

European Court Considers Meaning of 'Retrospective Punishment'

Kafkaris v Cyprus [2008] ECHR 21906/04 (12 February 2008)

The Grand Chamber of the European Court of Human Rights has recently considered the scope and application of art 7 of the *European Convention on Human Rights*, which provides that no person shall be subject to a 'heavier penalty than the one that was applicable at the time the criminal offence was committed'.

Facts

Mr Kafkaris was found guilty of three counts of murder by the Limassol Assize Court. Kafkaris was sentenced to mandatory 'life imprisonment' in respect of each count.

The prosecution sought clarification of the term 'life imprisonment' because of an inconsistency between the *Criminal Code*, which stated it was for the lifetime of the convicted person, and the *Regulations*, which stated it was for 20 years. The court held that the former was the case. However, upon his admission to prison, Kafkaris was given a written notice by authorities detailing the terms of his incarceration, including a conditional release date. The remission of his sentence had been assessed on the basis that it amounted to imprisonment for 20 years.

On 16 March 1998, Kafkaris applied for pardon or suspension of the remainder of his sentence so that he could care for his wife, who was suffering from leukaemia. This request was refused.

The date of his intended release was further postponed to 2 November 2002, because of an offence committed while in prison. However, he was still not released on this date.

Consequently, on 8 January 2004 he submitted a writ of *habeas corpus* to the Supreme Court challenging the lawfulness of his detention. His application was dismissed on 17 February 2004.

Kafkaris lodged a complaint with the European Court in June 2004 which was declared admissible in April 2006. In August 2006, the Chamber relinquished jurisdiction in favour of the Grand Chamber.

Decision

Article 7 provides, in part, that a heavier penalty cannot be imposed on a person than the one applicable at the time the offence is committed. The European Court considered, however, that it cannot be read in a way that outlaws the gradual clarification of the rules of criminal liability through judicial interpretation, so long as the development is consistent with the essence of the offence, and is reasonably foreseeable.

The Court further considered that an assessment of whether a penalty breaches art 7 requires consideration of its nature and purpose; its severity; its characterization under national law; procedures involved in its making and implementation; and whether it is imposed in response to a criminal offence. The Court drew a distinction drawn between a penalty and enforcement of the penalty.

At the time Kafkaris committed the offence, premeditated murder carried a sentence of life imprisonment. According to the existing Cypriot case law, this meant the biological life of the prisoner. However, at the time of his incarceration, executive and administrative authorities were operating under the premise that the penalty was tantamount to 20 years' imprisonment. The European Court concluded that at the time he was found guilty of the murders Cypriot law was insufficiently precise to enable Kafkaris to discern, even with appropriate advice, the scope of the penalty and the manner of its execution. Therefore there was a violation of art 7 in this respect.

The Court stated that the fact that Kafkaris no longer has a right to have his life sentence remitted relates to the manner of execution of the sentence, rather than the penalty imposed on him. Where the nature and purpose of a measure relates to the remission of a sentence or a change in a regime for early release, this does not form part of the penalty within the meaning of art 7. The Court considered, therefore, that there had not been a violation of art 7 of the Convention in this regard. While it is true that changes in prison legislation and the conditions of release rendered his imprisonment harsher, they cannot be construed as imposing a heavier penalty than that imposed by the trial court.

Justice Borrego Borrego offered a sharply critical dissent of the European Court's 'Ivory Tower' reasoning as regards art 7. He stated that Kafkaris is the victim of discriminatory treatment relative to all other Cypriot criminals, many of whom were also incarcerated under life sentences and who were released after 20 years. He claims that the reason for Kafkaris's continued incarceration is his inability or unwillingness to identify the powerful citizen who masterminded the murder, who remains at large.

Justices Loucaides and Jočienė also dissented on the issue of retrospective imposition of a heavier penalty. They note that the philosophy of art 7 is geared toward preventing abuses by the State, and its basic scope and objective is to prohibit the retrospective effect of criminal legislation such as that witnessed in the case of Kafkaris.

Relevance to the Victorian *Charter*

The terms of s 27(1) and (1) of the *Charter* are very similar to those of art 7(1) of the *European Convention*. As such, this case proves illustrative of the type of complex factual matrix that would bring the *Charter* into effect. Section 27(3) of the *Charter* goes beyond the provisions of art 7 and provides greater clarity than the Convention in situations where a penalty is reduced *after* a person has committed an offence, but *before* sentencing has taken place.

It should be noted that recent press reports indicate that Kafkaris is seeking to take the case to the UN Human Rights Committee, so further clarification of the principles in this case may emerge in the future.

The case is available at:

[http://cmiskp.echr.coe.int/tkp197/viewhbkm.asp?sessionId=5451013&skin=hudoc-en&action=html&table=F69A27FD8FB86142BF01C1166DEA398649&key=68298&highlight=.](http://cmiskp.echr.coe.int/tkp197/viewhbkm.asp?sessionId=5451013&skin=hudoc-en&action=html&table=F69A27FD8FB86142BF01C1166DEA398649&key=68298&highlight=)

Louise Fahy is a Lawyer with DLA Phillips Fox