R v Khawaja and the Fraught Question of Rehabilitation in Terrorism Sentencing

Robert Diab[*]

In R v Khawaja, *Supreme Court of Canada addressed the question of how courts should handle the sentencing of terrorism offenders. Although it affirmed the Ontario Court of Appeal's decision to raise the sentence imposed by the trial judge, the Supreme Court took a different approach to the importance of rehabilitation as a goal in terrorism sentencing generally. The Court of Appeal found that because of terrorism's unique and serious nature, there should be very little consideration of the possibility of rehabilitation. The Supreme Court disagreed, ruling that the weight to be placed on rehabilitation in such cases should be left to trial judges and that, depending on the facts, rehabilitation could be a significant factor even in the context of very serious terror offences.*

The author reviews the history of R v Khawaja, *contrasting the Supreme Court's decision with the approach of the Ontario Court of Appeal both in* Khawaja *and in a number of other cases. He reviews the British and Australian jurisprudence drawn on by the Court of Appeal, which looks on terrorism as a distinct type of crime that calls only for an emphasis on deterrence and punishment in sentencing, and argues that the Supreme Court's decision indicates a significantly different attitude to the issue.* Khawaja *allows for rehabilitation to potentially factor into the sentencing of terrorism offenders. The author further considers this decision though the lens Antony Duff's theory of punishment, which suggests that the concepts of moral agency, equality and the possibility of individual redemption are foundational to a sense of political community. He argues that the Supreme Court's decision constitutes an implicit affirmation of Duff's view on the importance of the goal of rehabilitation even for the worst offenders.*

* Assistant Professor, Faculty of Law, Thompson Rivers University. The author would like to thank the anonymous referees for their helpful comments and recommendations.

Introduction

Courts in recent years have grappled with the role that rehabilitation should play in sentencing an offender for involvement in terrorism. Until now the question has been confined to the case law, garnering little public notice or debate. But recent events suggest that it may become a matter of wider concern. Parliament has created the new offence of attempting to leave Canada to join a terror group abroad, thus criminalizing conduct at earlier stages of terror-related activity.[1] Police have also charged suspects with conspiracy to bomb a VIA Rail train in the Laurentian corridor, stopping a terrorism plot at a very early stage.[2] Other terror-related prosecutions are pending. Therefore courts may soon confront the task of sentencing offenders with lesser culpability than those who have played a central role in more developed plots. The question in these cases—for the court and for a wider public—will be whether and to what degree the objective of rehabilitation should play a role in sentencing, alongside denunciation, deterrence and incapacitation.

These events and the questions to which they give rise also lend a certain timeliness to the Supreme Court of Canada's recent decision in *R v Khawaja*.[3] One of the central issues in the sentencing appeal portion of this case was what role rehabilitation should play in the sentencing of terrorism offenders generally, and whether it might play an important role in more serious cases in particular. The Court's holding on these issues marks a clear break with prevailing approaches to terror sentencing

1. *Combating Terrorism Act*, SC 2013, c 9, ss 6–8.

2. Tu Thanh Ha, Colin Freeze & Daniel Leblanc, "RCMP Arrest Two for 'al-Qaeda-supported' Plot to Bomb Via Train", *The Globe and Mail* (22 April 2013) online: The Globe and Mail <www.theglobeandmail.com>.

3. 2012 SCC 69, [2012] 3 SCR 555 [*Khawaja* (SCC)].

in earlier jurisprudence in Canada, the United Kingdom, and Australia. It also sets out a uniquely affirmative position on the role of rehabilitation in this context.

The nature of the Court's break with earlier case law is best understood in light of the framework for terrorism sentencing put in place after September 11, 2001, and the jurisprudence arising within it. In response to 9/11, the United Nations called upon member states to pass new criminal laws to counter terrorism, including laws requiring stiffer sentences.[4] Canada responded in short order by passing the *Anti-Terrorism Act*, which did not impose any particular mandatory minimum penalties but did mandate consecutive sentences for multiple offences and the possibility of life imprisonment for many offences.[5] Many other nations also passed new and stiffer anti-terrorism laws.[6] By the end of the decade, courts in Canada, the UK, Australia and other Commonwealth jurisdictions had developed a jurisprudence on terrorism sentencing in cases ranging from principal figures in very serious plots to peripheral figures with minor or tangential roles.[7] Despite the range of conduct involved, a consensus had emerged from the cases: terrorism offences were a special category of

4. *Threats to international peace and security caused by terrorist acts*, SC Res 1373, UNSCOR, 2001, S/RES/1373.

5. SC 2001, c 41. For context on the passage of the Act, see Kent Roach, *September 11: Consequences for Canada* (Montreal: McGill-Queen's University Press, 2003) [Roach, *September 11*]. For an overview of the sentencing provisions in the *Anti-terrorism Act* and early jurisprudence, see Robert Diab, "Sentencing of Terrorism Offences after 9/11: A Comparative Review of Early Case Law" in Craig Forcese & François Crépeau, eds, *Terrorism, Law and Democracy: 10 Years After 9/11* (Montreal: Canadian Institute for the Administration of Justice, 2011).

6. Kent Roach, *The 9/11 Effect: Comparative Counter-Terrorism* (New York: Cambridge University Press, 2011).

7. For Canadian cases, see *R v Khawaja* (2009), 248 CCC (3d) 233 (available on WL Can) (Ont Sup Ct) [*Khawaja* (Ont Sup Ct)], aff'd 2010 ONCA 862, 103 OR (3d) 321, [*Khawaja* (Ont CA)]; *R v Khalid*, 2009 CarswellOnt 9874 (WL Can) (Ont Sup Ct), var'd 2010 ONCA 861, 103 OR (3d) 600 [*Khalid* (Ont CA)]; *R v Amara*, 2010 ONSC 441 (available on WL Can), aff'd 2010 ONCA 858, 266 CCC (3d) 422 [*Amara* (Ont CA)]; *R v Gaya*, 2010 ONSC 434, 255 CCC (3d) 419 [*Gaya* (Ont Sup Ct)] var'd 2010 ONCA 860, 266 CCC (3d) 428 [*Gaya* (Ont CA)]; *R v Dirie*, 2009 CanLII 58598 (Ont Sup Ct); and *R v Ahmad*, 2010 ONSC 5874.

For cases from the United Kingdom, see *R v Barot* [2007] EWCA Crim 1119; *R v Ibrahim* [2008] EWCA Crim 880; *R v Sherif*, [2008] EWCA Crim 2653; and *R v Khyam* [2008] EWCA Crim 1612.

crime and called for a primary, if not exclusive, emphasis on denunciation, deterrence and incapacitation. A number of courts had also held that terrorism offences by their very nature precluded, or at least called into question, the notion that rehabilitation should play more than a minimal role in sentencing.

A crucial development in this body of case law was a set of Ontario Court of Appeal decisions in the companion cases of *Khawaja*, *Khalid*, *Gaya*, and *Amara* in 2010.[8] That court followed the path taken by appeal courts in the UK and Australia by emphasizing denunciation and asserting a minimal role for rehabilitation.[9] But while British courts had held that rehabilitation was to play "little or no role" in the *more serious* terrorism cases, the Ontario Court of Appeal sided with Australian courts in embracing the proposition that rehabilitation should play only a minor role in *any* terrorism case.[10] In its decision in *R v Khawaja*,[11] the Supreme Court of Canada marked a break with both of these approaches. While upholding the lower court's decision to raise Khawaja's sentence because of the seriousness of his conduct, the Supreme Court rejected the Ontario Court of Appeal's categorical de-emphasis on rehabilitation in sentencing for terrorism offences generally. Yet it also declined to affirm the more restricted principle from British case law that rehabilitation should play a lesser role in at least the more serious cases.

However, the Supreme Court's rationale for this unique approach remains unclear. In effect, the Court held that terror offences do not fall within a special category of crime, nor should rehabilitation be minimized in every terrorism case, because such offences "capture a wide variety of conduct"—and on this basis, the weight to be placed on rehabilitation is best left to judges case by case.[12] In less serious cases, the point of this seems

For Australian cases, see *R v Lodhi*, [2006] NSWSC 691 [*Lodhi*]; *Lodhi v R*, [2007] NSWCCA 360 [*Lodhi* (CA)]; *R v Touma*, [2008] NSWSC 1475; *R v Sharrouf*, [2009] NSWSC 1002; *R v Mulahalilovic*, [2009] NSWSC 1010; and *R v Elomar*, [2010] NSWSC 10.

8. *Khawaja* (Ont Ca), *ibid*; *Khalid* (Ont CA), *ibid; Amara* (Ont CA), *ibid*; and *Gaya* (Ont CA), *ibid*.

9. See *R v Martin*, [1999] 1 Cr App R (S) 477; *Lodhi* (CA), *supra* note 7, *R v Touma*, *supra* note 7; *R v Sharrouf*, *supra* note 7; *R v Mulahalilovic*, *supra* note 7; and *R v Elomar*, *supra* note 7.

10. See discussion below of *Lodhi* (CA) *supra* note 7; *R v Touma*, *supra* note 7; *R v Sharrouf*, *supra* note 7; and *R v Mulahalilovic*, *supra* note 7;

11. *Khawaja* (SCC), *supra* note 3.

12. *Ibid* at para 124.

clear: judges should be free to place more emphasis on rehabilitation where they can easily balance this objective with the demands of denunciation and deterrence. But the Court's reasoning does not explain why judges should be free to give more weight to rehabilitation in very serious cases, where the demands of denunciation and deterrence would seem—at least in the view of earlier courts—to be so pressing as to require a primary, if not exclusive, focus. The Court's reasoning also leaves unclear why it contemplated the possibility that rehabilitation might have played a more important role in *Khawaja* itself.

The first part of this paper surveys the trial and appeal decisions in *Khawaja*, together with the principles from British and Australian cases on which the Ontario Court of Appeal drew in formulating its categorical position on the role of rehabilitation in terror sentencing. The second part examines the Supreme Court's reasons, highlighting the break they mark with earlier jurisprudence. Then, in an effort to make sense of the Court's unique position in *Khawaja* within a broader theory of punishment, the third part briefly considers the holding in light of the work of Antony Duff, and in particular, Duff's attempts to address the challenge that terrorism offenders pose to a rehabilitative conception of criminal justice.[13]

Duff, a prominent British criminal law theorist who now teaches in the US, has offered a set of arguments for why a liberal state should remain committed to a rehabilitative approach to punishment even for its most serious offenders. These arguments help to shed light on the issues at stake in, and the deeper implications of, the Court's commitment to the potential role of rehabilitation in every terrorism case. To the degree that *Khawaja* is consistent with Duff's theory, this paper will argue that the decision marks an important affirmation on the part of the Supreme Court of a distinctly liberal conception of political community in which the concepts of moral agency, equality, and redemption are central.

13. For Duff's general theory of punishment, see RA Duff, *Punishment, Communication, and Community* (New York: Oxford University Press, 2001) [Duff, "Punishment"]. For his application of this theory to the problem of the terrorism offender, see RA Duff, "Penance, Punishment, and the Limits of Community" (2003) 5:3 *Punishment and Society* 295 [Duff Penance]; "Notes on Punishment and Terrorism" (2005) 48:6 *American Behavioral Scientist* 758 [Duff, "Terrorism"]; and "Responsibility, Citizenship, and Criminal Law" in RA Duff and Stuart P Green, eds, *Philosophical Foundations of the Criminal Law* (New York: Oxford University Press, 2011) 125 [Duff, "Responsibility"].

I. Context of the Supreme Court's Decision in *Khawaja*

A. A Note on Rehabilitation in Canadian Sentencing Law

Before turning to the cases, it may be helpful to briefly address how the principle of rehabilitation functions within the *Criminal Code* framework for sentencing. While the *Code* affirms the importance of rehabilitation in the crafting of any given sentence, judges must weigh this objective against several other competing considerations.

For example, section 718 of the *Code* states that "the fundamental *purpose* of sentencing" is to contribute to "the maintenance of a just, peaceful and safe society by imposing just sanctions that have *one* or more" of a list of six "objectives", including these: "to denounce unlawful conduct;" "to deter the offender and other persons from committing offences;" "to separate offenders from society, where necessary;" and "to assist in rehabilitating offenders".[14] A sentencing judge could thus be consistent with section 718 in placing a primary, or even an exclusive, emphasis on rehabilitation or in ignoring it altogether. However, any sentence must also be in accord with the "fundamental *principle*" of sentencing set out in section 718.1, which states that "[a] sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender."[15] The extent to which a sentence may have rehabilitative objectives is also indirectly affected by the operation of other provisions, including 718.2, which mandates that a sentence should be increased to account for aggravating circumstances, which include "evidence that the offence was a terrorism offence".[16] This provision also requires that "where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh",[17] and that "all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders".[18]

In the context of terrorism offences in particular, three provisions added to the *Code* with the *Anti-Terrorism Act* are potentially relevant to the question of rehabilitation.[19] None of the new terrorism offences added to the *Code* by that Act carry minimum sentences, and offences such as participating in or facilitating terrorism carry maximum penalties of 10 and 14 years respectively.[20] However, the Act added a provision by which these and other maximum penalties for terror related offences could be circumvented. Section 83.27 of the *Code* states broadly that notwithstanding any other provision of the *Code*, "a person convicted of an indictable offence, other than an offence for which a sentence of imprisonment for life is imposed as a minimum punishment" is liable to receive a life sentence if "the act or omission constituting the offence also constitutes a terrorist activity."[21] The *Anti-Terrorism Act* also stipulates that where multiple sentences for terrorism offences are imposed, other than one of life imprisonment, the sentences are to be served consecutively.[22] Finally, another provision gives courts the discretion to raise the parole ineligibility period for those convicted of terrorism offences from either one-third of the sentence or seven years, whichever is shorter, to one-half or ten years.[23]

Recent amendments to the *Code* add a further factor that might affect the weight to be given to rehabilitation in the terrorism context. Both first and second-degree murder carry a mandatory life sentence in Canada.[24] Before Bill C–48 was passed in 2011, the longest period that offenders being sentenced for either single or multiple murders could be required to serve before being eligible for parole was twenty-five years.[25] Now, when courts sentence offenders for multiple murders, parole ineligibility can

14. *Criminal Code*, RSC 1985, c C–46, s 718 [emphasis added].
15. *Ibid*, s 718.1 [emphasis added].
16. *Ibid*, s 718.2(a)(v). While it may be an aggravating circumstance that the offence at issue is a "terrorism offence," there is no indication in the *Criminal Code* that the addition of this provision was meant to preclude the consideration of rehabilitation when deciding upon a sentence for a terrorism offence. I am indebted to one of the referees of this paper for pointing this out.
17. *Ibid*, s 718.2(c).
18. *Ibid*, s 718.2(e).
19. *Supra* note 5.
20. *Criminal Code*, *supra* note 14, ss 83.18, 83.19.
21. *Ibid*, s 83.27. The Crown is required to give notice to the accused of its intention to proceed under this provision prior to a plea being entered. *Ibid*, s 83.27(2),
22. *Ibid*, s 83.26. Judicial treatment of this provision is discussed below.
23. *Ibid*, s 743.6(1.1).
24. *Ibid*, s 745.
25. *Protecting Canadians by Ending Sentence Discounts for Multiple Murders Act*, SC 2011, c 5.

be much longer—possibly well beyond the offender's life expectancy—through the imposition of consecutive twenty-five-year periods of ineligibility for each conviction. Such consecutive terms, however, are discretionary rather than mandatory.[26]

Thus, in terrorism cases, as in any other sentencing context, judges must weigh rehabilitation against a host of other principles and considerations. Yet rehabilitation remains a potentially important consideration in this context. Just how important is a question that Canadian courts began to grapple with in *R v Khawaja*.

B. The Trial Decision in Khawaja (Ontario Superior Court)

The accused was a twenty-five-year old Ottawa resident who, in 2002, formed an association with a group of extremists in the UK and Pakistan.[27] He travelled to London and Lahore, where he briefly attended a training camp, and gave other members of the group money and access to his parents' apartment in Pakistan. Before the group was arrested in March 2004, Khawaja worked on the prototype of a remote-detonation explosive device he called the "hifidigimonster." He agreed to build roughly thirty of them for the group's use in the UK or elsewhere.

Principal members of the London group were found in possession of 600 kilograms of ammonium nitrate-rich fertilizer, along with maps of the UK's national utility grid. In the prosecution of Khawaja's co-conspirators in the UK, these materials were found to have been part of a specific plot to set off explosions at targets in central London (the fertilizer bomb plot). Wiretap evidence raised questions about the extent of Khawaja's knowledge of the plot, given that he participated in discussions of targets that included airports, nightclubs, and fuel, water and energy utilities. In a search of Khawaja's Ottawa home, police seized various electronic components, 2 semi-automatic military rifles, 640 rounds of ammunition, documents relating to violent jihad, and $10300 in cash.

A large part of Khawaja's defence consisted of the claim that he lacked knowledge of the fertilizer bomb plot, and that his primary intention was

26. *Criminal Code*, *supra* note 14, s 745.51(1).

27. *Khawaja* (Ont Sup Crt), *supra* note 7. The following summary of the facts draws on details set out at paragraphs 1 to 16 of the decision.

to assist the group in their involvement with insurgents in Afghanistan.[28] Justice Rutherford had a reasonable doubt about Khawaja's knowledge of the fertilizer plot, but convicted him on six counts of terror-related offences. The most serious was that of intending to cause an explosion endangering life, and doing so in association with a terrorist group.[29] Justice Rutherford suggested that Khawaja did not simply intend to assist with the group's plans in Afghanistan. Rather, his activity in building the hifidigimonster was "directed at assisting his terrorist associates in a way that could only result in serious injury, death and destruction to people and property somewhere".[30] Justice Rutherford imposed a global sentence of 10.5 years, which took some account of Khawaja's roughly 5 years in pre-trial custody.[31] Parole non-eligibility was set at five years.[32]

In arriving at this sentence, Rutherford J considered as mitigating circumstances Khawaja's age, lack of a criminal record, and conduct in prison. While Rutherford J acknowledged that in terror cases the emphasis should be placed on "denunciation, deterrence, and protection of the public",[33] he also noted that "the potential for rehabilitation . . . cannot be overlooked".[34] Yet in this case, he concluded, "the Court knows virtually nothing about [Khawaja's] potential for reformation, of any sense of responsibility or of any remorse he may feel for his criminal conduct, or of the likelihood of his re-offending".[35] Khawaja had not testified, he refused to be interviewed for the pre-sentence report and he made no

28. *Ibid* at para 32.

29. *Ibid* at para 3. See *Criminal Code* RS C 1985, c C–46 ss 81(1)(a), 83.2 (both carrying a life maximum). The remaining offences were: participating in a terrorist group (for receiving training) (s 83.18(1); 10 year maximum); instructing to carry out activity for terrorist group (ss 83.21(1); a life maximum); making property available to facilitate a terrorist activity (ss 83.03(a); a 10-year maximum); participating in a terrorist activity (meetings in the UK relating to bomb-building) (ss 83.18(1); a 10-year maximum); and facilitating a terrorist activity (ss 83.19; a 14-year maximum). *Ibid* at para 34.

30. *Ibid* at para 4.

31. *Ibid* at para 54. Khawaja received four years for bomb-building in association with a terrorist group; two years each for participation in the training camp, providing funding, and making property available; and three months for participating in discussions relating to terrorism activity in the UK and facilitating those activities. *Ibid*.

32. *Ibid* at para 55.

33. *Ibid* at para 24.

34. *Ibid* at para 26.

35. *Ibid* at para 27.

statement at sentencing. Because Khawaja's rehabilitative prospects were uncertain, Rutherford J treated them as neutral factors.[36]

The sentence also turned on an assessment of Khawaja's degree of responsibility. Justice Rutherford dismissed the suggestion that Khawaja's lack of knowledge of the specific intent of his associates to use the hifidigimonster in the fertilizer bomb plot was a mitigating factor. The detonators were clearly "intended to unleash fireworks at other as yet unspecified places in aid of the jihad".[37] Yet Rutherford J did not consider Khawaja's culpability to be comparable to that of his co-conspirators who received life sentences in the UK in *R v Khyam*.[38] Although Khawaja was "a willing helper and supporter", Rutherford J asserted four of the named members of the group "were away out in front of [him] in terms of their determination to bring death, destruction and terror to innocent people".[39] Yet apart from noting Khawaja's lack of specific knowledge of the fertilizer plot, Rutherford J did not explain that difference.[40]

The direction in 718.2(c) of the *Code*, calling for a global sentence that is not "unduly long or harsh," posed a further challenge in light of the requirement for consecutive sentences in section 83.26. Justice Rutherford interpreted each of those sections as a constraint on the other. To support this reading, he drew on Lamer CJ's dictum in the Supreme Court of Canada's decision in *R v M (CA)*,[41] to the effect that "[w]hether under the rubric of the 'totality principle' or a more generalized principle of proportionality, Canadian courts have been reluctant to impose single and consecutive fixed-term sentences beyond 20 years."[42] Justice Rutherford therefore implied that where consecutive sentences were imposed for terror offences, they should not exceed that ceiling. [43]

36. *Ibid* at para 29.
37. *Ibid* at para 32.
38. *R v Khyam*, *supra* note 7.
39. *Khawaja* (Ont Sup Crt), *supra* note 7 at para 37.
40. Khawaja's co-conspirators in the UK, apart from Khyam, also lacked knowledge of the specifics.
41. [1996] 1 SCR 500, 46 CR (4th) 269.
42. *Ibid* at para 43, cited in *Khawaja* (Ont Sup Crt), *supra* note 7 at para 39.
43. Justice Rutherford's treatment of the totality principle is relevant in the sense that he can be said to have imposed a sentence of roughly 20.5 years: i.e., the 10.5 years of further custody, along with credit for the 5 years spent in pre-trial custody (which, at the time, was conventionally credited at 2 for 1, or 10 years, but not explicitly acknowledged as such in this case).

Both the Crown and the defence appealed the sentence.

C. The Court of Appeal Decision

On appeal, Khawaja's sentence on count 1 (bomb-building in association with a terror group) was raised from 4 years to life without parole for 10 years. The sentence on the remaining counts was raised from 6 to 24 years, to be served concurrently. The Court of Appeal allowed the Crown's appeal on the basis of three specific errors in the decision below and an error in the "overall approach" to the sentencing of terrorism offences.[44]

The first of the three specific errors was an incorrect assessment of Khawaja's "level of determination",[45] or his culpability in relation to that of his UK co-conspirators. The finding that the latter "'were away out in front' of the appellant 'in terms of their determination to bring death, destruction and terror to innocent people' [was] not borne out by the record".[46] The record, including the emails cited in the trial decision, attested to a deep "commitment to violent Jihad" and a "willingness to do anything and go anywhere to promote violent Jihad".[47]

A more serious error was treating the lack of evidence of rehabilitative prospects as a neutral, rather than a negative, factor. In the Court of Appeal's view, "the absence of any evidence of the appellant's remorse or of his prospects for reformation should have been treated as a significant indicator of his present and future dangerousness".[48] Without "convincing evidence" that violent Jihad has been repudiated, a terrorism offender "continues to pose a serious threat to society and is likely to do so for the indefinite future".[49] Even where the offender does repudiate terror, the Court sought to affirm the broader principle that "the import of rehabilitation as a mitigating circumstance is significantly reduced in this context given the unique nature of the crime of terrorism and the grave and far-reaching threat that it poses to the foundations of our democratic

44. *Khawaja* (Ont CA), *supra* note 7 at para 192.
45. *Ibid* at para 191.
46. *Ibid* at para 194, citing *Khawaja* (Ont Sup Crt), *supra* note 7 at para 37.
47. *Ibid*.
48. *Ibid* at para 200.
49. *Ibid*.

society".[50] Yet in this case, the court concluded "there is simply no evidence at all of any rehabilitative potential on the part of the appellant".[51]

A third error pertained to Rutherford J's resolution of the apparent conflict between sections 83.26 (consecutive sentences) and 718.2(c) (the totality principle—not "unduly long"). Justice Rutherford read *R v M(CA)* to stand for the proposition that twenty years marks a notional benchmark for what is "unduly long or harsh" in section 718.2(c), one that would apply to the directive to impose consecutive sentences in section 83.26. The Court of Appeal held that this reading ran counter to the holding in *R v M(CA)*, and to the intention to include section 83.26 in the terror sentencing framework. In *R v M(CA)*, the Supreme Court of Canada had confirmed the validity of a twenty-five-year global sentence that consisted of shorter consecutive terms.[52] It found that although courts had in recent years tended not to exceed the twenty-year mark, neither the *Code* nor the *Charter*'s protection against cruel and unusual punishment precluded it.[53]

Turning to the larger error in "overall approach," the Court of Appeal set out three general grounds on which Rutherford J's sentence was "manifestly unfit".[54] First, it did not adequately reflect the "enormity" of the crime:

> Terrorism, in our view, is in a special category of crime and must be treated as such. When the terrorist activity, to the knowledge of the offender, is designed to or is likely to result in the indiscriminate injury and killing of innocent human beings, sentences exceeding 20 years, up to and including life imprisonment, should not be viewed as exceptional.[55]

50. *Ibid* at para 201.
51. *Ibid* at para 202.
52. *Supra* note 41 at para 94.
53. *Ibid* at para 72. The Court of Appeal's treatment of the totality principle and the significance of *R v M(CA)* are explored further below.
54. *Khawaja* (Ont CA), *supra* note 7 at para 192.
55. *Khawaja* (Ont CA), *supra* note 7 at para 238. The judgment contains this qualification:

> In advocating this sentencing approach to terrorist-related activity that, to the offender's knowledge, is designed to or is likely to result in the indiscriminate killing of innocent human beings, we are not suggesting that there will never be cases of that nature for which the appropriate sentence will be within or below the 15- to 20-year customary range. For example, full and meaningful co-operation by the offender with law enforcement authorities in the detection of terrorists and terrorist activity may well alleviate against the imposition of longer than customary sentences.

Ibid at para 220.

A second error in approach was that the sentence "fails to adequately reflect the continuing danger that this offender presents to society", based on the absence of evidence of remorse.[56] Finally, for deterrent purposes, the sentence had to be severe enough to "send a clear and unmistakable message that terrorism is reprehensible and those who choose to engage in it here will pay a very heavy price".[57]

D. The Court of Appeal's Development of Earlier UK and Australian Approaches

To lend further context to Supreme Court's decision in *Khawaja*, this section briefly examines a broader set of propositions set out by the Court of Appeal in this case and in its companion decisions in *Khalid*, *Gaya* and *Amara*.[58] These cases are also assessed in light of the appellate decisions from the UK and Australia on which they drew.

For the Court of Appeal in *Khawaja*, a longer sentence was necessary not only because Khawaja's involvement in the plot was serious, but also because the absence of evidence on rehabilitation suggested that he posed a continuing danger. It was also compelled by the categorical proposition the Court set out in the companion appeal of *Khalid*—that the "import of rehabilitation as a mitigating circumstance is significantly reduced in this context given the unique nature of the crime of terrorism and the grave and far-reaching threat that it poses to the foundations of our democratic society".[59] In other words, because terrorism offences are distinct in nature and involve special considerations, rehabilitation must generally play a lesser role in sentencing, *regardless of the degree of culpability*. The companion appeals in *Khalid* and *Gaya*, two cases involving more peripheral members of the "Toronto 18" plot, best illustrate the Court of Appeal's reliance on this proposition.

56. *Ibid* at para 239.
57. *Ibid* at para 246.
58. *Khawaja* (Ont CA), *supra* note 7; *Khalid* (Ont CA), *supra* note 7; *Amara* (Ont CA), *supra* note 7; and *Gaya* (Ont CA), *supra* note 7.
59. *Khawaja* (Ont CA), *supra* note 7 at para 201.

The accused in *Khalid* was a nineteen-year-old member of the group who assisted in the preparation of explosive materials, and who thus intended to cause explosions endangering life, but he lacked knowledge of the specific target of the bombs and other details of the plot. At trial, Durno J found that Khalid's rehabilitative prospects were favourable and that he posed no continuing danger to the community.[60] On this basis, he imposed a 14-year sentence rather than the 20 years sought by the Crown. The Court of Appeal held that the gravity of the offence warranted a *life* sentence and that Khalid's rehabilitative prospects could only justify bringing the sentence down into the range of twenty years. By imposing a shorter sentence, the trial judge had erred in placing "considerable emphasis on the respondent's youth, his lack of criminal record, his remorse and his prospects for rehabilitation".[61] In a terrorism case, the Court of Appeal said, less emphasis should have been placed on the offender and more on the offence itself: "When balanced against *the nature and seriousness of the crime*, [the offender's personal] factors are entitled to considerably less weight".[62]

Gaya involved an eighteen-year-old who had been a member of the Toronto 18 for roughly a month. He was tasked with finding a place to store three tons of ammonium nitrate, but had limited knowledge of the larger plot.[63] He pleaded guilty to intending to cause an explosion endangering life, and doing so in association with a terrorist group.[64] He provided a statement to police, was remorseful, and took full responsibility for the offence. Justice Durno emphasized that Gaya was "not the prime mover in the plot. He did not know all the details of the plan. He took detailed orders. He did not give them . . . He did not know anything about bomb making."[65] Gaya's rehabilitative prospects and his experience in custody had led Durno J to conclude that he "has already been specifically deterred and is not a continuing danger to the public".[66]

60. *Khalid* (Ont Sup Ct), *supra* note 7 at para 143.
61. *Khalid* (Ont CA), *supra* note 7 at para 41.
62. *Ibid* at para 45 [emphasis added].
63. See *Gaya* (Ont Sup Crt), *supra* note 7 (at a pre-trial hearing, Durno J found that Gaya was "wilfully blind that it was likely that the explosion(s) would cause death or serious bodily harm" at para 3).
64. Contrary to *Criminal Code*, *supra* note 14, ss 81(1); 83.2.
65. *Gaya* (Ont Sup Ct), *supra* note 7 at para 120.
66. *Ibid* at para 133.

Justice Durno imposed a twelve-year sentence, with parole eligibility set at one-third of the remaining time to be served. The Court of Appeal raised Gaya's sentence to eighteen years, and moved his parole eligibility period up to half of the remaining time to be served. It did so on the basis that Durno J's sentence "did not adequately reflect the unique nature of terrorism-related crimes, nor did it adequately reflect the enormity of the respondent's crime and the role he played in it".[67]

In formulating the rule that rehabilitation should play a lesser role in terror sentencing generally, the Ontario Court of Appeal expanded the scope of a proposition that, in its recent form, originated with the commonly cited dicta of Lord Bingham CJ in the 1997 English Court of Appeal decision in *R v Martin*.[68] *Martin* involved an Irish Republican Army conspiracy to set off explosions at an electricity plant, endangering but not specifically targeting human life. Lord Bingham held that the appropriate range of sentence for a terrorist conspiracy to cause an explosion endangering life should range from 20 to 35 years.[69] He went on to state that "[i]n passing sentence for the most serious terrorist offences, the object of the court will be to punish, deter and incapacitate; rehabilitation is likely to play a minor (if any) part."[70] The role of rehabilitation was thus minimized in *Martin*, not necessarily for all terror offences but for "the most serious" of them. By contrast, for the Ontario Court of Appeal in *Khawaja*, *Khalid*, *Gaya* and *Amara*, rehabilitation should play a minor

67. *Gaya* (Ont CA), *supra* note 7 at para 19.
68. *R v Martin*, *supra* note 9.
69. *Martin* was thus decided within a sentencing framework distinct from that set out in Canada's *Criminal Code*—one that contemplates much longer sentences than were likely to be imposed in Canada both prior to the *Anti-terrorism Act*, *supra* note 5, and in relation to the cases under review in this article. For the differences between the two frameworks, see Diab, *supra* note 5 at 372–375.
70. *R v Martin*, *supra* note 9 at 480. The Ontario Court of Appeal cites this passage in *Khalid* (CA), *supra* note 7 at 39, along with Rutherford J in *Khawaja* (Ont Sup Crt), *supra* note 7 at para 24, and Leblonde CJQ in *R c Namouh*, 2010 QCCQ 943 at para 36 (available on WL Can). Spigelman CJ of the New South Wales Court of Appeal cites Lord Bingham's dicta in *Lodhi* (CA), *supra* note 7 at para 89, along with Whealy J of the Supreme Court of New South Wales in *R v Touma*, *supra* note 7 at para 73; *R v Sharrouf*, *supra* note 7 at para 60; *R v Mulahalilovic*, *supra* note 7 at para 42; and *R v Elomar*, *supra* note 7 at para 78.

role in *all* terrorism cases.[71] This more expansive formulation marked a subtle shift from *Martin*, but a shift consistent with a tendency in other recent cases to characterize terrorism offences as belonging in a class of their own, with rehabilitation generally having little or no role to play.[72] That characterization may have been due in part to perceptions about the greater magnitude of the threat posed by terrorism in the wake of 9/11.[73]

However, a closer look at Lord Bingham's decision in *Martin* suggests that the tendency to treat terrorism as a distinct form of crime, with different rules on sentencing, has deeper roots in the common law. Lord Bingham drew authority for his approach to terrorism offences from a passage in Lord Lawton's 1975 Court of Appeal decision in *R v Turner*, which involved a bank robbery.[74] Lord Lawton said:

> Grave crimes fall into categories. There are some which are wholly abnormal. Their circumstances are horrifying. They may endanger the State. What is to be done with those who commit such crimes? There are other crimes which are very grave but which cannot be regarded as wholly abnormal.

71. *Khawaja* (Ont CA), *supra* note 7; *Khalid* (Ont CA), *supra* note 7: *Gaya* (Ont CA), *supra* note 7; and *Amara* (Ont CA), *supra* note 7. The Court of Appeal decisions in *Khawaja*, *Khalid*, *Amara*, and *Gaya* are each *per curiam* judgments of Doherty, Moldaver, and Cronk JJA.

72. Examples are explored below.

73. *See R v Barot*, *supra* note 7. This rationale appears explicit in Lord Phillips CJ's opinion. The case involved a plot to set off a series of explosions in the parkade of a large London office building. His Lordship wrote:

> We consider that [Crown counsel] is also correct in submitting that terrorist offences today are capable of being more serious even than the horrifying case of *Hindawi* [(1988) 10 Cr App R (S) 104, where the appellant attempted to bomb a plane by placing a bomb in his unwitting girlfriend's suitcase]. This case demonstrates the search by the terrorists for a means of causing death on an even greater scale than results from the destruction of a passenger plane and the events of 9/11 show that this can be achieved. It is not without significance that in *A v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68 the majority of the House of Lords accepted that the terrorist threat represented 'a public emergency threatening the life of the nation'. For this reason we have concluded that the guidelines suggested by the court in *Martin* require review.

Ibid at para 55.

74. (1975) 61 Cr App Rep 67.

> Into the first category fall such crimes as the Great Train Robbery, bad cases of espionage, cases of horrid violence such as occurred in the case of *Richardson and Others* (1967) 51 Cr. App. R. 381, known as the 'Torture Case'. We are running into an era when the courts are finding themselves having to deal with bomb outrages, acts of political terrorism and possibly in the future acts of political kidnapping. The courts must have some range of penalties to deal with those abnormal crimes.[75]

By adopting Lord Lawton's notion in *Turner* that there was a relatively new order of "abnormal" crime, Lord Bingham was suggesting that in sentencing the terrorism offender, the Court was confronted with new considerations distinct from those at play in a conventional criminal case. A longer sentence should be imposed for *conspiracy* to commit terrorism than would normally be imposed in a murder case, because, in Lord Bingham's words, "there can be no precise equivalence" between conventional murder and terrorism.[76] The latter involved "conduct threatening the democratic government and the security of the state, and the daily life and livelihood of millions of people"; it therefore has "a seriousness all of its own."[77]

It is one thing, however, to assert that a different approach on sentencing is called for by significant involvement in a serious terror plot and another to assert that courts should take a different approach in *all* terror cases, regardless of the extent of the offender's involvement. Yet recent decisions citing *Martin* had tended to gloss over this difference. One example is provided by the opinion of Price J of the New South Wales Court of Appeal in the 2006 case of *R v Lodhi*, the leading post-9/11 terror sentencing case in Australia.[78] With the intention of carrying out a bombing, Lodhi had collected maps of the Australian electrical supply

75. *Ibid* at 91.

76. *Martin*, *supra* note 9 at 478.

77. *Ibid*. In the post-9/11 period, a number of legal scholars have taken up the question of whether terrorism should be considered a unique offence or should fall within a special category of crime. See, e.g., George Fletcher, "The Indefinable Concept of Terrorism" (2006) 4:5 *Journal of International Criminal Justice* 894. "The better way to think of terrorism . . . is not as a crime but as a *different dimension of crime*, a higher, more dangerous version of crime, a kind of super-crime incorporating some of the characteristics of warfare." *Ibid* at 900. See also Thomas Weigend, "The Universal Terrorist: the International Community Grappling with a Definition" (2006) 4:5 *Journal of International Criminal Justice* 912; and Mohammed Saif-Alden Wattad, "Is Terrorism a Crime or an Aggravating Factor in Sentencing?" (2006) 4:5 *Journal of International Criminal Justice* 1017.

78. *Lodhi* (CA), *supra* note 7.

system and had made efforts to obtain explosives. He was convicted of collecting a document, possessing a thing, and doing a thing, all in preparation for a terrorist act.[79] He was thus conspiring to carry out a serious plot but was at a very early stage of the matter, in comparison to the more extensive steps taken by the parties in *Martin*.[80] Justice Price upheld the twenty-year sentence imposed at trial, partly on the basis of a more expansive formulation of the principle in *Martin*:

> Rehabilitation and personal circumstances should often be given very little weight in the case of an offender who is charged with a terrorism offence. A terrorism offence is an outrageous offence and greater weight is to be given to the protection of society, personal and general deterrence and retribution.[81]

Wheally J of the New South Wales Supreme Court would then cite both the appellate holding in *Lodhi* and Lord Bingham's dicta in *Martin* in each

79. See the Australian *Criminal Code Act 1995* (Cth), ss 101.4, 101.5, 101.6, as amended by *Criminal Code Amendment (Terrorism) Act 2002* (Cth).

80. See *R v Martin*, *supra* note 9. Bingham CJ notes that the parties:

> [T]ook a number of steps such as acquiring premises and vehicles, carrying out research and planning, reconnoitering five of the [power] sub-stations, purchasing equipment, making 37 long delay Time and Power Units for the 37 bombs to be used at the sub-stations, buying and dismantling ladders for ease of concealment and constructing wooden blocks with which to reassemble the ladders. The appellant and all of the convicted conspirators had a false identity and were supplied by PIRA with money to finance the operation.

Ibid at para 2.

81. *Lodhi* (CA), *supra* note 7 at para 274. It bears noting that the discussion of sentencing principles in *Lodhi* is fundamentally shaped by the distinct considerations of the sentencing framework in Australian criminal law legislation, which differs in subtle but important ways from the framework in both the UK and Canada. For a brief overview of these differences, see Diab, *supra* note 5 at 375–377 (For reasons explored there, Australian judges have greater flexibility than Canadian judges in emphasizing deterrence and concerns about public safety over other principles of sentencing).

of four decisions[82] involving offenders whose level of culpability ranged from very serious to more peripheral.[83]

A further example of an expansive restatement of the *Martin* principle can be found in Rutherford J's trial decision in *Khawaja* where this general proposition was asserted:

> In terrorism sentencing cases particular emphasis is placed on the elements of denunciation, deterrence, and protection of the public by separating the offender from it. Moreover, where acts of terrorism are pursued for religious or ideological cause, it may be considered that even personal deterrence may be of less significance than protection of the public.[84]

One might argue that the tendency in these cases to restate Lord Bingham's dicta in more expansive terms had little effect on their outcomes. Rehabilitation was either factored in to some degree (as in the trial decision in *Khawaja*), or the offences were so serious that rehabilitation was bound to play only a small role (as in *Lodhi* and *Elomar*).[85] The point, however, is that the cases noted here exhibit a tendency to cite the rule in *Martin* without acknowledging its limited scope. And this tendency might be said to have culminated in the Ontario Court of Appeal's expansion of *Martin* into a categorical proposition in *Khawaja*, in the manner explored above. In both *Khalid* and *Gaya*, this led to the raising of the sentences originally imposed at trial, where the principle of rehabilitation had played

82. For citations to *Lohdi* (CA), *supra* note 7, see *R v Touma*, *supra* note 7 at para 131; *R v Sharrouf supra* note 7 at para 59; *R v Mulahalilovic*, *supra* note 7 at para 41; *R v Elomar*, *supra* note 7 at para 78. For citations to *R v Martin*, *supra* note 9, see *R v Touma*, *supra* note 7 at para 73; *R v Sharrouf supra* note 7 at para 60; *R v Mulahalilovic*, *supra* note 7 at para 42; *R v Elomar*, *supra* note 7 at para 78.

83. See e.g. *R v Mulahalilovic*, *supra* note 7 at para 63 (Mulahalilovic's culpability consisted primarily in his recklessness as to the possible terrorist use of the ammunition he provided to conspirators who were involved in a plot in which the offender was unaware). See also *R v Sharrouf*, *supra* note 7. The case concerned the acquisition of various clocks and batteries for a terrorist group, with knowledge that they were to be used to build explosive devices for a terrorist act. The court, however, also found that Sharrouf had suffered from a "serious schizophrenic condition" at the time of the offence. *Ibid* at paras 44–45.

84. *Khawaja* (Ont Sup Crt), *supra* note 7 at para 24. Notably, however, Rutherford J also held that "Notwithstanding the emphasis on denunciation, deterrence and protection of the public, the potential for rehabilitation and promotion of a sense of responsibility on the part of the offender cannot be overlooked. Momin Khawaja is still a young man. There is evidence of some redeeming qualities in him." *Ibid* at para 26.

85. *Lodhi* (CA), *supra* note 7, and *R v Elomar*, *supra* note 7.

a larger role. It is precisely this expansion of *Martin*, and the categorical minimization of rehabilitation in this context, that the Supreme Court in *Khawaja* would reject.

II. The Supreme Court Decision and Its Break from Earlier Approaches

Writing for a unanimous court of seven justices, McLachlin CJ began her analysis in the sentencing appeal portion of the decision by asserting a broad proposition:

> At the outset, I wish to underscore that the temptation to fashion rigid sentencing principles applicable to terrorism offences as a distinct class of offences should be avoided, subject to the provisions in the Criminal Code that specifically pertain to those offences. The general principles of sentencing, including the totality principle, apply to terrorism offences.[86]

Terror offences are therefore to be approached on sentencing as any other offence in the *Criminal Code* not subject to a mandatory minimum; or, put another way, the Court's point of departure was in rejecting Lord Bingham's notion in *Martin* that terror offences were somehow "abnormal", or that they belonged, as the Ontario Court of Appeal had put it in *Khawaja*, to a "special category of crime".[87]The Supreme Court therefore agreed with the Court of Appeal in its result, but sought to signal from the outset that it was doing so on the basis of a deeper shift in approach.

Turning to the first of three specific errors found in the trial judgment by the Court of Appeal, McLachlin CJ agreed with the first. In her words, the trial judge's decision and particularly the finding that Khawaja was "less morally blameworthy than Khyam and other associates", entailed an "unreasonable devaluation of the seriousness of the appellant's conduct".[88] The evidence, she went on, had clearly indicated that Khawaja was as involved as his conterparts in the UK,[89] and that his intention to

86. *Khawaja* (SCC), *supra* note 3 at para 115.
87. *Khawaja* (Ont CA), *supra* note 7 at para 238.
88. *Khawaja* (SCC), *supra* note 3 at para 117.
89. *Ibid* at paras 116–117.

"'bring death, destruction and terror to innocent people' appears to have been . . . as strong as that of other members of the Khyam group".[90]

The Chief Justice also agreed that the trial judge had erred in treating the absence of rehabilitative prospects as a neutral factor. But she rejected the Court of Appeal's broader proposition about rehabilitation. For the Court of Appeal, even if there had been promising evidence on that matter, the weight to be placed on rehabilitation was "significantly reduced" in light of the special nature of the offence.[91] McLachlin CJ's response to this portion of the appeal court's judgment was twofold. First, she held that the "[t]he lack of information on a person's probability of re-offending, in the face of compelling evidence of dangerousness, is sufficient to justify a stiffer sentence."[92] A longer sentence was therefore appropriate in this case without recourse to the proposition that rehabilitation should play a lesser role in terror sentencing generally. But the Chief Justice asked whether rehabilitation *might* have played a more important role here if the evidence had been different: "The absence of evidence on the appellant's likelihood of re-offending gave the trial judge no assurance that he was no longer committed to violent jihad and terrorism, or that there was any chance that, over time, he could change and be released from state control without undue risk of harm to the population."[93] Thus, even though Khawaja's conduct fell near the higher end of the spectrum of culpability in terrorism offences ("as strong as that of other members of the Khyam group"[94]—who all received life sentences in the UK), rehabilitation was not an inappropriate consideration *as a matter of principle*.

The second part of McLachlin CJ's response consisted of a clear rejection of the larger rule at issue in the Court of Appeal's decisions in *Khawaja*, *Khalid*, *Gaya* and *Amara*:

> I cannot accept the broad proposition that "the import of rehabilitation as a mitigating circumstance is significantly reduced in [the] context [of terrorism] given the unique nature of the crime . . . and the grave and far-reaching threat that it poses to the foundations of our democratic society" (C.A., at para. 201). The terrorism provisions catch a very wide variety of conduct, suggesting that the weight to be given to rehabilitation in a given case is best

90. *Ibid* at para 121, citing to *Khawaja* (Ont Sup Crt), *supra* note 7 at para 37.
91. *Khawaja* (Ont CA), *supra* note 7 at para 201.
92. Khawaja (SCC), *supra* note 3 at para 123.
93. *Ibid*.
94. *Khawaja* (SCC), *supra* note 3 at para 121.

left to the reasoned discretion of trial judges on a case-by-case basis. This does not, however, negate the fact that on the evidence in this case, the absence of evidence on rehabilitation prospects justified a stiffer sentence *than otherwise might have been appropriate*.[95]

The Court therefore rejected the Court of Appeal's categorical de-emphasis on rehabilitation in terror sentencing generally. It also implied that even in a case as serious as *Khawaja*, rehabilitation might have played a meaningful role in crafting the sentence had there been better evidence of rehabilitative prospects. What effect this might have had on the sentence was left unclear—a slightly shorter sentence term, perhaps, or a shorter period of parole ineligibility, or both.

A further point should not be overlooked. By refusing to endorse the Court of Appeal's categorical approach to terror sentencing and by leaving the role of rehabilitation to the discretion of trial judges, the Supreme Court impliedly rejected the more restrictive principle in *Martin* to the effect that at least in more serious cases, rehabilitation should play a minimal role. In contrast to both the Court of Appeal's approach and the *Martin* approach, the Supreme Court preserved the *possibility* that rehabilitation could be an important consideration in *any* terrorism case.

Before going further, it may help to identify more clearly the difference of opinion on this point between the Supreme Court and the Court of Appeal. For the lower court, terrorism was a special kind of crime that called for an emphasis on denunciation and deterrence in order to thwart the menace of terrorism swiftly and effectively. What this means, in effect, is that the only way we can "send a clear and unmistakable message"[96] is by showing that we are absolutely intolerant of such conduct (and imposing a severe sentence); thus, *we cannot adequately deter and rehabilitate at the same time*.[97] In contrast, the Supreme Court has held that if a trial judge

95. *Ibid* at para 124 [emphasis added]
96. *Khawaja* (Ont CA), *supra* note 7 at para 246.
97. See *ibid* at 247:

> Our sentencing and correctional philosophy also places a premium on the notion of individual dignity and it accepts redemption and rehabilitation as desired and achievable goals. Regrettably, the hallmarks that define our justice system may be seen by those who reject democracy and individual freedom as signs of weakness. Terrorists, in particular, may view Canada as an attractive place from which to pursue their heinous activities. And it is up to the courts to shut the door on that way of thinking, swiftly and surely.

is satisfied on the evidence that there are good prospects of rehabilitation, he or she should be free to accord significant weight to rehabilitation. If this inhibits us from sending as strong a message as we might have, then *we favour some rehabilitation over a greater emphasis on deterrence*. Put otherwise, for the Court of Appeal, deterrence required severity and little discussion of redemption; for the Supreme Court, concerns about deterrence could be adequately addressed while still fostering rehabilitation.

What the Supreme Court contemplated here is nuanced. It was not proposing that sentences in more serious cases be much shorter. The Court was clear that denunciation and deterrence are "important principles in the sentencing of terrorism offences, given their seriousness".[98] A trial judge might still err by failing to accord sufficient weight to these principles, or by placing inordinate weight on rehabilitation in a serious terrorism case. In more serious cases where rehabilitation is correctly given significant weight, the Court appears to contemplate the imposition of substantial but slightly lower custodial sentences than might otherwise have been imposed, or earlier parole eligibility, or both.

What is difficult to discern from the passage in McLachlin CJC's judgment quoted above, or from the judgment as a whole, however, is why the Court chose to affirm the potential validity of rehabilitation as a sentencing principle in *any* terrorism case rather than only in less serious ones. It is also not clear why the Court resisted the inclination to approach terror offences as a special category of crime, or why it appeared to favour a balancing of rehabilitation with deterrence, rather than concluding (as the Court of Appeal and other courts had done) that sending a strong deterrent message necessarily entails a significant minimization of rehabilitation. The Chief Justice's explanation—that terrorism entails a "wide variety of conduct"[99]—does not make the rationale clear. In cases involving less serious conduct, rehabilitation might be easily balanced with concerns about denunciation and deterrence, but in more serious cases there would seem to be a greater tension between them. A value judgment was being made here: by preserving a possible role for rehabilitation in more serious cases, the Supreme Court was affirming the importance of *rehabilitative* justice where other courts had assumed deterrence and denunciation to be

98. *Khawaja* (SCC), *supra* note 3 at para 130.
99. *Ibid* at para 124.

central, if not exclusive, concerns. The underlying rationale for this value judgment is a question addressed in part III.

To lend a clear sense of the Supreme Court's break with the reasoning of the Court of Appeal in *Khawaja*, it may be worth briefly canvassing the Supreme Court's response to the third error at issue: the trial judge's treatment of the totality principle. The Court of Appeal sought to correct Rutherford J's view of a potential conflict between the directives in section 83.26 of the *Criminal Code*—to impose consecutive sentences for multiple counts of terrorism offences and an upper limit of the totality principle at common law, in the range of 15 to 20 years. As noted earlier, the Court of Appeal had made clear that Rutherford J's notion of a fixed upper range was based on an erroneous reading of *R v M(CA)*,[100] which identified a customary upper range but allowed for longer sentences that would not offend the totality principle. However, the Court of Appeal's conclusion to that discussion was to assert—once again, categorically—that in sentencing terrorism offenders, "the customary upper range [of 15 to 20 years] for consecutive fixed-term sentences will not be applicable".[101]

The Court of Appeal had arrived at that conclusion after trying to discern why Parliament had chosen to include section 83.26—and it is precisely that court's interpretation of Parliament's intent that McLachlin CJ sought to reject. The Court of Appeal had held:

> In our view, s. 83.26 reflects Parliament's intention that the general principle of totality must be moderated or altered in the case of terrorism-related crimes. This provision signals that, when offenders are convicted of a number of such crimes, total sentences will be higher than they otherwise would be, and the customary upper range for consecutive fixed-term sentences will not be applicable.[102]

And further on: "[W]e believe that in enacting [s. 83.26], Parliament intended to send a message that terrorism is a crime that warrants special consideration and it is to be treated differently for sentencing purposes."[103]

For McLachlin CJ, section 83.26 did not signal an intention to alter the application of the totality principle. In her view, the Court of Appeal's reading of Parliament's intent was premised on an erroneous

100. *Supra* note 39 at para 92.
101. *Khawaja* (Ont Ca), *supra* note 7, at para 210.
102. *Ibid*.
103. *Ibid* at para 218.

interpretation of that principle. What the principle requires, she said, is not a specific temporal limit, but only that "the sentence not exceed the overall culpability of the offender".[104] Thus, it is not the case that sentences for terror offences should, as a matter of course, depart from the customary limits set out in *R v M(CA)*. Sentences beyond the twenty-year range "may be imposed more often in terrorism cases", she suggested, but this "merely attests to the particular gravity of terrorist offences and the moral culpability of those who commit them."[105] The grounds for upholding the application of the totality principle in *Khawaja* were thus limited to *the evidence in that case*: "[T]he heightened gravity of the terrorism offences at issue in this case was sufficient to justify imposition of consecutive sentences running over 20 years, without violating the totality principle".[106] Beyond this point, significantly, McLachlin CJ did not seek to venture.

The Chief Justice concluded her analysis of the sentencing appeal by addressing the Court of Appeal's finding of errors in the trial judge's "overall approach".[107] The Court of Appeal was correct, she said, in holding that the trial decision failed to reflect the gravity of the appellant's actions, along with the continuing danger that "this committed and apparently remorseless man would pose to society on release".[108] But on this final point, McLachlin CJ took a further opportunity to emphasize a broader difference in principle between her approach and that of the Court of Appeal. After quoting the Court of Appeal's assertion that the initial sentence had failed to send a "clear and unmistakable message that terrorism is reprehensible and those who choose to engage in it [in Canada] will pay a very heavy price", [109] the Chief Justice offered a more equivocal affirmation. "Without suggesting that terrorism offences attract special sentencing rules or goals," she said, "I agree that denunciation and deterrence, both specific and general, are important principles in the sentencing of terrorism offences, given their seriousness".[110] Important principles, but neither exclusive nor even primary.

104. *Khawaja* (SCC), *supra* note 3 at para 126.
105. *Ibid*.
106. *Ibid*.
107. *Khawaja* (Ont CA), *supra* note 7 at para 192.
108. *Khawaja* (SCC), *supra* note 3 at para 129.
109. *Khawaja* (Ont CA), *supra* note 7 at para 246.
110. *Khawaja* (SCC), *supra* note 3 at para 130.

III. A Duffian Reading of *Khawaja* and Its Broader Implications

By refusing to treat terrorism as a special category of crime, the Supreme Court sought to cast the terrorism offender as in some sense an ordinary subject of the criminal law. Contrary to earlier jurisprudence, offenders in very serious cases may now ask a court on sentencing to give serious consideration to the sympathetic principles and objectives in sections 718 to 718.2 of the *Criminal Code*, including rehabilitation and reintegration. The Court has thus rendered the sentencing of terrorism offenders less of an "abnormal" exercise by the standards of the criminal law, and potentially more compatible with the principle of rehabilitation found elsewhere in our sentencing framework.

However, to arrive at the position that every terrorism offender is entitled (at least in theory) to have sentencing courts give serious consideration to rehabilitation, the Court had to implicitly confront a question that punishment theorist Antony Duff has grappled with in the course of developing a general theory of punishment.[111] The question, as Duff has posed it, is whether there are certain kinds of offences that render rehabilitation as a sentencing goal fundamentally inappropriate or implausible. One response on which both Duff and the Supreme Court in *Khawaja* appear to agree is that even grave acts of domestic terror are not among those offences. Yet, once again, the Court's rationale for this conclusion is unclear.

In what follows, the register of the analysis in this article shifts to explore theoretical justifications for the unique position the Supreme Court sets out in *Khawaja*. It draws for this purpose on Duff's work in light of his notable attempts to address the particular problem posed by the terrorism offender to liberal states that seek to maintain the importance of rehabilitation in criminal justice. This article does not suggest that Duff's theory actually underlies the Court's holding, but only that it offers one way of understanding how that holding might be theoretically supported. By drawing on Duff's work, this article also seeks to advance the broader argument that *Khawaja* marks an important affirmation by

111. Duff, "Penance", *supra* note 13; "Terrorism", *supra* note 13; and "Punishment", *supra* note 13.

the Court of a liberal conception of political community. As explained below, the Court's insistence on the possible relevance of the principle of rehabilitation in all terrorism cases reflects a commitment to an idea of the state in which the concepts of moral agency and equality, and the possibility of individual redemption, are central.

Turning, then, to Duff, it might help to begin by briefly situating his arguments on the role of rehabilitation in terrorism sentencing within his larger theory of punishment. In an ideal sense, Duff contends, the practice of punishment can be made consistent with the liberal values of a community by serving as a form of communication between an offender and the community. A sentence should thus "communicate to the offender the censure that his crime deserves"[112] while fostering an experience of "penance" and "atonement" on the offender's part, so as to effect a form of moral reparation with the community. These ends can be accomplished through means of punishment that engage the offender in "burdensome" experiences and tasks, ranging from community work service to time in custody.[113] Such experiences "focus [the offender's] attention on [the] crime and its implications . . . and can thus help to induce or to strengthen a repentant understanding of the crime as a wrong against [the] community".[114] They also serve as a "forceful apology to those he has wronged", and thus "reconcile him with the community".[115] Duff concludes that "a state that is to show its citizens the respect due to them as responsible moral agents must address them in the kind of moral language that is central to this account of punishment".[116]

Duff's theory thus turns on a distinction he draws between "inclusive" and "exclusive" forms of punishment. Inclusive punishments reflect a need to take account of an individual's capacity not only for wrongdoing, but also for atonement and repair.[117] By contrast, exclusive forms of punishment entail sanctions that are merely intended to deter or incapacitate—e.g., a life sentence without parole or the death penalty. These, in effect, "cease to respect or address [offenders] as moral agents" by expecting citizens to be deterred from wrongdoing by the threat of

112. Duff, "Penance", *supra* note 13 at 300.
113. *Ibid*.
114. *Ibid*.
115. *Ibid* at 301.
116. *Ibid* at 303.
117. *Ibid* at 305.

sanctions;[118] and then, if a crime is nonetheless committed, by abandoning rather than seeking to repair the bond that links the offender to the community—in essence, treating citizens as mere subjects of power.[119] Duff argues that inclusive forms of punishment are "what we are *owed*—as citizens who can do wrong, and whose public wrongdoings should be censured, but who can also repair those wrongs by suitable kinds of apology and moral reparation".[120] Inclusive punishments recognize us as moral agents and give us a means "through which the bonds of political community are to be repaired and strengthened".[121]

Yet Duff is also alive to the argument that in certain extreme cases—horrific crimes, careers of persistently violent criminals, and terrorism offences—there is a point at which the bond between offender and community has been irreparably damaged. Beyond this point "we need not, or should not, or cannot continue to treat the offender as a full member of the normative political community".[122] In response to that argument, Duff writes:

> I am *fairly* confident that . . . no single deed, however terrible, should put a person beyond civic redemption. With many horrific crimes, there might be room for serious doubt about the perpetrator's status as a responsible agent: but if he is a responsible agent, we must treat him as such—as someone who could, and who should be given the chance to, repent his crime and redeem himself.[123]

Duff is less confident about how persistent violent offenders should be dealt with, but he suggests that a similar logic applies. Future victims need protection, yet if the community seeks to recognize each of its members as a moral agent, it must give even that kind of offender "the chance to redeem and restore himself".[124] The two concerns can be accommodated by imposing a "*presumptively* permanent detention—detention for life unless and until [the offender] shows that he can be safely restored to ordinary community".[125]

Terrorism, Duff's third extreme case, is really a variation of his first: the horrific single criminal act. Where a citizen is involved in a serious plot or attack, Duff contends that the community is still obliged to recognize the offender's moral agency, along with his or her membership in the community itself. Yet Duff distinguishes between forms of terrorism depending on the nature and scale of the attack: "we might plausibly feel that especially with the more serious kinds of international (as distinct from domestic) terrorism, we are faced by something that is more like war than crime".[126] In these cases, the laws of war should prevail. We may detain a person involved in such an attack without trial and for the duration of hostilities, but the purpose is simply to incapacitate and not to punish.[127]

Duff is reluctant to offer a means of distinguishing between attacks that are crimes and those that are acts of war. Contemporary terrorism, he suggests, has rendered the distinction untenable.[128] In any event, he argues:

> [W]e should be slow and reluctant, especially in the case of domestic terrorism, to abandon the constraints and protections of the criminal law and the criminal process in favor of the much weaker constraints of war—to turn the terrorist from a citizen into an enemy.[129]

118. *Ibid* at 303; see also Duff, "Punishment", *supra* note 13 at 81.
119. Duff, "Penance", *supra* note 13 at 306; see also Duff, "Punishment", *supra* note 13 at 81.
120. Duff, "Penance", *supra* note 13 at 303.
121. *Ibid* at 305.
122. *Ibid* at 306.
123. *Ibid*.
124. *Ibid* at 307.
125. *Ibid*. For a discussion of dangerous offenders, see also Duff, "Punishment", *supra* note 13 at 170.
126. Duff, "Terrorism", *supra* note 13 at 759.
127. *Ibid* at 760–61. This is not to say that for Duff all forms of detention under the laws of war are for the purpose of incapacitation. A person might be detained following a sentence for war crimes, in which case the primary objective would be punishment rather than incapacitation. Duff's larger point, however, is that in both cases, a recognition of the subject's humanity should "[limit] what we may do to them". *Ibid* at 760.
128. See Duff, "Responsibilitiy", *supra* note 13:

> [I]t could be argued that the phenomena of modern terrorism require us to rethink our existing categories: neither the framework of 'normal' criminal law, nor that of warfare as classically conceived, can accommodate modern terrorism; we must either articulate a new normative category, or develop our existing categories.

Ibid at 147.
129. Duff, "Terrorism", *supra* note 13 at 760.

Duff offers a number of reasons for this,[130] although in Canada the choice of how to treat a citizen suspected of involvement in terrorism would largely be dictated by constitutional and criminal laws on detention and due process. The larger point is that in a manner analogous to the Supreme Court's holding in *Khawaja*, Duff opposes any approach to terrorism offenders (or suspects) that would render them somehow abnormal—as enemies to be dealt with outside of the criminal law, rather than as ordinary subjects of that law. And like the Supreme Court in *Khawaja*, Duff insists that in principle, the terrorism offender should not be considered beyond rehabilitation or reintegration. Thus, Duffian logic is arguably at play in *Khawaja*: by seeking to preserve the possibility of rehabilitation in all terrorism cases, the Court seeks to maintain the recognition of each offender's moral agency or capacity for change and reintegration.

This raises a more crucial question *in extreme cases*: why should a community place a greater value on this form of recognition than it might place on denunciation and deterrence? Put otherwise, even if we assume—contrary to the view of the Court of Appeal and other courts mentioned above—that we can strongly denounce and deter terrorists while *also* seeking to foster their rehabilitation, why should we bother and do the latter? Why should we not claim the additional security and comfort that a lengthy incapacitation of such offenders would give us?

Duff's argument in favour of a concern for rehabilitation in this context rests on the claim that a community that is committed to upholding the value of individual dignity and equality must *strive* to recognize every member's moral agency regardless of their conduct. And, for reasons canvased above, this in turn entails a commitment to inclusive, rehabilitative forms of sentencing rather than to exclusive forms alone. His defence of this position is based on two closely related arguments.

The first argument rests on the premise that membership in a political community is best understood not as a form of contract that the community or a member can easily rescind, but as a more deeply rooted and largely involuntary relationship.[131] A person's status as a member is not contingent on his or her affirmation of the community's values, but should be assumed as an axiomatic or existential fact. On this view, an

130. Duff, "Responsibility", *supra* note 13 at 147.

131. Duff, "Penance", *supra* note 13 at 302.

offender does not forfeit the right to belong when he or she does wrong, but triggers an obligation to repair the bond with the community—even if the offender lacks the inclination to do so. The community in turn respects its members as responsible agents by committing to give each of them the opportunity to effect some form of reparation regardless of their crime and regardless of whether they are likely to atone. The analysis is no different for the terrorism offender; as Duff's contends, "it is open to us to insist that the terrorist is a citizen who is both bound and protected by the values of the polity".[132] In short, maintaining a commitment to the redemptive potential of every offender strengthens the bond between members of the community.

The second argument flows from the first. For Duff, imposing an exclusionary form of punishment in serious cases (life without parole) would be tantamount to a refusal to continue recognizing the offender's moral agency and capacity for redemption. To recognize these qualities in some cases and not others, depending on the offence at issue, would render the recognition of moral agency conditional on good behavior or on an affirmation of the community's values. Yet, for Duff, in a liberal and humane community such recognition should not be conditional or premised on some form of contract, but should be based on the very fact of being human.[133] One might object to this argument by claiming that a community can continue to recognize an offender's humanity by treating him or her humanely while still imposing an exclusionary form of punishment such as life imprisonment. However, Duff's larger point seems to be that while an exclusionary but humane sentence might recognize some part of the offender's humanity, it would not recognize his *moral agency*, dignity, or equality—in other words, his humanity in a more robust sense. This can only be done through inclusive forms of punishment, the essential features of which are the prospect of rehabilitation and reparation of the bond with the community. Thus, to choose incapacitation or deterrence to the exclusion of rehabilitation

132. Duff, "Terrorism", *supra* note 13 at 759. See also Duff, "Punishment", *supra* note 13. "We *could* see those who commit [very] serious crimes as having forfeited their standing as citizens, but we *should* not do so. We should instead still see them as fellow citizens to whom we owe it not to allow their crimes to destroy the bonds of community, and it is precisely by punishing them that we preserve those bonds." *Ibid* at 151.

133. Duff, "Terrorism", *supra* note 13 at 759.

in some contexts and not others would amount to a kind of selective recognition of the humanity of each individual.

Duff's arguments might therefore be read as a broader justification for the Supreme Court's position in *Khawaja*, although there are important differences. In keeping with Duff's theory, the Court affirmed that there is a potential role for rehabilitation in all terrorism cases, and thereby showed an unconditional commitment to recognizing the moral agency of all offenders. By doing so, the Court does something more than affirm the rehabilitative mandate of Canadian criminal law, or the need to be consistent and equitable in applying that mandate. In ways that Duff's theory helps to discern, the Court also affirms a larger liberal conception of political community which values every member's moral agency, equality and potential for redemption.

Yet the Court's approach in *Khawaja* appears to differ from Duff's in one notable respect. To be more consistent with the thrust of Duff's theory of punishment, the Court might have held that in every case where there is a reasonable prospect of rehabilitation, trial judges *must* place at least some weight on realizing that prospect. In saying that "the weight to be given to rehabilitation in a given case is best left to the reasoned discretion of trial judges on a case-by-case basis",[134] the Court left open the possibility that a trial judge might reasonably hold (as the Court of Appeal did) that the demands of denunciation and deterrence can only be met by placing a greater emphasis on those principles, at the expense of rehabilitation. However, the Court may not have done this due in part to the fact that our system is already fundamentally structured such that almost all sentences are inclusive in the Duffian sense. In other words, we have neither the death penalty nor, with one exception, life without the possibility of parole.[135] Thus, aside from that exception, every life sentence or indeterminate sentence is in Duffian terms only *presumptively* exclusionary. In this sense, our system already entails a commitment to every offender's moral agency and capacity for redemption, and the Supreme Court in *Khawaja* simply sought to resist the Court of Appeal's departure in spirit from the rehabilitative character of the larger framework.

134. *Khawaja* (SCC), *supra* note 3.

135. The recent addition of section 745.51(1) of the *Criminal Code* provides for the possibility of life without parole by allowing for consecutive twenty-five-year parole ineligibility periods when sentencing for multiple murders. However, the decision to impose consecutive non-parole periods under this section is discretionary.

Conclusion

The purpose of this paper is to articulate the nature of the break marked by the Supreme Court's decision in *Khawaja* from earlier appellate approaches to sentencing in terrorism cases, and to explore the principled reasons for that break. Earlier approaches had tended to minimize the role of rehabilitation anywhere on the spectrum of terrorism cases, and to preclude virtually any role for it in the more serious cases. The Supreme Court in *Khawaja* held instead that no categorical rules about rehabilitation should apply to terror sentencing, implying that even in more serious cases, it might continue to play an important role. Yet the Court offered only a partial justification for this position. A reading of *Khawaja* in the light of Antony Duff's work in this area suggests that the Court's commitment to rehabilitation in more serious cases is premised on the view that regardless of the offence at issue, both the courts and the community should strive to recognize the moral agency and capacity for reparation of each of its members. As Duff argues, such recognition flows from an idea of community in which concepts of moral agency, equality and redemption are central.