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The Role of Aggravated Offences in Combating Hate Crime – 15 years after the CDA 1998 – Time for a change?

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Abstract.

*The racially aggravated offences created by the 1998 Act (later extended to religious aggravation) were based on a rather arbitrary selection of underlying crimes and have proved difficult to interpret and apply for a number of reasons. Moreover, the relationship between the aggravated offences and the more general duty to increase the sentence for any offence where there is racial (or religious) aggravation is problematical. This is illustrated by the common misunderstandings of the case law on the degree of mutual exclusivity between the crimes underlying the aggravated offences and the more general aggravated sentencing provisions. In the context of the question referred by the government to the Law Commission, as to whether the aggravated offences should be extended further to include a number of other grounds of aggravation, it is argued that this would be counter-productive and that their further extension would lead to even greater confusion and complexity. It is suggested that the preferable course would be to abolish the aggravated offences and to focus on a broader and better articulated sentencing provision of general application which would be all the more effective without the complications of its uncertain relationship with an anomalously selected group of aggravated offences.*

The Crime and Disorder Act 1998 marked a new departure in English Law, creating for the first time a range of specific offences whose *raison d'être* was that they were racially aggravated variations of existing offences. The provisions in sections 29-32 of the 1998 Act, and the offences created thereby can be distinguished from previous legislative attempts to deal with racial hatred directly such as the creation of the completely new offence in the Race Relations Act of 1965 of inciting racial hatred which proved difficult to enforce and subject to worries concerning its impact on freedom of expression<sup>1</sup>. They also went a step further than the results of earlier pressure to create an offence of racially motivated violence in the Criminal Justice and Public Order Act 1994 which the government of the day resisted, instead creating the offence of intentionally causing a person harassment, alarm or distress<sup>2</sup> which could cover racial harassment but which did not require or depend on any specific motivation of the offender, whether racial or otherwise. A distinction has also to be drawn between the specific offences based on racial aggravation created by the 1998 Act and the more general provision in s.82 of the same Act (now to be found in s.145 of the CJA 2003) providing for racial aggravation in relation to any other offence to be compulsorily treated as an aggravating factor in sentencing (thus confirming the approach to sentencing racially aggravated crimes of violence enunciated in Ribbans<sup>3</sup> 1995 16 Cr App Rep (S) 698).

In contrast to all these provisions outlined above, the essence of the offences created in ss. 29-32 of the 1998 Act was that they were all parasitical on existing offences of

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<sup>1</sup> See now ss. 18-23 of Public Order Act 1986

<sup>2</sup> Inserted as s 4A of the Public Order Act 1986

<sup>3</sup> 1995 16 Cr App Rep (S) 698

violence, criminal damage or harassment but with the added ingredient of racial aggravation which became part of the definition of the offence and which, significantly, had to be proved before conviction rather than simply brought in as an aggravating factor to be taken account of at the sentencing stage. What were the reasons behind creating these very specific offences and for adopting the structure given to them in 1998, how have they been interpreted and what have been the difficulties and developments associated with them over the past 15 years and what lessons can be learned from this experience in shaping the future development of the criminal law in combating hate crime more generally? The last of these questions has become particularly pertinent in the light of the Law Commission's announcement in December 2012 that it had been asked by the government to review whether the provisions ought to be extended to include hostility based on disability, sexual orientation or gender identity. Before considering this last question, the history and development of the existing offences will be analysed so as to provide an informed basis for the debate.

### The range of offences selected.

The legislation was the result of growing awareness in the 1990's of the problems of racial violence<sup>4</sup> and harassment and significant increases in the number of racial incidents recorded under a variety of definitions. The Labour party included in its manifesto for the 1997 General Election a commitment to create new offences of racially motivated violence and racial harassment. Following its election in May of that year, a Home Office Consultation paper, Racial Violence and Harassment was issued and the proposals therein constituted the basis of the racially aggravated offences selected in the Act. These can be summarised as follows (in each case the offence has to be "racially aggravated" for the purposes of s.28 of the Act, the meaning of which expression will be examined subsequently);

Racially aggravated offences initially created by ss. 29-32 of the 1998 Act (indicating also the increase in *maximum* penalty available on trial on indictment as compared with the maximum available for basic offence underlying the racially aggravated offence)

- |         |  |
|---------|--|
| s.29(1) | (a) an offence under s.20 OAPA 1861 (malicious wounding or grievous bodily harm) ( <i>5 years increased to 7 years</i> ) |
|         | (b) an offence under s.47 OAPA 1861 (actual bodily harm) ( <i>5 years increased to 7 years</i> )                         |
|         | (c) common assault ( <i>6 months increased to 2 years</i> )  |
| s.30(1) | an offence under s.1(1) of the Criminal Damage Act 1971 (criminal damage) ( <i>10 years increased to 14 years</i> )      |

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<sup>4</sup> Awareness generated by the Stephen Lawrence case of 1993 was significant even before the publication of the McPherson Report in 1999

- s.31(1) (a) an offence under s. 4 of the Public Order Act 1986 (fear or provocation of violence) (*6 months increased to 2 years*)
- (b) an offence under s. 4A of the Public Order Act 1986 (intentional harassment alarm or distress) (*6 months increased to 2 years*)
- (c) an offence under s. 5 of the Public Order Act 1986 (harassment alarm or distress) (*summary only and remained so— fine increased from level 3 [£1000 max] to level 4 [£2,500 max]*)
- s.32(1) (a) an offence under s.2 of the Protection from Harassment Act 1997 (harassment) (*6 months increased to 2 years*)
- (b) an offence under s.4 of the Protection from Harassment Act 1997 (putting in fear of violence) (*5 years increased to 7 years*)

It should be noted that originally the racially aggravated offence of criminal damage under s.30 was not included in the proposals which were aimed as those offences directed in a broad sense against the person. However this provision was added to the Bill at 3<sup>rd</sup> reading in March 1998 as it was pointed out that racially motivated offences of criminal damage are very often directed towards the owner or occupier of property or indeed designed to terrorise or harass or dismay members of racial groups irrespective of who owned the property. The example was given of racist graffiti on bus shelters and there was also reference to the killing of Stephen Lawrence and the fact that a plaque erected in his memory had been vandalised.

The question of why the above offences were selected to be given distinct racially aggravated versions is in some ways best answered by looking at what offences were not selected. In particular the fact that s.20 OAPA (malicious wounding or inflicting GBH) is included but s.18 (wounding or causing GBH with intent) is left out is noticeable and significant. The reason was explained by the Home Office Minister in during the passage of the Bill as follows

“Where the basic offence already carries a maximum sentence of life imprisonment as under section 18 of the Offences Against the Person Act 1861, the racially aggravated offence is not in practical terms required as the sentence cannot be increased. In other words, there is nothing to be gained, if there is no increased sentence, in placing the additional burden on the Crown Prosecution Service to meet the racially aggravated test. For that reason [also], we have not included murder and manslaughter in the list of offences.”<sup>5</sup>

The fact that the racial aggravation could thus be taken into account under the general sentencing provision given statutory force in s.82 therefore meant that s.18, with its

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<sup>5</sup> Alun Michael, Home Office Minister of State, *Hansard*, Commons, Standing Committee B 12 May, 1998, col 325

maximum of life, (and *a fortiori*, murder, with its mandatory life penalty), did not need a specific offence in aggravated form. This approach is not entirely unproblematic as it suggests that the only reason for enacting the specific offences is to increase the available sentence, ignoring arguably at least equally powerful considerations of denunciation which would justify the creation of specific offences. Furthermore, it creates some unfortunate anomalies and practical problems to do with alternative verdicts and charging practice<sup>6</sup>. If there is evidence both of racial aggravation and of the specific intent to cause gbh required under s.18, prosecution under s.18 will be appropriate but if the jury are not in the event persuaded of the intent to cause gbh, only a normal s.20 charge will be automatically available as an alternative verdict even though the racial aggravation element is very clear. The prosecution, in order to avoid this may and probably should include the racially aggravated s.20 offence in the indictment but this may give the wrong signals to the accused that the prosecution are willing to accept a plea to the racially aggravated s.20 (maximum 7 years) where there is in fact good evidence of a serious s.18 offence plus racial aggravation also to be taken into account at the sentencing stage (for which the sentence may in principle be anything up to life). It may also confuse a jury who will have to be told that they can ignore the racial aggravation in deciding whether the more serious s.18 offence is made out but have to consider it in relation to s.20 where however there is no need to be satisfied of the intent to cause gbh. If the jury consider the racial aggravation to be the most serious aspect of a bad case they may be tempted to convict of the s.20 offence to reflect the racial aggravation explicitly rather than of the more serious s.18 offence which does not refer to racial aggravation even though they think there was an intent to cause gbh (of course logically in this situation they should convict of both the s.18 offence and the racially aggravated s.20 but they may not fully understand the logic of this.) A much clearer and more logically structured arrangement would have been to enact a racially aggravated version of s.18 as well as s.20 so that these anomalies and practical problems could have been eliminated. Indeed amendments during the passage of the Act were moved to do just this but were rejected<sup>7</sup>.

Similar issues can potentially arise in relation to the aggravated public order offence based on s.4 of the Public Order Act 1986. The basic non-aggravated offences under the Public Order Act are expressly made alternative verdicts to their new aggravated forms. However the more serious public order offences of violent disorder and affray do not have racially aggravated versions and whilst an ordinary offence under s.4 of the Public Order Act (fear or provocation of violence) is an alternative verdict to either violent disorder or affray, there is no provision for the aggravated s.4 offence to be an alternative verdict to violent disorder or affray. Thus if there is evidence of violent disorder or affray and of racial aggravation, whilst the racial aggravation can be taken into account in sentencing on either of those offences, if the actual conviction is of s.4 as an alternative verdict e.g. because there is no threat of unlawful violence, the racially aggravated version cannot be used because it is not made an alternative verdict and there is a further potential problem in reflecting the racial aggravation in the sentencing for the basic s.4 offence because there is in existence the aggravated s.4 offence which should have been charged if racial aggravation is alleged. Furthermore, if the racially aggravated s.4 offence is included in case the jury

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<sup>6</sup> As was pointed out at the time in Leng, Taylor and Wasik, Blackstone's Guide to the Crime and Disorder Act 1998 pp 48-51

<sup>7</sup> Hansard, Lords, 17 March 1998, col 699 et seq

do not convict of violent disorder or affray, the jury will again be confronted with the paradox that the racial aggravation is something of which they have to be satisfied on the less serious charge (aggravated s.4) but not for the more serious charge of violent disorder or affray which does not have a specifically racially aggravated form.

### The test of racial (and religious) aggravation

The 1998 Act set out the test of racial aggravation in s.28 as follows (the words in square brackets have been added to reflect the fact that religious aggravation was added as a result of the Anti-terrorism Crime and Security Act 2001, s.39):

“(1) An offence is racially [or religiously] aggravated for the purposes of sections 29-32 below if-

- a) at the time of committing the offence, or immediately before or after doing so, the offender demonstrates towards the victim of the offence hostility based on the victim's membership (or presumed membership) of a racial [or religious] group; or
- b) the offence is motivated (wholly or partly) by hostility towards members of a racial [or religious] group based on their membership of that group”

Section 28 can be seen to have created two separate types of racial aggravation in sub paragraphs a) and b); a) demonstrated racial hostility and b) racially hostile motivation which are alternative ways of proving the aggravating feature.

The second form of aggravation, based on motivation, is the primary target of the aggravated offences, seeking to denounce, punish and deter the singling out of victims based on their membership of a racial (or religious) group. It is also however quite difficult to prove as was explained in the Consultation Paper, Racial Violence and Harassment in 1997<sup>8</sup>

“Ministers recognise that the creation of offences which required the prosecution to prove that the offence was motivated on racial grounds would create a difficult hurdle to be overcome by the prosecutors. The prosecution would need to distinguish a racial motive from other possible motives and would have to demonstrate the degree to which a person had been influenced by various motives. There may be a whole range of different circumstances and motives at work in such cases and this may put a conviction in doubt for all but the most overtly racist incidents.”

The government intends that the new offences should cover cases where the prosecution is able to show racial motivation but it believes that for most racial incidents of violence and harassment a much more realistic test will be necessary.

The test of demonstrated racial hostility was explained in the next two paragraphs to be this “much more realistic” alternative test

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<sup>8</sup> At paragraphs 8.2 to 8.3

...the new offences should be committed where it is shown .... that the offender demonstrated racial hostility at or around the time of the basic offence, or that the motivation for committing the offence was racial hostility.

This sets the threshold for the new offences at a level which is likely to catch all the cases where there is any evidence of racism

There are two ways of looking at the tactic of providing these two alternative ways of proving the aggravating feature. On the one hand the fact that aggravation is not totally dependent on proving the difficult matter of motivation answers some of the problems about the potential “chilling effect” on free speech since it lessens the temptation or necessity to rely on previous utterances of the defendant about racial matters as evidence of his racial motivation. To meet the alternative ground of demonstrated racial hostility, the words demonstrating racial hostility have to be uttered immediately before or after the violence or harassment and so represent a much more focussed limitation on freedom of expression. On the other hand, the demonstrated racial hostility ground moves quite a distance away from the core and most legitimate aim of distinguishing offences where the offender singled out his victim on racial (or religious) grounds to include cases where the offender happens to show in the course of committing an offence that he has racist views, whether or not they influenced him in committing the offence or choosing his victim.

Of course it will often be the case that a person who demonstrates racial hostility at the time of the offence was indeed committing the offence and selecting his victim because of those views i.e. was racially motivated, but this does not have to be shown. Some critics<sup>9</sup> of the demonstrated racial hostility ground found it on these grounds to be

“positively Orwellian in that it seeks to police people’s emotions. It increases maximum sentences by up to 300% for offences which have nothing to do initially with race or nationality and where there is no racial motivation but where, in the course of the attack, some hostility or resentment may emerge accidentally”

On the other hand, it will often be the case that person who demonstrates racial hostility at the time of the offence is actually motivated by it in whole or in part and, perhaps equally importantly, this will be the perception of the victim of the offence whose distress and fear will thus be heightened as a result. Thus the demonstrated racial hostility ground can be defended on the grounds that it will often be evidential of racial motivation and also that it aggravates the offence itself independently in any event in terms of the impact on the victim. As will be seen it is the demonstrated racial (or religious) hostility ground which has proved to be most important in practice as compared with the racial motivation ground of aggravation even though the demonstrated racial hostility aspect has itself not been without its own problems.

### The interpretation and application of the statutory provisions

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<sup>9</sup> Lord Monson, *Hansard*, Lords, 12 February 1998, col 1266

A key concept under both of the alternative tests of racial aggravation set out in s.28(1) a) and b) above is that of membership of a “racial group.” Section 28(4) defines this as a “group of persons defined by reference to race, colour, nationality (including citizenship) or ethnic or national origins.” This definition is almost identical to that used first in the Race Relations Act 1976 (which however did not include citizenship) and even closer to that used in the Public Order Act 1986 (the only difference being the order in which the words “race” and “colour” appear). The leading case under the 1976 Act is the House of Lords decision in *Mandla v Dowell Lee*<sup>10</sup> which established that for the purposes of unlawful discrimination, Sikhs constituted a group “defined by reference to .... ethnic origins” even it originated as a religious community since *inter alia* it had a long shared history, of which the group was conscious as distinguishing it from other groups, and the memory of which it kept alive, and it had a cultural tradition of its own, including family and social customs and manners. This relatively broad approach to the meaning of racial group has been followed in a number of other discrimination cases so that Romany gipsies are recognised as racial group on account of their ethnic origin<sup>11</sup> and Irish Travellers have also been so recognised<sup>12</sup>. Whilst Rastafarians are not regarded as a racial group but rather as a religious group<sup>13</sup> (one factor being in contrast to the Sikh history of several centuries, the Rastafarian history was only of 60 years) the significance of this was removed by the addition in 2001 of religious aggravation on the grounds of membership of a religious group, religious group being defined, by a new subsection (5) inserted into s.28 of the 1998 Act, as “a group of persons defined by reference to religious belief or lack of religious belief”.

The types of groups protected under the Act as interpreted in line with discrimination law and amended in 2001 were thus fairly wide and the interpretation given to the concept of racial group in criminal cases decided specifically under the 1998 Act tended to further develop the broad contextual approach of *Mandla v Lee*. The leading authority and clear illustration of this is the House of Lords case of *Rogers*<sup>14</sup> where a line of cases was approved giving a broad context to “racial group. Thus in *Director of Public Prosecutions v M*<sup>15</sup> it had been held that “bloody foreigners” could, depending on the context, demonstrate hostility to a racial group and in *A-G's Reference (No 4 of 2004)*<sup>16</sup>, the Court of Appeal held that “someone who is an immigrant to this country and therefore non-British” could be a member of a racial group for this purpose and in *White (Anthony)*<sup>17</sup>, it was held that “African” could demonstrate hostility to a racial group, because it would generally be taken to mean black African. In *Rogers*, Baroness Hale confirmed this line of cases and agreed with the submissions that

“ ...the statute intended a broad non-technical approach, rather than a construction which invited nice distinctions. Hostility may be demonstrated at the time, or immediately before or after, the offence is committed (section

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<sup>10</sup> [1983] 2 AC 548

<sup>11</sup> *Commission for Racial Equality v Dutton* [1989] QB 783

<sup>12</sup> *O'Leary v Punch Retail* 29 August 2000

<sup>13</sup> *Dawkins v. DoE* [1993] IRLR 284 CA

<sup>14</sup> [2007] 2 AC 62

<sup>15</sup> [2004] 1 WLR 2758

<sup>16</sup> [2005] 1 WLR 2810

<sup>17</sup> [2001] 1 WLR 1352



28(1)(a)). The victim may be presumed by the offender to be a member of the hated group even if she is not (section 28(1)(a)). Membership of a group includes association with members of that group (section 28(2)). And the fact that the offender's hostility is based on other factors as well as racism or xenophobia is immaterial (section 28(3)).”

Baroness Hale went on to comment that

“This flexible, non-technical approach makes sense, not only as a matter of language, but also in policy terms. The mischiefs attacked by the aggravated versions of these offences are racism and xenophobia. Their essence is the denial of equal respect and dignity to people who are seen as “other”. This is more deeply hurtful, damaging and disrespectful to the victims than the simple versions of these offences. It is also more damaging to the community as a whole, by denying acceptance to members of certain groups not for their own sake but for the sake of something they can do nothing about. *This is just as true if the group is defined exclusively as it is if it is defined inclusively*”.

Notwithstanding the generally supportive and expansive approach of the House of Lords in *Rogers* (where doubt was cast on some anomalous and restrictive earlier decisions such as *DPP v Pal*<sup>18</sup>), the aggravated offences have not been without their difficulties in the five years since *Rogers*. Thus in *SH*<sup>19</sup> the trial judge, in withdrawing an offence alleged to be aggravated by the expression of the words “black monkey” said

"I understand what the judges in the House of Lords and the Court of Appeal have to say about the theory behind the matter, as it were. But it seems to me that using one's common sense ... you have no chance of persuading a Woolwich jury to be sure that he said what he said as a result of hostility towards the man because of his race as opposed to personal dislike or loss of temper or both"

On the prosecutions appeal against the ruling, the Court of Appeal ordered a retrial and, amongst other criticisms of the judge's handling of the case, pointed out that the judge completely missed the distinction between hostile motivation in s.28(1)(b) and demonstrated hostility in s.28(1)(a). This had been a common error in earlier years but has persisted despite the supportive analysis of the offences by the House of Lords in *Rogers*, and indeed, as the opening line of the quote above shows, in full knowledge of the appellate courts' approach.

*SH* might be dismissed as a case where the trial judge was clearly unsympathetic to the aims of the legislation but *Jones v DPP*<sup>20</sup> demonstrates the on-going difficulties which magistrates in particular have had in conscientiously aiming to follow relevant case law. The defendant had, in a dispute with a neighbouring couple, referred to the wife's presumed internet bride status. The magistrates read the earlier cases of *DPP v Howard*<sup>21</sup> and *Johnson v DPP*<sup>22</sup> as requiring that not only did para (b), racially

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<sup>18</sup> [2000] Crim LR 756

<sup>19</sup> [2010] EWCA Crim 1931

<sup>20</sup> [2011] 1 WLR 833

<sup>21</sup> [2008] EWHC 608 (Admin)

hostile motivation, require a subjective motive of hostility to a member of the relevant group but that para a), demonstrated racial hostility, also required a subjective element inherent in the notion of hostility. The magistrates considered that D was actually motivated by (non-racial) hostility towards the husband because of an ongoing dispute rather by racial hostility to the wife and therefore concluded that even the para a), demonstrated racial hostility, ground of aggravation was not made out. The Divisional Court corrected them on this and said

“limb (a) involves no examination of subjective intent or motivation behind the demonstration of racial hostility for the victim. It merely requires the demonstration of racial hostility. It contains an objective test of whether the defendant demonstrated racial hostility to the victim.”

The legal difficulties inherent in the legislation, especially where offences are to be tried by magistrates are perhaps well illustrated by the following somewhat complex reasoning offered by the Ousely J in the Divisional Court in *Jones v DPP*<sup>23</sup>

“The decision in the *Howard* case does not contradict what I have said because it was dealing exclusively with limb (b). The comment of Richards LJ in the *Johnson* case [2008] EWHC 509 draws upon the *Howard* case [2008] EWHC 608 but misapplies it *obiter* seemingly to a section 28(1)(a) case, to which it has no real application. The weight which would otherwise be attributed to this *obiter* has to be significantly qualified. As I have said, the decision in the *RG* case 168 JP 31, which draws the distinction was not cited in the *Johnson* case. Accordingly, the justices misdirected themselves in law in requiring there to be motivation of racial hostility in order to convict of this offence under limb (a) of section 28 of the 1998 Act.

If a Lord Justice of Appeal can misapply the case law (seemingly both *obiter* and *per incuriam*) it is perhaps not surprising that magistrates have continued to misdirect themselves. This is not the place to try to review and explain all the detailed complexities of all of the case law on even just the racially aggravated offences but enough has hopefully been said to demonstrate that they cannot be regarded as simple or straightforward. It is in this context that one has to assess the question, recently referred to the Law Commission by the government and to which this paper now turns, of whether the aggravated offences should be extended beyond racial and religious hostility to hostility on the ground of disability, sexual orientation and transgender identity.

#### The potential extension of the grounds of aggravation.

It will be contended in this section that extension of the aggravated offences would be inappropriate and counter-productive and would only exacerbate existing difficulties by extending them to a wider category of cases whilst at the same time marginalising an even broader range of potential grounds of aggravation. Instead it will be argued that a much more fruitful approach would be to strengthen the provisions relating to sentencing of offences motivated by (or demonstrating)

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<sup>22</sup> [2008] EWHC 509 (Admin)

<sup>23</sup> At paragraph 23

hostility towards minority groups and indeed that, if this were to be done, far from it being desirable to extend the aggravated offences it would be preferable if they were to be repealed. This last point may seem surprising at first glance and to constitute an retreat from the continuing strong public commitment to combat and denounce racial and religious discrimination. However, given more effective provision and use of sentencing powers for any offence where there is racial religious or any other relevant ground of aggravation, the existence of a limited number of specific aggravated offences is not only an unnecessary diversion but can actually operate as an unwelcome complication in dealing effectively even with factual situations which fall within those specific offences. These complications are clearly illustrated by the separate but inter-related cases of *McGillivray*<sup>24</sup> and *O'Callaghan*<sup>25</sup> which concern the question of the extent of the mutual exclusivity between the aggravated offences and the duty (under CJA 2003, s 145) to treat racial and religious hostility as a ground of aggravation for all other offences .

*McGillivray* was a striking case of assault on a passer-by by means of an Alsatian dog (in Central London, Tavistock Square, WC1) with seemingly very clear racial hostility expressed and demonstrated by the defendant and resulting in four penetrating wounds to the victim's thigh. The prosecution originally charged the defendant with the racially aggravated offence of assault occasioning actual bodily harm (contrary to s.29(1)(b) CDA 1998) but the indictment was subsequently amended to include a second count of the basic offence of assault occasioning actual bodily harm under s.47 of the OAPA 1861 to which the defendant pleaded guilty. No evidence was offered on the racially aggravated offence of which he was formally found not guilty. However, the recorder in sentencing for the basic offence said that he regarded the offence as clearly racially aggravated and sentenced the defendant to three years<sup>26</sup> instead of the two years that he would have found appropriate if there had not been racial aggravation. Stanley Burnton J in the Court of Appeal ruled that it was not open to the recorder, irrespective of the view he took of the facts, to sentence the appellant on the basis that he was in fact guilty of a racially aggravated assault of which he had been found not guilty.

Some of the complications in this area have arisen because the facts of the case do not squarely raise the issue of whether the power to increase the sentence for racial aggravation under what is now s.145 is available where the substantive aggravated offence under CDA has not actually been charged. It is one thing to say, if you are charged with the aggravated offence, and no evidence is offered and you are then acquitted of that offence, that you cannot be then sentenced for the basic offence on the basis that in fact the offence was racially aggravated. To do that would be unfair and unacceptable and that is what *McGillivray* clearly does decide. However, in the commentary to the case in the *Criminal Law Review*<sup>27</sup> it is said that it

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<sup>24</sup> [2005] 2 Cr App R (S) 60

<sup>25</sup> [2005] 2 Cr App R (S) 83

<sup>26</sup> Note that this was still within the 5 year maximum for the basic offence under s.47 and so did not come close to using the extra 2 years which would have been available for the aggravated offence. The need to make the extra two years available was supposed to have been the main criterion for selecting which offences should be available in aggravated form (and for not having an aggravated version of s.18 for example) but it seems generally that few cases result in a higher sentence than the maximum available for the basic offence.

<sup>27</sup> [2005] Crim LR 484 at 486

“does not appear that this element [that the aggravated offence was charged but not proceeded with] was crucial to the decision, and the same result should logically follow if the offender were charged with the basic version of the offence as in *O’Callaghan* (below)”

Before turning to *O’Callaghan*, it is perhaps worth observing, contrary to the commentary quoted above, that it does in fact seem integral to *McGillivray* in its own terms that not only was the aggravated offence originally charged and not proceeded with but a verdict of not guilty of that offence was recorded. Stanley Burnton J did not say you cannot be sentenced for an offence of which you have *not been found guilty* but that you cannot be sentenced for an offence of which you have *been found not guilty*, which of course is a different matter. The commentary on *McGillivray* in its turn influences the interpretation generally given to *O’Callaghan* which is commented on as the next case in the *Criminal Law Review*<sup>28</sup>.

In *O’Callaghan*, there never was a charge of the aggravated offence, the basic offence of assault was charged from the outset and there was no express suggestion of racial aggravation in the course of the trial. Neither was there a Newton hearing and racial aggravation was not raised with defence counsel before mitigation. The trial judge however indicated in sentencing that he considered that there must have been racial aggravation for which factor he increased the sentence from 15 months to 18 months. The Court of Appeal again ruled that he was wrong to do so but it is not at all clear that the case is authority for the proposition, for which it is often cited<sup>29</sup>, that a court should not treat an offence as racially or religiously aggravated if a racially or religiously form of the offence was available but was not charged.

It is true that at para 17 of Gross J’s judgement in the Court of Appeal it was acknowledged that

“there is much to be said for the point as to principle raised by the single judge, namely that if the racially aggravated assault could have been but was not charged, then it would be wrong to increase the sentence on account of racial aggravation”

but the paragraph concluded

However, on the view we take of the matter it is unnecessary to go that far and determine any such points of principle. In any event, there are situations where a Newton hearing is undoubtedly appropriate for the determination of facts relevant to sentence but which were irrelevant to guilt. Moreover, there is the apparently mandatory wording of s.153 of the PCC(S) Act 2000 for offences not within ss.29 to 32 of the CDA 1998.

This latter reference to s.153 PCC(S) is to what is now s.145 CJA 2003 which states that a court “*must*” treat racial aggravation as an aggravating factor on sentence for an offence “other than one under sections 29 to 32 of the Crime and Disorder Act

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<sup>28</sup> At 486-488

<sup>29</sup> In addition to the commentary on *McGillivray* quoted above, see e.g. Anthony and Berryman’s *Magistrates’ Court Guide* (2013) para B5.2B where, however, the negative proposition is at least qualified by the word “normally”.

1998". The offences under ss.29 -32 are thus the (mutually excluded) aggravated offences, *not* their underlying basic offences under OAPA 1861 or CDA 1971 etc for which latter offences, in contrast, the sentencer *has* to treat racial aggravation as an aggravating feature. Hence the reference in O'Callaghan to "the apparently mandatory wording" of what is now s.145 requiring racial aggravation to be treated as an aggravating factor. The Court therefore then went on in para 18 to say (italics added)

*We therefore prefer to proceed on the assumption that the question of racial aggravation could have been dealt with as part of the sentencing process, even though it had not arisen during the trial.* Even on this assumption, we have no doubt that the course followed by the judge was, with respect, wrong in principle and unsustainable. In our judgment, where the question of racial aggravation has not arisen at trial, then even *when it is open to the sentencer to pass an increase on the ground of racial aggravation (as we are prepared to assume it was here)* either a Newton hearing must be held or, at the very least, plain and adequate notice must be given by the sentencer that he is considering sentencing on an enhanced or aggravated basis.

Thus *O'Callaghan* is not an authority for saying that racial aggravation should not be considered at the sentencing stage where a racially aggravated offence could have been, but was not, charged and indeed it suggests that it probably can be and indeed that the wording of s.145 appears to require it to be<sup>30</sup>. What it does make clear however that if the racial aggravation is not part of the offence charged (i.e. the offence is not charged as an aggravated one under ss29-32 CDA 1998) and the racially aggravating features have not been rehearsed during the trial then a Newton hearing or some other form of notice must be given to the accused and to counsel to at least allow submissions to be made.

For completeness, reference should also be made to the case of *Kentsch*<sup>31</sup> where the Court of Appeal again reduced a sentence for s.47 OAPA 1861, *inter alia* because the sentencing judge had referred to racial aggravation as an aggravating factor. However, like *McGillivray*, this was a case where a count for the racially aggravated version had been included but then withdrawn from the indictment and there was also a co-accused who had pleaded guilty to the unaggravated offence and it was not established on the evidence from which defendant any demonstrated racial hostility had emanated. Clearly there could be no question in these circumstances of sentencing one defendant, the appellant, on the basis of racial aggravation which had not been proven against him.

### Conclusions

The case law discussed above demonstrates considerable difficulties, even where there is fairly clear evidence of racial aggravation, in prosecuting aggravated offences. The prosecution cannot be sure in advance whether they will be able to make out the racial aggravation at the trial and defendants may be unwilling to plead guilty to the

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<sup>30</sup> This interpretation does not make the racially aggravated offences completely redundant or necessarily pointless since the higher *maximum* sentence is not available in the absence of the aggravated offence. Again it should be recalled that the main criterion for the selection of the offences to be enacted in aggravated form was whether there was a need to make available a higher maximum.

<sup>31</sup> [2005] EWCA Crim 2851

aggravated offence but may be prepared to plead to the basic offence as happened in both *McGillivray* and *Kentsch*. The prosecution may be then tempted to accept the plea (rightly or wrongly) and in these circumstances it is clear that the appellant cannot be sentenced for racial aggravation when he has been formally acquitted (as in *McGillivray*) of the aggravated offence or where the aggravated offence has been removed from the indictment on which he was first arraigned (as in *Kentsch*). Notwithstanding these cases and their misinterpretation along with the misunderstanding of *O'Callaghan* (to the extent that it has been taken to mean almost the opposite of what it actually says about the degree of mutual exclusivity), it should be and is open to the court to sentence for racial (or religious) aggravation where a racially aggravated offence could have been but was not charged in the first place (especially if the evidence of racial aggravation only emerges during the trial). This of course must be subject to the proviso that the accused is given the chance to respond to the racial aggravation allegation either through a Newton hearing or (at the very least) through his counsel's speech in mitigation. However, the fact that the true import of cases such as *McGillivray* and *O'Callaghan* has not been properly understood (or is at least contestable and varies according to the precise way in which proceedings have been conducted) is itself a demonstration of the undue complexity introduced by having both a number of specific aggravated offences and also a general aggravating provision dealing with the same aspects of aggravation but with an unclear degree of mutual exclusivity. The logical conclusion is that there should either be a series of aggravating offences OR there should be a provision requiring the aggravating factors to be included in sentencing but not both. If there has to be a choice between one route or the other, it is submitted that the best choice is the sentencing provision.

The reasons for this include;

- a) the original choice of offences in the CDA 1998 was arbitrary and included e.g. s.20 OAPA 1861 but did not include the closely related s.18 and this has created anomalies and problems in relation to selection of charge and alternative verdicts as discussed above;
- b) the difficulties that magistrates in particular have had in understanding the nature of the two modes of aggravation – demonstrated racial hostility and racially hostile motivation – and the relationship between them – see the discussion of *SH* and related cases above;
- c) the likely increase in difficulties of the above nature, and the increasing number of cases evidencing such difficulties, if the grounds of aggravation in the specific offences were to be extended to include hostility on the grounds of disability, sexual orientation and transgender identity
- d) the potential problem that the more grounds of aggravation that are specifically recognised in the aggravating offences, the more anomalous it may seem that other potential victim groups are not included (such as those based on age, sex, or other social groups (e.g. Goths – see the Sophie Lancaster case discussed below.). Whilst it is true that the same criticism might be made of a measure providing for aggravated sentencing rather than aggravated offences (i.e. that the groups referred to and protected are limited and exclude other groups equally deserving of protection) this consideration is not quite as telling in the case of a sentencing provision given that there is any event a much wider basis of aggravation outside

ss145/145 CJA in the form of the general sentencing guideline, the relevant part of which is as follows<sup>32</sup>

Sentencing Guidelines Council

Overarching principles; Seriousness

“D. The Assessment of Culpability and Harm ...

i) Aggravating factors .....

1.22 Factors indicating higher culpability:

.....

Offence motivated by hostility towards a minority group, or a member or members of it”

Of course this is not quite the same as the broader nature of aggravation first introduced in the CDA 1998 since it only talks about “motivated by” and thus is effectively limited to cases where motivation can be proved as opposed to the more commonly relied on form of aggravation under the 1998 Act of “demonstrated ... hostility” where the subjective element of motivation does not have to be shown. Nevertheless there is considerable scope for this guideline to be used much more than it is, or where it is used, for its use to be publicised and recorded and declared in open court. There are very few reported cases on its direct or express use (see e.g. *Taylor*<sup>33</sup> where it arguably need not and should not have been referred to as the offence was itself an aggravated one under CDA 1998.) The highly publicised Sophie Lancaster trial is a much better known case where the general guideline was *in effect* used (although the fact that it was so used is not always appreciated). This case in fact provides a tragic but powerful example of the right way to deal with such cases albeit that the usage could be put into a rather clearer statutory framework within which the grounds of aggravation might be more clearly signalled as being relevant.

In the Sophie Lancaster case<sup>34</sup> the sentencing remarks of the Recorder of Preston, Judge Anthony Russell QC, were quoted with approval in the Court of Appeal:<sup>35</sup>

“I am satisfied that the only reason for this wholly unprovoked attack, was that Robert Maltby and Sophie Lancaster were singled out for their appearance alone because they looked and dressed differently from you and your friends. I regard this as a serious aggravating feature of this case, which is to be equated with other hate crimes such as those where people of different races, religions, or sexual orientation are attacked because they are different. This aggravating feature applies to all of you and I add that the courts are perfectly capable of recognising and taking account of such aggravating features without the necessity of Parliament enacting legislation to instruct us to do so.

These remarks related to convictions of two defendants for murder, and of a further three for s.18 OAPA 1861, arising from a savage and unprovoked attack on two

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<sup>32</sup> [http://sentencingcouncil.judiciary.gov.uk/docs/web\\_seriousness\\_guideline.pdf](http://sentencingcouncil.judiciary.gov.uk/docs/web_seriousness_guideline.pdf)

<sup>33</sup> [2009] EWCA Crim 532 – see also *Killeen* 2009 EWCA Crim 711 where arguably it was s.145 which should have been used since it was case of racial hostility – an Irish traveller case – and see further the original case formulating this aspect of the guideline - *Celaire* [2003] 1 Cr. App. R. (S.) 116 where the example given of hostility to a minority group was racial hostility within s.28 CDA 1998!

<sup>34</sup> *Ryan Herbert and others* [2009] 2 Cr. App. R. (S.) 9

<sup>35</sup> At paragraph 20

young people whose appearance as Goths appeared to be the only reason for singling them out. In relation to murder, the relevant statutory provision in Schedule 21 CJA 2003 only specifically mentions the racial, religious, disability, sexual orientation and transgender forms of aggravation and s.18 is governed by s.145/146 CJA 2003 which provisions similarly only cover effectively the same grounds of aggravation. However, both offences are in effect covered by the general sentencing guideline on aggravating features which refers to “hostility towards a minority group” and thus the approval of Judge Russell’s remarks can be seen as a powerful endorsement of the potential of the minority group aggravating feature.

Overall, it is submitted that the most effective, simple and transparent way forward in this area should be by way of aggravating factors to be used at the sentencing stage rather than by means of any extension of the existing aggravated offences. The aggravating sentencing factors mentioned in s.145 CJA 2003 could themselves be more effectively used if there were not the complications of considering the question of their interrelationship with the specific aggravated offences, and in particular the mutual exclusivity question of whether a basic offence can be treated as aggravated for sentencing purposes on racial or religious grounds where an aggravated offence could have been preferred from the outset. The abolition (rather than extension) of the aggravated offences would not only remove these problems (and any further extension of them) but would allow a single unified aggravating sentence provision to be enacted referring to all the groups currently covered by s.145/146. Furthermore this general aggravating provision could also be widened to encompass, and thereby more clearly signal, a more generic “minority group” criterion, which already exists in the general sentencing guideline and in the practice of the courts as endorsed by the Court of Appeal in *Ryan Herbert*. Although the removal of the aggravated offences first enacted in 1998 might seem to be a backward step to some eyes<sup>36</sup>, the difficulties inherent in their application and in their relationship to the aggravating factors in sentencing, mean that their demise would be more than compensated by a broader and more clearly articulated sentencing provision. This would provide for aggravation at the sentencing stage on a broader range of aggravating grounds, consistently with the existing general sentencing guideline, irrespective of the underlying offence committed and all the more effective for not having the complicating features of the substantive offences, including their anomalous grounds of selection and their (apparent) mutual exclusivity.<sup>37</sup>

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<sup>36</sup> Sometimes a seemingly backward step is necessary in order to open up a more attractive route forward. An analogy might also be drawn with tax law and in particular with the relief for mortgage interest on the principal private residence that at one time was given. The effect of this relief was beneficial to those initially in receipt but in the long term it merely put up the price of houses to the disadvantage of subsequent purchasers, particularly first time buyers. The phenomenon is known to economists as tax capitalisation. Ultimately the tax relief was abolished amongst much initial grief from householders but in the longer term it is now hardly remarked upon. Similarly it might be said that the initial enactment of the racially aggravated offences was a good thing in that it sent out a particular message but the initial benefits have now disappeared because of the complications that the offences have brought with them and the increasing pressure to include other grounds of aggravation. The denunciatory effect of the original provisions has thus been capitalised (i.e. in this context has become ossified) and whilst removing them would no doubt be criticised initially, in the longer term a clearer signal would ultimately be sent by having a more simple, effective and better articulated sentencing provision covering all the relevant grounds of aggravation without the complication of the relationship with a limited number of aggravated offences.

<sup>37</sup> A draft of this article was submitted to the Law Commission by way of a response to its Consultation Paper No 213 *Hate Crime: The Case for Extending the Existing Offences* (2013).