

Chapter 14 (Sentencing Adult Offenders): Update

14.1 Imprisonment

14.1.4 Release from custody

Section 243A of the Criminal Justice Act 2003, which relates to the duty to release offenders serving a fixed-term sentence of less than 12 months unconditionally at the halfway point in their sentence, is amended (by the Offender Rehabilitation Act 2014) so that it now provides that the only offenders who are released unconditionally at the halfway point of their sentence will be those serving a custodial sentence of less than 12 months who are under the age of 18 at the halfway point in their sentence. All other offenders serving sentences of less than 12 months will now be subject to release on licence when they reach the halfway point in their sentence.

The Offender Rehabilitation Act 2014 also inserts a new section, s 256AA, into the 2003 Act. This creates a new period of supervision for offenders serving custodial sentences of less than 2 years. The supervision period begins at the end of the sentence and ends on the expiry of 12 months from the date of automatic release (subs (4)). This means that an offender serves half of their custodial sentence in custody, the second half under licence in the community, with the post-sentence supervision period then applying until the offender has spent 12 months in the community since their automatic release date. Section 256AA(2) requires offenders to comply with requirements during this supervision period. The purpose of such supervision is the rehabilitation of the offender (subs (5)).

Schedule 1 to the 2014 Act also inserts a new section, s 256AB, into the 2003 Act. This sets out requirements that may be specified during the supervision period. They are:

- to be of good behaviour and not behave in a way that undermines the rehabilitative purpose of the supervision period;
- not to commit any offences;
- to keep in touch with the supervisor;
- to receive visits from the supervisor;
- to reside permanently at an address approved by the supervisor and to obtain prior permission for any stay of one or more nights at a different address;
- not to undertake work, or a particular type of work, unless it is approved by the supervisor, and to notify the supervisor of any proposal to undertake work;
- not to travel outside the British Islands except with prior permission of the supervisor or to comply with a legal obligation (for example, deportation or extradition);
- to participate in activities in accordance with instructions given by the supervisor (including a rehabilitation activity requirement under s 200A);
- a drug testing requirement (s 256D);
- a drug appointment requirement, to attend appointment to address the offender's dependency on, or propensity to misuse, controlled drugs (s 256E).

Section 256AC deals with breach of supervision requirements imposed under s 256AA. The court may issue a summons for the offender to appear or a warrant for the offender's arrest. Section 256AC(4) sets out the sanctions available to the court where it is proved to the satisfaction of the court that the offender has, without reasonable excuse, failed to comply with a requirement during the supervision period: committal to prison for a period not exceeding 14 days; a fine not exceeding level 3 on the standard scale; a 'supervision default order' imposing either an unpaid work requirement (see s 199) or a curfew requirement (see s 204).

Schedule 19A to the 2003 Act deals with supervision default orders, including the court's powers where the offender fails to comply with the requirements or is convicted of an offence.

Licence conditions

The Criminal Justice (Sentencing) (Licence Conditions) Order 2015 (SI 2015/337) sets out conditions of licences upon release from prison under s 250 of the Criminal Justice Act 2003. The standard conditions (in para 3) are to:

- be of good behaviour and not behave in a way which undermines the purpose of the licence period;
- not commit any offence;
- keep in touch with the supervising officer in accordance with instructions given by the supervising officer;
- receive visits from the supervising officer in accordance with instructions given by the supervising officer;
- reside permanently at an address approved by the supervising officer and obtain the prior permission of the supervising officer for any stay of one or more nights at a different address;
- not undertake work, or a particular type of work, unless it is approved by the supervising officer and notify the supervising officer in advance of any proposal to undertake work or a particular type of work;
- not travel outside the United Kingdom except with the prior permission of the supervising officer.

Paragraph 7 makes provision for additional conditions, including:

- residence at a specified place;
- making or maintaining contact with a person;
- participation in, or co-operation with, a programme or set of activities;
- possession, ownership, control or inspection of specified items or documents;
- disclosure of information;
- a curfew arrangement;
- freedom of movement;
- supervision in the community by the supervising officer, or other responsible officer, or organisation.

Requisite custodial period

Section 268 of the CJA 2003 is amended so that the definitions of 'requisite custodial period' (i.e. the period that has to be served before the offender is eligible for release) for the various custodial sentences under the Act are brought together. They are:

- For standard determinate sentences: the half-way point of the sentence;
- For extended sentences, the two-thirds point of the sentence;
- For 'special custodial sentences' under s 236A (see below), the half-way point of the sentence.

14.4 Dangerous offenders

14.4.3 Extended sentences for violent or sexual offences

Section 246A of the CJA 2003 is amended by s 4 of the Criminal Justice and Courts Act 2015 so that offenders who are sentenced to extended sentences can be released before the end of the custodial term only if the Parole Board so directs (rather than being released on licence automatically at the two-thirds point of the custodial term).

Section 8(2) of the Offender Rehabilitation Act 2014 amends s 226A of the 2003 Act to insert a new provision requiring the extension period of the extended determinate sentence to be at least 1 year. Subs (3) of section 8 makes the same change to s 226B of the 2003 Act as regards offenders under the age of 18.

Detailed guidance on sentencing dangerous offenders was given in *R v Burinskas* [2014] EWCA Crim 334. Lord Thomas CJ made some preliminary observations (at [8]):

- i) For a life sentence to be imposed under s 224A there is no requirement of a finding that the offender is dangerous within the meaning of the CJA 2003, although it is likely that in most such cases he will be. It follows that the fact that an offender is not dangerous is not something that of itself would make it unjust to pass a life sentence under this section.
- ii) Section 225(2)(b) does not apply to the relevant offence in s 224A. There is no requirement to consider whether the "seriousness" threshold has been passed.
- iii) Section 224A could lead in cases that may be rare to the imposition of a life sentence in respect of an offence which does not carry life as a maximum.

The Court first considered life sentences under s 225. Lord Thomas said (at [10]):

Where the sentencing judge is satisfied in the exercise of his judgment that an offender is dangerous and that the two conditions at s 225(2)(a) and (b) are met, there is no discretion. He must pass a life sentence.

His Lordship went on to say (at [22]):

In our judgment ... the question in s 225(2)(b) as to whether the seriousness of the offence (or of the offence and one or more offences associated with it) is such as to justify a life sentence requires consideration of:

- i) The seriousness of the offence itself, on its own or with other offences associated with it in accordance with the provisions of s 143(1). This is always a matter for the judgment of the court.
- ii) The defendant's previous convictions (in accordance with s 143(2)).
- iii) The level of danger to the public posed by the defendant and whether there is a reliable estimate of the length of time he will remain a danger.
- iv) The available alternative sentences.

Turning to extended sentences under s 226A, his Lordship said (at [25]):

It should not be overlooked that s.226A(4) makes the imposition of this sentence discretionary ... [E]ven where there is a finding of dangerousness, an ordinary determinate sentence is sometimes appropriate. In two of these cases the sentencing judges expressed the view during argument (without correction) that where a finding of dangerousness had been made there were only two sentencing options: life imprisonment or an extended sentence. Where a life sentence is not justified an extended sentence will usually, but not always, be appropriate. The option of a determinate sentence should not be forgotten.

Lord Thomas went on to give guidance on the approach that a court should take when considering whether to impose a sentence under the dangerous offenders provisions of the CJA 2003, as amended by LASPO 2012. His Lordship said (at [42]) that the 'first question to be considered in all cases where these provisions apply is whether the offender is dangerous'. His Lordship went on to say (at [43]):

The order in which a judge should approach sentencing in a case of this type is this:-

- i) Consider the question of dangerousness. If the offender is not dangerous and s 224A does not apply, a determinate sentence should be passed. If the offender is not dangerous and the conditions in s 224A are satisfied then (subject to ss 2 (a) and (b)), a life sentence must be imposed.
- ii) If the offender is dangerous, consider whether the seriousness of the offence and offences associated with it justify a life sentence. Seriousness is to be considered as we have set out at paragraph 22.
- iii) If a life sentence is justified then the judge must pass a life sentence in accordance with s 225. If s 224A also applies, the judge should record that fact in open court.
- iv) If a life sentence is not justified, then the sentencing judge should consider whether s 224A applies. If it does then (subject to the terms of s 224A) a life sentence must be imposed.
- v) If s 224A does not apply the judge should then consider the provisions of s 226A. Before passing an extended sentence the judge should consider a determinate sentence.

Special custodial sentences for certain offenders of particular concern

Section 236A of the CJA 2003 (inserted by sch 1 of the Criminal Justice and Courts Act 2015) makes provision for 'special custodial sentences for certain offenders of particular concern'. Section 236A applies where (i) a person is convicted of an offence listed in Schedule 18A to the CJA 2003; (ii) the offender was aged 18 or over when the offence was committed, and (iii) the court does not impose a sentence of life imprisonment for life or an extended sentence under s 226A. Where those conditions are satisfied, if the court imposes a sentence of imprisonment for the offence, the term of the sentence must be equal to the aggregate of the appropriate custodial term and a further period of 1 year for which the offender is to be subject to a licence. By virtue of subs (4), the term of a sentence of imprisonment imposed under s 236A must not exceed the maximum term permitted for the offence. The offender is eligible for release by the Parole Board after serving half the custodial term (and must be released at the end of the custodial term).

14.5 Mandatory sentences

14.5.5 Discount for guilty plea

In *R v Goodale* [2013] EWCA Crim 1144, it was pointed out that, in the case of fixed minimum sentences, such as 'three strike' burglars, it is not uncommon to see sentences recorded in days so that the necessary precision is achieved.

14.7 Community sentences

14.7.2 Activity requirement; 14.7.13 Supervision requirement

The Criminal Justice Act 2003 is amended by the Offender Rehabilitation Act 2014 to make provision, in community orders and suspended sentence orders, for a new '**rehabilitation activity requirement**'. This requirement replaces the 'activity' and 'supervision' requirements.

The new 'rehabilitation activity requirement' is defined in s 200A of the 2003 Act as a requirement that the offender must, for the duration of the order, 'comply with any

instructions given by the responsible officer to attend appointments or participate in activities or both' (subs (1)). An order imposing a rehabilitation activity requirement must specify the maximum number of days for which the offender may be instructed to participate in activities (subs (2)). Any instructions given by the responsible officer must be given with a view to promoting the offender's rehabilitation, but may have other purposes too (subs (3)). The activities that responsible officers may instruct offenders to participate in include activities forming an 'accredited programme', or activities whose purpose is reparative, such as restorative justice activities (subs (7)). For these purposes, an activity is a restorative justice activity if the participants include the offender and one or more of the victims (i.e. people affected by the offending in question), the aim of the activity is to maximise the offender's awareness of the impact of the offending concerned on the victims, and the activity gives the victim(s) an opportunity to talk about, or by other means express experience of, the offending and its impact (subs. (8)).

14.9 Fines

The coming into force of s 85 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (from March 2015) means that the maximum fine that the magistrates can impose for an either-way offence is now unlimited, as is the maximum for a level 5 summary offence. The former limitation of £5,000 per offence now becomes a fine 'of any amount'.

The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Fines on Summary Conviction) Regulations 2015 (SI 2015 No. 664) makes specific provision for maximum fines for a large number of specified offences. A maximum fine of £20,000 is prescribed for the offences listed in sch. 2 of that SI. Schedule 3 makes provision for certain offences to be punishable on summary conviction by a fine or maximum fine expressed as a proportion of the amount specified for the offence (for example, 'one-tenth of the greater of £5,000 or level 4 on the standard scale'). The effect is that an either-way offence is punishable with a fine of any amount unless specific provision is made for that offence in this SI.

14.9.3 Fixing the amount of the fine

In *R v Sellafeld Limited and Network Rail Infrastructure* [2014] EWCA Crim 49, the Court of Appeal considered the approach to be taken when imposing a fine on a large company. Lord Thomas CJ (at [5]) said:

Where a fine is to be imposed a court will therefore first consider the seriousness of the offence and then the financial circumstances of the offender. The fact that the defendant to a criminal charge is a company with a turnover in excess of £1 billion makes no difference to that basic approach.

His Lordship went on, at [6]:

The fine must be fixed to meet the statutory purposes with the objective of ensuring that the message is brought home to the directors and members of the company (usually the shareholders).

14.12 Surcharges

By virtue of the Criminal Justice Act 2003 (Surcharge) (Amendment) Order 2014, a surcharge is a victim surcharge is now also payable on imposition of an immediate custodial sentence by a magistrates' court.

Criminal Courts Charge

The Criminal Courts Charge has been abolished.