightly accepts that if the Parole Act and its relevant provisions are viewed in isolation, they clearly demonstrate an intention on Parliament's part to have persons like himself dealt with under the new regime, pursuant to which he has no right to release prior to the expiry of his three year sentence. Of that there can be no doubt. The key question is therefore whether Mr Morgan's case comes within s 6(1) and, if so, with what consequence.

[85] The substance of s 6(1) of the Sentencing Act is identical to that of s 25(g) of the New Zealand Bill of Rights Act 1990. Sections 6(1) and 25(g) are modelled on, albeit they are not in exactly the same terms as, article 7 of the European Convention on Human Rights and article 15 of the International Covenant on Civil and Political Rights. The right to the benefit of the lesser penalty which s 6(1) affords, is premised on there being a variation in the penalty for an offence between commission and sentence. The expression "an offence" clearly means an offence of the generic kind rather than the offence which the offender has actually committed. Penalties for individual offences actually committed are never individually varied between commission and sentence. To do that would be in the nature of a bill of attainder which would be constitutionally quite improper.

[86] Section 6(1) is referring to a variation in the penalty for the kind of offending in question, not to an individual manifestation of that kind of offending. The reference to an offender having the right to the benefit of the "lesser" penalty requires a comparison between the pre-variation penalty for the kind of offending in question and the post-variation penalty for that kind of offending. In the present case

the question is whether there has been a variation in the penalty for cultivating cannabis between the date when Mr Morgan committed his offence and the date on which he was sentenced for it.

[87] The normal and natural meaning of the composite expression "*an* offence in respect of which *the* penalty has been varied" (my emphasis) conveys the idea that between the commission of the offence and sentencing for it, Parliament has varied the maximum penalty to which the offender is liable for that kind of offence. The section is directed at individual kinds of offending in respect of which there has been a change in the maximum penalty that can be imposed. That change may increase or reduce the severity of what can be imposed. In either event, if the change occurs between commission and sentence, the offender is entitled to be dealt with on the basis of the lesser maximum.

[88] This interpretation is consistent with what was provided for in the immediate predecessor to s 6(1), namely s 4 of the Criminal Justice Act 1985. That section was in much more detailed terms and referred repeatedly to maximum terms of imprisonment and maximum fines. The much more spartan terminology of s 6(1) of the Sentencing Act seems to have been adopted in order to harmonise the language of that section with the way in which s 25(g) of the Bill of Rights was expressed. There is nothing either in the legislative history of s 6(1) or elsewhere to suggest that its substance was intended to differ from s 4 of the Criminal Justice Act 1985. It is interesting to note that the headings to each section are in identical terms, viz. penal enactments not to have retrospective effect to disadvantage of offender.

[89] My reading of s 6(1) of the Sentencing Act and my view that it was not intended to be substantively different from the terms of s 4 of the Criminal Justice Act, is consistent with, and indeed supported by, the jurisprudence of the European Court of Human Rights and with the preponderance of the views expressed in the Privy Council and the House of Lords in the cases of *Flynn v Her Majesty's Advocate*[99] and *R (Uttley) v Secretary of State for the Home Department*[100] which Blanchard J has reviewed in detail.

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[99] 2004 SCCR 281, PC.
[100] [2004] 1 WLR 2278.

[90] I refer first to the way the European Court has approached article 7, the relevant sentence of which provides:

> Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

[91] Emphasis was placed in the three European decisions I am about to mention and in *Uttley* on the word "applicable". Although that word does not appear in our ss 6(1) and 25(g), it seems to me that it is clearly implicit in them. The European decisions all clearly support, either expressly or implicitly, the proposition that article 7 is referring to changes in the maximum sentence available for the offending in question.

[92] The first of the European cases is *Hogben v United Kingdom*,[101] the second is *Coëme v Belgium*,[102] and the third is *Affaire Grava c. Italie*.[103] In *Coëme*'s case appears the following passage which was heavily relied on in *Uttley*:

> The Court must therefore verify that at the time when an accused person performed the act which led to his being prosecuted and convicted there was in force a legal provision which made that act punishable, and that the punishment imposed did not exceed the limits fixed by that provision.[104]

[93] In *Grava*'s case, of which we were provided with only the French text, the European Court said of the penalty of which *Grava* was complaining:

> It is clear that this penalty did not exceed the legal maximum which could be imposed for the offence of which the claimant was accused at the time at which it was committed … . Accordingly no issues arise with respect to article 7 of the Convention.
>
> [Il est clair que cette peine n'a pas dépassé le maximum légal pouvant être infligé pour l'infraction dont le requérant était accusé au moment où celle-ci avait été commise … . Dès lors, aucun problème sous l'angle de l'article 7 de la Convention ne se pose à cet égard.][105]

[94] In *Flynn* the effect of the variation was to defer consideration of eligibility for parole in the case of life sentences for murder. Lord Hope, agreeing with

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101 (1986) 46 DR 231.
102 Reports of Judgments and Decisions 2000 – VII, 75 (ECHR).
103 No. 43522/98, 10 October 2003, (ECHR).
104 At para 145.
105 At para 50.

Lady Hale,[106] said he did not wish to cast doubt on the validity of changes after the offence was committed to guidelines as to how sentences may be arrived at "within the maximum sentence that was applicable to the offence".[107] His Lordship must have been contemplating changes having the practical effect of increasing the sentence that would otherwise have been imposed at the date of commission. Had that not been so, there would have been no potential for article 7 to be breached.

[95] But, with respect, I consider that this statement, and the similar statement of Lady Hale, tend to undermine the conclusion of both Judges that parole and release date changes introduced after commission can be invalid as representing a harsher penalty. It is difficult to see a valid basis for distinguishing a guideline increase from a release date or parole increase which will similarly bear more heavily on an offender. If a guideline increase does not breach article 7, I would have thought that, a fortiori, an increase resulting from different release or parole rules would not constitute a breach of article 7. The latter case is *a fortiori* because a guideline increase is unarguably part of the penalty. It is imposed directly by the sentencing Judge. There is no logical basis for saying that a guideline increase is valid if it does not result in a sentence which exceeds the commission date maximum, but a parole or release date increase is invalid when it does not exceed that maximum. Nor should it logically matter whether the increase comes at the front end or the back end of the sentence.

[96] In *Uttley* all their Lordships saw article 7 as breached only if the person alleging the breach was required to serve more than the maximum that could have been imposed when the offence was committed. They all cited and adopted the passage from *Coëme v Belgium* which I have noted earlier.[108]

[97] In his article entitled *Nulla Poena Sine Lege in Comparative Perspective: Retrospectivity under the ECHR and US Constitution*,[109] Simon Attrill criticises the decision of their Lordships in *Uttley*. Specifically he criticises their reliance on

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106 At para 100.
107 At para 45.
108 See Lord Phillips at para 20, Lord Rodger at para 41, Lady Hale at para 45, Lord Carswell at para 49, and Lord Steyn (implicitly, by agreeing with other speeches) at para 1.
109 [2005] Public Law 107.

Coëme v Belgium. He seeks to show that when the European Court of Human Rights used the expression "exceed the limits" [fixed by the offence date maximum] the Court should be understood in context to be referring to the limitation period for bringing a prosecution as it was that which was in issue in *Coëme*. But that construction of the crucial passage in *Coëme* is very difficult in the light of the fact that the Court was saying that the "punishment" should not exceed the relevant limits. While that observation may strictly have been obiter dictum in *Coëme*, it was expressly adopted in *Uttley* and in that case was undoubtedly part of the ratio.

[98] The line of reasoning which seems to me to be the correct way of dealing with the present case is such that I do not have to consider the appropriateness of the distinction between a penalty and its administration. Except to the extent of the concept of effective penalty or sentence which I discuss below, I would prefer to leave the proper compass of the sentence/administration distinction for a case in which the point matters.

[99] Mr Morgan's suggested construction of s 6(1) is inconsistent with the preponderance of United Kingdom and European authority. Furthermore, the construction of s 6(1) which he propounds would mean that Parliament has created an obvious clash between what is expressly provided for in the Parole Act and what would then be mandated by s 6(1). Parliament can hardly have meant to create such a clash.[110] Nor do I consider Parliament can have intended to leave a gap in the Parole Act which s 6(1) was designed to fill. There is no room for any gap because the Parole Act expressly says that it applies to everyone sentenced after its commencement. There are stated exceptions but Mr Morgan accepts that he does not come within any of them. The drafting approach necessarily involves the whole field being covered, with no capacity for any gap.

[100] The Sentencing Act and the Parole Act were introduced into Parliament as one Bill and separated only immediately before enactment. The meaning which I would, in any event, give to s 6(1) is therefore strongly supported by the

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[110] See *Flynn* per Lord Bingham at para 7.

unlikelihood of Parliament having intended a meaning which would frustrate, pro tanto, the clear terms of the Parole Act.

[101] Human rights are important. They must be taken seriously but not to the point of adopting a construction which would demonstrably frustrate Parliament's clear intent. Section 6 of the Bill of Rights does not require or justify such an outcome. This conclusion is consistent with the view I took in *R v Pora*.[111] In that case the clash between the legislative provisions was unavoidable. Here a clash arises only if one gives to s 6(1) of the Sentencing Act a construction which Parliament cannot have intended.

[102] I note that the authors of the relevant chapter in *The New Zealand Bill of Rights*, when discussing aspects of s 25(g) of the Bill of Rights, say:

> On the other hand, simply because a sentencing law is applied retrospectively does not mean that it will always implicate section 25(g) of the Bill of Rights. It must be the case that the retrospective application of the law subjects the offender to a greater penalty than would otherwise have been possible at the time he or she committed the offence. [112]

The reference in this passage to a greater penalty than would have been "possible" clearly denotes that the authors rightly regard the concept of penalty for s 25(g) purposes, and hence by necessary implication for s 6(1) purposes, as signifying the penalty open to the Court, ie the maximum penalty to which the offender was liable for the offence in question at the date of its commission.

[103] I would not, however, confine my maximum penalty approach to what might be called the nominal maximum provided for the offence. The European jurisprudence requires rights afforded by the convention to be interpreted and applied in a manner which renders them "practical and effective" rather than "theoretical and illusory": see per Lord Hope in *Flynn*[113] and *Stafford v United Kingdom*.[114]

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111 [2001] 2 NZLR 37.
112 Rishworth, Huscroft, Optican and Mahoney, *The New Zealand Bill of Rights*, (2003), 710, n265.
113 At para 44.
114 (2002) 35 EHRR 1121, 1143 at para 78.

[104] In practical terms the nominal maximum of seven years imprisonment which applied to the offence of cultivating cannabis at the time Mr Morgan offended was not what I would call the effective maximum. That maximum was two-thirds of seven years. This is because a person sentenced to seven years imprisonment for cultivating cannabis on the day Mr Morgan committed the offence would have had a final release date pursuant to s 90 of the Criminal Justice Act on the expiry of two-thirds of the sentence. The effect of s 90, subject to presently immaterial exceptions, was that a person sentenced to seven years imprisonment for cultivating cannabis had to be released after serving four years eight months of the sentence. If the exceptions applied, the effective maximum would have to be modified accordingly.

[105] An offender like Mr Morgan, to whom the exceptions do not apply, was absolutely entitled to release on reaching the two-thirds date. There was nothing discretionary about it. Section 90 represented a mandatory legislative modification of the nominal maximum. There would have been no capacity to require an offender serving a sentence of imprisonment for cultivating cannabis to serve the full term under s 107A of the Criminal Justice Act because cultivating cannabis was not a specified offence for the purposes of that section.

[106] In view of the need to construe provisions such as s 6(1) of the Sentencing Act in a practical rather than a theoretical way, I consider that had Mr Morgan been sentenced to more than four years eight months imprisonment he would not have received the benefit of the lesser penalty which applied at the date he committed the offence because the maximum penalty at that time was effectively four years eight months.

[107] I emphasise that this approach is based on the legislatively prescribed non-discretionary right to release after two-thirds of the sentence that applied when Mr Morgan committed the offence. As a result of applying the Criminal Justice Act release provisions to the maximum penalty provided for in the Misuse of Drugs Act 1975, Parliament effectively varied the maximum which any person could be required to serve for cultivating cannabis, absent recall, from seven years to four years eight months. It would, in this situation, be artificial and contrary to

Convention jurisprudence to apply the maximum penalty approach prescribed by s 6(1) on the basis of the nominal maximum. With this modification I construe the reference to penalty in s 6(1) of the Sentencing Act as a reference to the maximum penalty to which an offender was liable at the time of committing the offence. A sentence of three years imprisonment was within the effective maximum for cultivating cannabis at the time Mr Morgan committed the offence. There has therefore been no breach of his s 6(1) right. I would therefore grant leave to appeal but dismiss the appeal itself.

HENRY J

[108] This appeal turns on the interpretation of s 6 of the Sentencing Act 2002, which provides:

> **6. Penal enactments not to have retrospective effect to disadvantage of offender**
>
> (1) An offender has the right, if convicted of an offence in respect of which the penalty has been varied between the commission of the offence and sentencing, to the benefit of the lesser penalty.
>
> (2) Subsection (1) applies despite any other enactment or rule of law.

[109] Mr Morgan is serving a sentence of three years imprisonment imposed on a conviction for cultivating cannabis. When he was sentenced on 14 January 2003 the Parole Act 2002 was in force. His offence was committed prior to that Act's enactment. It is beyond question the Act applies in its terms to Mr Morgan as being an offender subject to a sentence of imprisonment.[115] His sentence expires on the date when he has served the full term of his sentence.[116] That date is also his release date.[117] Mr Morgan's complaint is that under the Criminal Justice Act 1985 regime, which was in force at the time he committed the offence, s 90(1)(b) dictated his entitlement to "final release" after serving two-thirds of his sentence. Section 90(1)(b) entitled an offender to release on conditions, both standard and discretionary, with a liability of possible recall.

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[115] Section 8(1) Parole Act 2002.
[116] Section 82 Parole Act 2002.
[117] Section 86(2) Parole Act 2002.

[110] The argument is that the repeal of s 90(1)(b) of the Criminal Justice Act and the enactment of s 86(2) of the Parole Act have increased the penalty for the offence of cultivating cannabis by removing the release provisions of the former. It is argued that by virtue of s 6 of the Sentencing Act, Mr Morgan is entitled to the benefit of the s 90(1)(b) release provisions. In my view the argument is unsound in its conception.

[111] Section 6 is in identical terms to s 25(g) of the Bill of Rights Act 1990. The forerunner to s 6 was the 1980 amendment to the Criminal Justice Act 1954. That provision was in similar terms to s 4 of the 1985 Act, and was introduced to give effect to article 15.1 of the International Covenant on Civil and Political Rights. Article 15.1 states:

> 1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.

Article 7.1 of the European Convention on Human Rights is expressed in similar terms, and provides:

> No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

[112] There is nothing to suggest that s 6 was in any way intended to effect a change to the previous law. Although in different terms to its predecessor, s 6 expresses, in a simpler way consistent with present drafting practice and with the International Covenant, the substance of the earlier Criminal Justice Act provisions. The meaning of s 6 is clear. It requires determination of the penalty for the offence in question as at the relevant dates, and the application of whichever is the lesser. The penalty thus identified becomes the penalty to which the offender is liable. Section 6 is not concerned with the exercise of any sentencing discretion, but with the penalty provided by law for the offence. That penalty can only be the prescribed maximum. It is impossible in my view to read the words of the section otherwise. The discretion of the sentencer to impose a lesser term of imprisonment is given by

s 81, and there are further discretionary provisions ranging from discharge up to the prescribed maximum. Those have nothing to do with s 6. The details of an individual offender's particular offending are irrelevant to the enquiry, as is the fact here that Mr Morgan's offending would not have attracted seven years imprisonment.

[113] It is fallacious in my opinion to contend that the earlier penalty for cultivating cannabis was detention for two-thirds of the sentence of imprisonment imposed at the discretion of the sentencer, for that is the effect of what is propounded. That interpretation fails, as required by s 6, to identify the penalty which the generic offence carries. The penalty was that which could lawfully be imposed - here assuming there was a variation, seven years with early release after serving four years eight months. That is the only lesser penalty for the offence of cannabis cultivation which could benefit Mr Morgan by way of fixing his potential liability. Put simply, the argument is that the penalty was varied from detention for four years eight months to detention for seven years. Three years detention is within the limit of the potential liability (the penalty) applicable to the offence and therefore not unlawful. Accordingly s 6 cannot assist.

[114] The careful analyses of both Blanchard J and Tipping J, with which I respectfully agree but do not attempt to repeat, demonstrate that this interpretation accords with that given to article 7 by the House of Lords in *R (Uttley) v Secretary of State for the Home Department,*[118] the Privy Council in *Flynn v Her Majesty's Advocate*,[119] and the European Court of Human Rights in *Coëme v Belgium*.[120] As Blanchard J notes, there is no persuasive authority to the contrary. It is also consistent with the Court of Appeal's approach in *R v Poumako*.[121] The interpretation also reflects the substance of s 6 and its predecessors. The mischief, identified as such when the 1980 amendment was introduced, was to remove what was seen as unfair and unjust, namely subjecting an offender to a greater penalty than could have been imposed when the offence was committed. But a penalty within the earlier prescribed limit does not offend that principle.

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118 [2004] 1 WLR 2278.
119 2004 SCCR 281, PC.
120 Reports of Judgments and Decisions 2000-VII, 75 (ECHC).
121 [2000] 2 NZLR 695.

[115] I would however leave open the question whether the enactment of s 86(2) of the Parole Act and the repeal of s 90(1)(b) of the 1985 Act can be said to have varied the penalty within the meaning of s 6 for offences carrying a finite sentence of imprisonment exceeding two years. The following points would seem to me to require consideration:

1. Section 6 is directed to the imposition of a penalty, essentially the power of the sentencer, although statutorily imposed consequences such as forfeiture of property and disqualification orders may also be penal in effect. Generally those too will be imposed by the sentencer, even if mandatory. The power of the sentencer is not here affected.

2. Parole, remission and early release historically have been considered matters of administration or management – how the sentence imposed by the Court is, within its limits, to be served. Changes of policy in matters of management affecting how a sentence is to be served are always likely.

3. It is a principle of sentencing policy that the sentencer does not take into account such matters other than for exceptional reasons not presently relevant. Arguably the inference is that they are not regarded as penal for sentencing purposes.

4. The right to release given by s 90(1)(b) was far from unfettered. It was conditional and subject to recall. Importantly, although described in argument as mandatory, s 90(1) was subject to a number of statutory provisions, which had the potential to override the right to release. The problem that arises is how to determine what is the maximum "penalty" for a particular offence for s 6 purposes, if early release provisions outside the province of the sentencer are taken into account. To define it as two-thirds of the maximum term available to the sentencer may be too simplistic, because it ignores the qualifications which apply to release. If early release is to be taken into account, it may also be necessary to take into account and apply the provisions of the earlier legislation governing release, otherwise the offender is not being accorded the true benefit of the lesser penalty.

5. It may not be logical to treat the variation of one aspect, such as statutory eligibility for or the criteria to be applied in considering discretionary release (parole) as not varying the penalty when that could well have adverse effects on a prisoner, but another such as statutory early release on terms which may include discretionary conditions, as a variation.

7. Parole, remission and early release will generally form a composite package, with a mixture of purposes such as rehabilitation, prevention of further offending and protection of the public. The subjective assessment of whether one particular regime is a greater or lesser "penalty" than another may result in differing but legitimately held views.

[116] It is unnecessary for present purposes to review the case law on this point, which in some respects could be said to be conflicting.

[117] There is the further question whether s 6 could apply to grant the relief sought in any event. Assuming an increase in penalty was effected by the legislation**,** s 6 may well not apply even in the circumstances where the "lesser" penalty was exceeded – for example if Mr Morgan had been sentenced to six years imprisonment.

[118] It is important to identify the principle Mr Morgan effectively seeks to apply, which must be one of general application to all offenders who committed an offence prior to the commencement date, but who were sentenced to long term imprisonment after the commencement date. It has not been articulated, but at its narrowest it must be to the effect that if mandatory early release provisions were in force at the time the offence was committed, the offender is entitled to the benefit, if any, of those provisions. A comparison would need to be made between the regime of the Parole Act and the particular earlier legislation to identify and apply the lesser penalty. It is difficult to see that as the legislative intent, particularly when historical offending is frequently before the Courts. In that respect it can be noted that relevant changes of significance were made in 1975, 1985 and 1993.

[119] More importantly, to apply earlier provisions would be in contravention of the clear directions of the Parole Act. To treat this class of offender as subject to the "pre-cd" regime is to rewrite the Parole Act, not just to make a choice of which of

two inconsistent sentencing provisions should prevail where there are no consequential complications as was the case in *R v Pora*.[122] Nor does it reflect the rationale behind the argument, which is to invoke the 1985 Act. There must be a strong argument that even if a conflict is seen between s 6 of the Sentencing Act and ss 8 and 86(2) of the Parole Act, the latter provisions were intended to prevail, notwithstanding subs (2) of s 6. It would seem difficult to attribute any other intention to this composite legislation.

[120] I make one further observation. The reason for the distinction drawn between offenders sentenced after the commencement date and those already serving imprisonment may be that the latter group can be said to have certain accrued rights, such as dates of parole eligibility, early release, and sentence expiry already determined and recorded, which should be respected. Whether the distinction is justified may be disputable.

[121] Although I would grant leave, I would dismiss the appeal.

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[122] [2001] 2 NZLR 37.