Neutral Citation Number: [2009] EWCA Crim 2667

Case No: 200905220 A2 200906118 A2

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM WORCESTER CROWN COURT
ON APPEAL FROM LEWES CROWN COURT
HIS HONOUR JUDGE GEDDES
HIS HONOUR JUDGE JOSEPH
T20080035 T20090205

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/12/2009

Before :

LORD JUSTICE HUGHES VICE PRESIDENT OF THE COURT OF APPEAL CRIMINAL DIVISION
MRS JUSTICE RAFFERTY DBE
and
MR JUSTICE HEDLEY

Between :

Terence Round	**Appellant**
Vincent David Dunn	**Appellant**
- and -	
The Queen	**Respondent**

(Transcript of the Handed Down Judgment of
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Tel No: 020 7404 1400, Fax No: 020 7404 1424
Official Shorthand Writers to the Court)

Mr J Dixon (instructed by **Purcell Parker**) for the **Appellant Terence Round**
Mr M Aspinal (instructed by **Crown Prosecution Service**) for the **Crown**
Mr P weatherby (instructed by **Prisoner Advice Service)** for the Appellant **Vincent David Dunn**
Mr S Kovats (instructed by Treasury Solicitor) for **The Secretary of State for Justice)**

Hearing date : Tuesday 1st December 2009

Judgment
As Approved by the Court

Lord Justice Hughes :

1. These two applicants seek leave to appeal against sentence. Neither suggests that his sentence was other than perfectly proper in length. The only contention of each in his grounds of appeal is that owing to the manner in which sentencing legislation has been commenced, or not commenced, there is an anomaly as a result of which he is not regarded as eligible for release under home detention curfew ("HDC") as early as he might have been if his sentence, whilst still of identical length, had been differently constructed.

2. The cause of the problem is the piecemeal manner in which sentencing legislation has been enacted and commenced over the past several years. The Criminal Justice Act 2003 ("CJA 2003") was passed with the evident intent to make a sea change in the way shorter custodial sentences were to be imposed and served. Sections 181-182 created a new concept known as 'custody plus'. Under this new scheme, sentences of less than 12 months were to be constructed in a new way. The power to determine the balance between the time to be served in prison and the time to be served on licence was committed to the court, as was the power to determine the conditions of licence. That differed radically from the normal position which has obtained for generations and still obtains for sentences of 12 months or more. That normal position is that the time (and conditions) of early release upon licence are either provided for in statute or are a matter of executive policy for the Secretary of State (in some but not all instances on the advice or direction of the Parole Board); they are not matters determined by the court. The limited power of the court to *recommend* licence conditions in some cases under s 238 CJA 2003 does not affect that proposition; the decision remains one for the Secretary of State.

3. In consequence of the new power of the court to specify when release on licence should take place, the early release provisions in the CJA 2003 were structured in the expectation that sentences of less than 12 months would henceforth be 'custody plus' sentences. That gave rise to a number of changes from previous statutes, in particular the Criminal Justice Act 1991 ("CJA 1991").

4. Although these provisions were enacted into law by Parliament in November 2003, and although most of the other provisions of the CJA 2003 were commenced in a planned manner by April 2005, some of the sentencing provisions have never been brought into force. Those which have not been include sections 181-182, together with sections 183-186 which created a further novel sentencing regime known as intermittent custody. It is now nearly five years since the bulk of the CJA 2003 was brought into force. We are told by Mr Kovats, appearing for the Secretary of State, that there are no current plans to bring the custody plus provisions into force; the grounds were stated by the Secretary of State in a parliamentary answer on 10 November 2009 to be want of resources. That decision is a matter of executive policy for the Government. The consequence of the change of mind is that:

   i) sections 181-182 remain on the statute book, albeit dead in the water at least for the foreseeable future; and more importantly

ii) some of the early release provisions of the CJA 2003 are, as a result, inapt to deal with sentences of under 12 months.

5. In turn, the result of this has been that highly complex adjustments have had to be made in the Commencement Order under which other provisions of the CJA 2003 were brought into force. The Criminal Justice Act 2003 (Commencement Number 8 and Transitional and Saving Provisions) Order 2005, 2005 No 950 ("the 2005 Order"), Schedule 2, paragraph 14 provides as follows:

> "**14.** The coming into force of sections 244 to 264 and 266 to 268 of, and paragraph 30 of Schedule 32 to the 2003 Act, and the repeal of sections 33 to 51 of the 1991 Act, is of no effect in relation to any sentence of imprisonment of less than twelve months (whether or not such a sentence is imposed to run concurrently or consecutively with another such sentence)."

It is perhaps unnecessary to say that the effect of that provision is not immediately apparent to the reader.

6. The meaning of this paragraph has been the subject of at least two applications for judicial review, one of which was brought on appeal to the Court of Appeal in R (Noone) v Governor of HMP Drake Hall and the Secretary of State for Justice [2008] EWCA Civ 1097; [2009] 1 WLR 1321. The substantial principal judgment of Scott Baker LJ in that case, running to 60 paragraphs, indicates just how complex is the question. So far as this court is concerned, however, its meaning is as determined by that court, and we are grateful that we need not rehearse the considerable detail into which it was necessary to go. We understand that leave to appeal the decision to the Supreme Court has very recently been given, but unless and until it is reversed it binds us.

7. In short summary, the solution which the 2005 Order has adopted to the problem created by the decision not to bring custody plus into force is as follows. Sentences of 12 months or more are now governed, as to early release on licence, by the provisions of the CJA 2003. But sentences of less than 12 months remain governed by the somewhat different regime of the CJA 1991. As will be seen, this can create differences of treatment which are significant in relation to (at least) (i) HDC and (ii) time spent on licence.

8. That would be difficult enough to operate in adjacent cases which resulted, respectively, in sentences either side of 12 months, as may very easily happen to co-defendants who have committed the same offence together but whose culpability differs, or where one has pleaded guilty and the other has not. Difficulties may arise also when a single defendant is sentenced on different occasions to sentences which are consecutive to one another, one under 12 months and another of that term or longer. The potential for unnecessary confusion is much greater when the same defendant is sentenced on the same occasion to consecutive terms, some of under 12 months and some which are 12 months or longer. That is of course extremely common. Defendants habitually commit more than a single offence. It is axiomatic sentencing practice to make sentences consecutive if the circumstances of the offences call for it. A series of offences of the same or similar character may well be met by concurrent sentences, pitched according to overall criminality, and this is permitted by section 153(2) CJA 2003.

But consecutive sentence may properly be passed in order to make clear to individual victims that the offence concerning them has been met by an individual sentence. Offences of different character are likely to call for consecutive sentences. Many offences are such that a sentence other than a consecutive one would normally be wrong in principle; simple examples include offences of failing to answer bail or assaults on policemen in the course of arrest, but there are many more. For these reasons and for many others, it is to be expected that up and down the country consecutive sentences, mixing terms either side of 12 months, will be passed in the Crown Court on countless occasions each day.

9. The particular implication of the solution adopted by the 2005 Order which concerned the court in Noone, and principally concerns us, arises from the existence of provisions permitting the Secretary of State in his discretion to release prisoners not on their statutory early release/licence date but sooner, under the conditions usually known as HDC.

10. As is by now well known, the CJA 2003 made it the ordinary statutory rule that a fixed term prisoner is required to be released at the half way mark in the term imposed by the court and to be on licence for the second half of that term: see sections 244(1) and 249(1). Entitlement to release at the half way mark was already the rule under the CJA 1991 for sentences under four years (see s 33(1)), and thus it remains the rule for the less than 12 month sentences which remain governed by that Act. So far, so reasonably good, although note that for sentences under 12 months there was, and thus still is, no licence period (s 33(1)(a)), but only an 'at risk' period for the purposes of s 116 Powers of Criminal Courts Act 2000. Section 246 CJA 2003, however, provides, so far as material, as follows:

> "246 (1) Subject to subsections (2) to (4) the Secretary of State may
>
> (a) release on licence under this section a fixed-term prisoner…at any time during the period of 135 days ending with the day on which the prisoner will have served the required custodial period,
>
> …..
>
> (2) Subsection (1)(a) does not apply in relation to a prisoner unless –
>
> (a) the length of the requisite custodial period is at least 6 weeks,
>
> (b) he has served –
>
> (i) at least 4 weeks of his sentence, and
>
> (ii) at least one half of the relevant custodial period.
>
> …..
>
> (4) [exceptions not material to this case]

(5) The Secretary of State may by order –

(a) amend the number of days for the time being specified in subsection 1(a)…….

……

(c) amend the fraction for the time being specified in subsection 2(b)(ii)…"

The "required custodial period" is defined by subsection (6) by way of reference back to section 244(3) and in the context of a fixed term prisoner means half the sentence. Sections 250(5) and 253 then go on to require that when a prisoner is released on licence under section 246 there must be home detention curfew requirements in his licence.

11. What this means is that independently of the statutory rule that all CJA 2003 sentences are composed of half custody and half licence, the Secretary of State has a purely discretionary power to anticipate the halfway release point by up to 135 days (four and a half months), providing that HDC conditions are attached to the prisoner for the period of accelerated release. Three things are to be noted.

i) The prisoner is not *entitled* to any release at all under s 246; it is a matter entirely for the Secretary of State, and the discretion is exercised through prison officials. We understand from Prison Service documents that he has laid down some general guidelines, and that he treats prisoners guilty of certain types of offence as normally ineligible, and others as normally eligible. But beyond that, there is an individual assessment in each case. Moreover, the criteria have changed from time to time. The most recent guidance for prison officials which we have seen runs to something over 20 pages.

ii) If the Secretary of State does choose to release a prisoner under s 246, it may be 135 days before his normal licence date, or it may be at any time between then and that date; there is no basis for saying that it will normally be four and a half months before the normal licence date.

iii) The Secretary of State can by Order alter the period of 135 days, either up or down.

12. Section 246 was originally intended to apply to all prisoners, whatever the length of their sentences. It contains provisions designed to cater for custody plus prisoners with sentences of less than 12 months. In their case, the "requisite custodial period" is, however, defined by section 244(3)(b) in terms of section 181 as "the custodial period within the meaning of section 181". But once custody plus had been shelved, this definition could not work. Instead of providing an alternative definition, perhaps such as 'one half of the sentence', the solution adopted by the 2005 Order was, as we have seen, to disapply to sentences under 12 months a whole range of provisions in the CJA 2003, including section 246.

13. The CJA 1991 thus continues to govern sentences of less than 12 months. On the face of it, it might be thought that that would create less difficulty than it does,

because that Act contains its own provisions for HDC release. They are in section 34A, which was inserted into the 1991 Act by the Crime and Disorder Act 1998. However, there are two complications.

14. First, the rules for HDC release in s 34A of the 1991 Act are expressed differently from those in s 246 of the 2003 Act. The material part of s 34A provides:

> "(3) After the prisoner has served the requisite period for the term of his sentence, the Secretary of State may, subject to section 37A below, release him on licence.
>
> (4) In this section "the requisite period" means—
>
> (a) for a term of three months or more but less than four months, a period of 30 days;
>
> (b) for a term of four months or more but less than eighteen months, a period equal to one-quarter of the term;
>
> (c) for a term of eighteen months or more, a period that is 135 days less than one-half of the term."

15. In fact, although there are some differences in effect between this formulation and that of s 246 CJA 2003 in relation to sentences <u>over</u> 12 months, the outcome of the rules in relation to sentences under 12 months is, so far as we can see, the same as if s 246 were applied to them with an additional provision making the "requisite custodial period" one half of the sentence.

i) Under both sections, sentences under 3 months would attract no possibility of HDC. If the CJA 1991 applies, such sentences are simply outside s 34A. If the CJA 2003 were applied, there can be no HDC unless the custodial period is 6 weeks, and half of anything under 3 months would not qualify.

ii) Under both sections, sentences of 3 months would produce eligibility for HDC at one month. In the case of the CJA 1991 that is because section 34A(4)(a) expressly says so. In the case of the CJA 2003 it would be because at least four weeks and half of what would be the custodial period of six weeks will have been served: see s 246(2)(b)(i) and (ii).

iii) Under both sections, sentences between 4 months and 11 months would have the same HDC date at a quarter of the sentence. In the case of the CJA 1991 that is because s 34A(4)(b) expressly stipulates that proportion. In the case of the CJA 2003 it would be because of the requirement in s 246(2)(b)(ii) that half of the custodial period must have been served.

16. Much more importantly, on the authority of <u>Noone</u>, because two different Acts govern sentences either side of 12 months, each attracts its own calculation for the purposes of the possibility of HDC release and licence date, <u>even if the two sentences are consecutive terms part of the same sentencing process</u>. Whilst two or more 1991 Act sentences which are consecutive to each other are simply added together and treated as one, and two or more 2003 Act sentences are treated in the same way, a 1991 Act sentence is <u>not</u> added to a 2003 Act sentence and treated as

a single sentence. They have to be treated as two separate sentences with their own calculations. That makes a difference to both (a) the date when discretionary HDC release becomes possible and (b) the period of licence after the date on which the prisoner is entitled to release. And the result of the calculations depends upon which of the two sentences (or groups of sentences) is expressed to be first in time: see Noone at paragraph 51. The calculations are done by the Prison Service on the basis that the first sentence spoken by the Judge will come first, unless he expressly says otherwise.

17. The difference of calculation can be illustrated by the present case of Round. We leave out of account the effect of 69 days which he had spent in custody before sentence, because those fall to be taken into account identically against all the possible calculations. He was sentenced on 17 September 2008 to 3 years for burglary and 3 months consecutive for failing to surrender to court for his trial. On the conventional form of sentence as pronounced by the judge, the 3 years for the principal offence came first. That is governed by the CJA 2003. He would be entitled to release in respect of that sentence at half way, namely after 18 months (16 March 2010 or thereabouts). The consecutive 3 month sentence would then begin (Noone). He would be entitled to early release after a further half of 3 months, thus after 19 ½ months in all on or about 1 May 2010. At that point the sentence from which he would be released would be the 3 month one; by itself that sentence would have produced no period on licence, but because the licence period attributable to the 3 year sentence would not by then be over, he would remain on licence for 18 months from notional release under the 3 year sentence, that is to say until about 16 September 2011. Meanwhile, his HDC eligibility would be as follows. There would be none under the 3 year sentence, because at the end of it he has to start the 3 month sentence. Under the latter, he would be eligible for HDC after 30 days in accordance with CJA 1991 s 34A(4)(a), that is to say in mid April 2010.

18. If however the sentences had been structured, unconventionally, so that the shorter ancillary sentence had come first, the result would be different. In that event, he would serve first the 3 months for failure to surrender. Entitlement to release under that sentence would come after 6 weeks and he would then begin the consecutive 3 year term. Under that, he would be entitled to release on licence after a further 18 months, thus again after 19 ½ in all on or about 1 May 2010. Because the sentence from which he would then be released would be the 3 year sentence, he would remain on licence for a further 18 months, thus until about 1 November 2011, as contrasted with mid September 2011 if the 3 year sentence had come first. Meanwhile, as to the possibility of HDC, there would be none under the 3 month sentence, because he then immediately begins the 3 year sentence, but under the 3 year sentence s 246 CJA 2003 would permit the Secretary of State to release him 135 days before the halfway stage, namely on or about 11 October 2009.

19. We summarise the effect of the 2005 Order upon the case of Round (again leaving out of account time in custody on remand before sentence):

	HDC possible	Release entitlement	Licence until
3 years first	mid April 2010	c 1 May 2010	Mid September 2011
3 months first	c 11 October 2009	c 1 May 2010	c 1 November 2011

20. Dunn's case appeared to raise essentially the same point. He was sentenced on 1 May 2009 to 18 months for assault occasioning actual bodily harm and 4 months consecutive for common assault. There was no remand time in custody to be considered. Whichever way round his sentences were expressed the date on which he is entitled to release is the same, namely after 11 months on or about 1 April 2010. If expressed in the form of the longer sentence first, the possibility of HDC will arise on or about 1 March 2009 and there would be 7 months on licence from release entitlement date. If the sentences were expressed the other way round, there would be a possibility of HDC in mid November 2009 and there would be 9 months licence from release entitlement date.

21. As it turns out, further enquiry has revealed that, whatever the Crown Court record may have suggested, the sentences on Dunne were in fact pronounced shorter first. That was, as we understand it, because the offence attracting the shorter term had been committed first, and the Judge dealt with the sentences in chronological order. Mr Weatherby accordingly did not in the end ask us to alter the sentence. We have nevertheless been grateful to him for very helpful submissions upon the statutory position. The case of Dunne does, in consequence, reveal that significant differences in the manner in which a sentence is treated by the Prison Service may depend on matters as accidental as the order of the indictment or of the logical treatment of multiple offences.

22. From several worked examples which we have seen, it appears to be the case that if the shorter sentence is expressed to come first, the HDC date will normally either be earlier or unaffected. The effect on the period on licence is more variable. Often, and perhaps usually, if the shorter sentence is expressed to come first, the period on licence after entitlement to release will be longer than if the longer sentence is expressed to come first, but this will not always be so. The extent of the difference of course depends on the lengths of the respective sentences. If one were to postulate the fairly common situation of sentences of 18 months (CJA 2003) and 9 months consecutive (CJA 1991) the HDC date is about two months earlier if the shorter sentence is expressed to go first, whereas the period on licence after release is twice as long (9 months rather than 4 ½). If the sentences were 5 years (CJA 2003) plus 6 months consecutive (CJA 1991), the statutory rules would suggest that the HDC date would be about 10 weeks earlier if the shorter sentence were expressed to go first, and the period on licence after release would be only 3 months more. However, as we understand it the Secretary of State elects at present not to grant HDC release to those serving a term over 4

years, so if the shorter sentence were first there would be no eligibility to HDC, whereas if the conventional structure of longest first were adopted there would be the possibility of HDC release under the shorter, subsequent sentence.

23. After the decisions in the Administrative Court and the Court of Appeal in Noone, the Senior Presiding Judge circulated to Crown Courts a brief letter referring to the case and enclosing a note from the prison service explaining how consecutive CJA 1991 and CJA 2003 sentences are in fact dealt with. The Senior Presiding Judge's letter, properly, gave information but not advice. Beyond saying that sentencers *may* wish to bear the implications in mind, the note similarly (and properly) did not purport to give advice.

24. There are in fact not merely two regimes for early release and licence, but several, some of which have subsets of differing rules. They include the following.

i) Where all sentences are 12 months or over and relate to offences post 4 April 2005, the rules of the CJA 2003 apply without qualification. The prisoner is entitled to release at half, may perhaps be granted discretionary HDC up to 135 days earlier, and will be on licence until the end of the full term of the sentence.

ii) Sentences of under 12 months, whenever the offence was committed, are governed by CJA 1991. The prisoner is entitled to release at half, may perhaps be released on HDC but under the different rules in s 34A CJA 1991; there is otherwise no licence period at all: s 33(1)(a).

iii) Sentences of 12 months or more but less than 4 years for offences before 4 April 2005 are governed by the CJA 1991 but the rules are slightly different from (ii). The prisoner is entitled to release at half, but this time will be on licence until the three quarter mark; he may perhaps be released on HDC under the rules in s 34A CJA 1991 and if so will be on licence until the three quarter mark less the HDC period: s 33(1)(b), 37(1) and 37(1B).

iv) Sentences of 4 years or more for offences before 4 April 2005, where no offence is within Schedule 15 CJA 2003. The prisoner is entitled to release at half; there is no possibility of HDC (s 34A(1) CJA 1991), he will be on licence until the end of the full term of his sentence: s 33(1A) and s 37ZA(1).

v) Sentences of 4 years or more for offences before 4 April 2005, where any one offence is within Schedule 15 CJA 2003. The prisoner may be released on licence at half, is not entitled to release on licence until two thirds, and there can be no HDC; if he is released on ordinary licence, his licence will run not to the full term but to the three quarter mark, but if he is released on HDC it will run to the three quarter mark less any HDC period: s 33(1B), 37(1) and 37(1B).

There are in addition entirely separate rules for prisoners who are initially released, under either Act, then recalled, and then re-released. Save to note their existence, it is not necessary to complicate this analysis further by reference to them.

25. To these propositions, already more than sufficiently complex, must be added this further consideration. If a defendant is not only *eligible* for HDC but is actually granted it, then if the sentence is governed by the CJA 1991 there is an adjustment to his period of licence, but if it is governed by the CJA 2003 there is none. If the 1991 Act applies, and there would otherwise be licence to three quarters, the effect of s 37(1B) is that if he is granted HDC, the period of licence is reduced by the time on HDC. That only applies to 1991 Act sentences of 12 months or more, because there is no licence period for those under that figure. The CJA 2003 has no equivalent provision.

26. There is a further difference of significance between CJA 2003 sentences and CJA 1991 sentences. In the case of the latter, section 116 Powers of Criminal Courts Act 2000 applies, so that the prisoner who has been released early (whether on licence or not) is at risk, if he commits a further offence during the overall period of his sentence, of an order for return to prison for the remainder of that full term, to be served before whatever sentence is imposed for the new offence. Section 116 was repealed by the CJA 2003 (s 332 & Schedule 32 Part I paragraph 116). But that repeal does not apply to sentences governed by the CJA 1991. That means that the repeal does not apply to (a) sentences imposed for offences committed before 4 April 2005, but also (b) sentences of less than 12 months. That is the effect of the 2005 Order, Schedule 2, not in this case paragraph 14, quoted above, but paragraph 29.

27. Section 116(1) Powers of Criminal Courts Act 2000 provides:

> " (1) This section applies to a person if—
> (a) he has been serving a determinate sentence of imprisonment which he began serving on or after 1st October 1992;
> (b) he is released under Part II of the Criminal Justice Act 1991 (early release of prisoners);
> (c) before the date on which he would (but for his release) have served his sentence in full, he commits an offence punishable with imprisonment ("the new offence"); and
> (d) whether before or after that date, he is convicted of the new offence."

28. Paragraph 29 of Schedule 2 of the 2005 Order provides:

> "**29** The coming into force of paragraph 116 of Schedule 32 to the 2003 Act and the repeal of sections 6(4)(d), 116 and 117 of the Sentencing Act is of no effect in relation to a person in a case in which the sentence of imprisonment referred to in section 116 (1)(a) of the Powers of Criminal Courts (Sentencing) Act 2000—
>
> (a) is imposed in respect of an offence committed before 4th April 2005; or
>
> (b) is for a term of less than twelve months."

29. It must follow from the logic of Noone that this means that section 116 continues to apply whenever the 1991 Act sentence is the one from which the prisoner is

released. If there are consecutive sentences, section 116 will remain available if the CJA 1991 term is the one served last.

30. In the case of Round, his sentences were structured in the conventional manner, with the principal (longer) sentence passed first and the shorter sentence expressed to be consecutive to it. He advances the superficially simple proposition that injustice has inadvertently been done in relation to HDC eligibility by structuring the sentence in this way, and he contends that this court should (a) allow him to appeal out of time and (b) allow the appeal not by altering the length of any component sentence or the total, but merely by turning their order upside down, so that the shorter (CJA 1991) sentence is expressed to be served first.

31. A similar submission has been made in three unrelated cases previously heard in this court. They are Wolstenholme [2009] EWCA Crim 1902, Isse [2009] EWCA Crim 1354 and Hurren [2009] EWCA Crim 2351. In each case this court acceded in the briefest of terms to the submission and reversed the order of the sentences there passed.

32. However, in none of those cases was there any argument beyond the particular effect of the sentence upon HDC. No one was asked to consider the impact of the order of sentences on the period of licence or the applicability of section 116 Powers of Criminal Courts Act 2000. No argument was addressed to the very variable effects of the multiple rules for early release and licence upon different categories of prisoner. Nor was any court given the opportunity to consider the several cases setting out the general rule that the rules for early release are an irrelevant consideration upon sentence. Lastly but most importantly we are unable to find in any of the brief judgments any decision upon the vital question whether the sentence as passed was wrong in principle. The nearest one gets to it is the observation in Wolstenholme that it is essential that the sentences are passed lowest first. The reality is that the sentences were varied in those cases as a perfectly understandable indulgence to the prisoner.

33. The argument for taking account of the differing HDC effect runs as follows. Parliament should be taken to have intended that the Secretary of State should have available to him the discretionary power to release on HDC in any case where he thought he should exercise it. That is demonstrated by the manner in which the earlier existing HDC provisions of s 34A CJA 1991 were very largely adopted in s 246 CJA 2003. What has been created is described as a statutory anomaly, perpetrated (however accidentally) by the Executive and contrary to the discernible policy of Parliament. Therefore any sentencing judge should do what he can to revert to the underlying statutory policy and that means structuring consecutive sentences, however unnaturally, in the manner which will make HDC available at the earliest possible time.

34. The Secretary of State accepts that there is an anomaly. We were not told of any current proposal to remove it. His contention, however, is that that is not a problem which the courts can cure by departing from the general rule that the treatment by the Prison Service of the court's sentence is not for the court. He submits that the court could not take into consideration the practice as to licence or HDC if there were a single regime, and the fact that there are two (or more) does not alter that position.

35. In Al Buhairi [2004] 1 Cr App R (S) 496 this court (Latham LJ, Hallett and Jowitt JJ) said this of HDC eligibility:

> "We ask ourselves therefore whether or not it is incumbent upon a sentencing judge to reduce what would otherwise be a perfectly proper sentence because he may or may not be eligible for early release under this new administrative procedure. We remind ourselves that release on home detention curfew is a matter for the discretion of the prison governor…
>
> …we are satisfied that this is far too speculative an area and basis upon which this court should direct sentencers to proceed. It would leave sentencing judges all over the country in an impossible position when asked to speculate as to when any particular accused person may or may nor be released under this scheme."

That decision was expressly approved by Lord Woolf CJ in this court in Al Kazraji [2004] 2 Crim App R (S) 291.

36. In Dale [2004] 2 Cr App Rep (S) this court (Kay LJ, David Clarke J and Judge Brodrick) reached a similar conclusion. [The suggestion had been that the judge ought, when making allowance for time spent in custody prior to a community order for the breach of which he was passing sentence, to have taken into account the effect which HDC would have had if the appellant had instead been serving a sentence.] The judgment contained this passage:

> "[the judge] was right to avoid precise calculations founded upon the current scheme for early release on home detention curfew. That is a discretionary scheme. The details change from time to time. It is a matter of action by the Executive and the courts ought not to interfere either to increase sentences in order to frustrate the scheme or to reduce sentences in respect of something which may be discretionary and may in fact not apply in the case in question. In addition, the consequences of attempting to tailor a sentence so that it precisely reflects the consequences of the scheme are likely to be even more arbitrary than the consequences of ignoring it. As we understand the position, the scheme is intended to operate on the basis that the level of sentencing remains the same rather than sentencing being altered to take account of the possibility of earlier release by executive action."

37. The question whether the *length* of the sentence ought to be adjusted for the likely effect of HDC is of course not exactly the same as the one facing us, which is whether sentences of proper length must as a matter of general principle be expressed in an unconventional manner in order to accommodate for the benefit of the defendant the complexities of the HDC rules. But in each case the question is whether the sentence should be adjusted to those rules. The proposition that sentencers should pass the correct sentence and leave early release and licence to

be coped with by statute or executive policy as Parliament directs is a general one. In Bright [2008] EWCA Crim 462 this court considered a case in which in a case where the judge had passed a seven year sentence, telling the defendant that he would serve half of it, but had then been reminded that the offence pre-dated 4 April 2005 so that under the CJA 1991 there was no entitlement to release until two-thirds had been served. Sir Igor Judge P (as he then was) said this:

> "From this [counsel] sought to argue that as the judge intended a 3 ½ year sentence actually to be served the sentence should in any event be reduced to 5 ¼ years. The submission is based upon a fallacy. The actual sentence was 7 years imprisonment. The release provisions did not and should not have affected the judge's sentencing decision."

It is true that in that case the judge had subsequently said that his sentence would have been the same if he had appreciated that it fell under the 1991 Act, and it is perhaps possible that if attention should be paid, contrary to the court's decision, to release, the effect might have been the same since under the 1991 Act the defendant, as a fraudsman, might well have been released as a matter of discretion at half. But if the submission under consideration here were correct, the Judge in that case could not properly have said what he did. This court's observation was a general one. It was, moreover, followed in Giga [2008] EWCA Crim 703, where neither consideration applied.

38. The question precisely raised by this case of Round is this. Was it wrong in principle for the judge in this case to structure his sentence in the way he did ? Was he, and is every judge, obliged as a matter of principle to structure consecutive sentences in a way which, if the defendant should turn out to be eligible for HDC, made him eligible at the earliest possible date, even if that meant expressing the sentences in a way that is unnatural ?

39. Whilst we wholly understand that a prisoner who is approaching what might otherwise be the date on which he could be considered for HDC is likely to focus wholly on that and upon no other consideration, our conclusion is that the answer to the question we have posed is that it is not incumbent on sentencers to alter the ordinary manner of expressing their sentences to maximise the uncertain possibilities of HDC.

40. First, we are unable to accept the proposition that there is a discernable statutory policy for earliest possible HDC release, from which executive action has inadvertently departed. The legal position at which we have arrived is all the result of parliamentary action. It derives from two principal statutes and one commencement order. It may well be that the commencement order required only the negative resolution procedure, but it is legislation.

41. Second, sentencing is no doubt these days a great deal more technical than it used to be, but it is not, and must not become, simply arithmetical or formulaic. It speaks directly to all concerned with the offence and offender. The natural structure of a sentence will normally, although not always, be to pass the principal (and thus usually the longest) term first. This court recognised in Wolstenholme that to make the shorter sentence go first would be contrary to the approach which

most judges would naturally adopt. There is great virtue in the sentence being pronounced in the natural manner, the more easily to be understood by all who hear it.

42. This consideration is expressly recognised by section 174(1)(b)(i) CJA 2003, which requires the court, in passing sentence, to "explain to the offender in ordinary language….the effect of the sentence". True it is that the complexities of sentencing, coupled with the uncertainties of the HDC discretionary regime, make this obligation one which is capable of discharge only in the most general possible terms, but it seems to us that Parliament has here recognised an important truth, after which the courts should strive as best they can.

43. If that consideration stood alone, it may be that an argument could still be advanced that judges should pass sentences effectively upside down as a result of the eccentric statutory position with which the courts are confronted. We do not think that it does stand alone.

44. Our third reason is that the general principle that early release, licence and their various ramifications should be left out of account upon sentencing is, as it seems to us, a matter of principle of some importance. The existence of the varied regimes which we have attempted to summarise in paragraphs 23 and 24 above confirm us in that view. Above all, the HDC regime is entirely in the discretion of the Secretary of State. Whatever the statute may say about eligibility, there is no way of knowing in advance what decision may be made about HDC release. The Secretary of State might, between the passing of the sentence and the arrival of any possibility of HDC release, change his policy, whether because of public concern about release, or pressure on prison places, or for any other reason. At present, it appears, his policy is not to consider HDC for any prisoner sentenced to four years or more, nothwithstanding that the absence of such a restriction in the CJA 2003, when it had previously appeared in the CJA 1991 might have been taken to signal a policy to the opposite effect. But he could change this policy at any time, and if he did so any calculation of likely HDC eligibility which the judge had previously made when sentencing would retrospectively be undone. Even if the policy remains the same, its application to any individual is a matter of considerable uncertainty. HDC is, for example, only available if the defendant will live somewhere where the electronic monitoring equipment can be made to work; there are some parts of the country where it cannot. HDC is unlikely to be considered for a foreign national with no home in the UK. There are many other similar examples. Those more general considerations apart, the exercise in assessment of whether HDC release should be granted or not, and if so when, is very much a matter of judgment in each individual case. It is, we are satisfied, wrong in principle for sentencers to be required to adjust the sentence imposed to so uncertain a future prospect. And it is wrong in principle for the judge to be required to analyse in nice detail the many pages of Prison Service Instructions in order to attempt to foresee the impact on the prisoner of a discretionary regime.

45. The varied regimes demonstrate that the potential for complication involving consecutive sentences, some governed by the CJA 1991 and some by the CJA 2003, is not limited to the present type of case where the reason a sentence still falls under the CJA 1991 is that it is for a term of less than 12 months. <u>All</u> sentences for offences committed before 4 April 2005 remain governed by the

1991 Act. It is not in the least unusual for defendants to have to be sentenced for offences of which some were committed before 4 April 2005 and some after that date. Nor is it likely that that will cease to be so for many years to come, as the typical case of historic sexual abuse coming to light long after the events demonstrates. The wide possible range of regimes for early release and licence strongly reinforces the undesirability, never mind the impracticability, of courts being required to reflect the differences in their sentences. We do not think that it is possible to confine the exploration of the effects of the sentence to HDC, as the appellant would have us do. If the judge is required to give effect in his sentencing to the HDC consequences, it is likely to follow that he ought also to embark upon detailed release and licence calculations in every case, and perhaps that he ought to have regard to the differing categories of prisoner, and the ways in which they are likely to be treated as a matter of discretion by the Secretary of State.

46. Fourth, the differing effects of the CJA 1991 and CJA 2003 regimes are not limited, as this appeal might initially suggest, to HDC rules. There are also important differences between them when it comes to the period which the prisoner must serve upon licence if and when he is released. If, contrary to our view, it were the rule that the sentencing judge must consider in detail the early release and licence effects of his sentences, his view about the desirable length of licence may well vary from case to case. In some, usually where he takes the view that there is a risk of further offending or he wishes to protect erstwhile victims from contact with the offender, a judge may wish that the period of licence is as long as it properly can be. In others he may take the view that the defendant ought not to be exposed for any longer than is necessary to the risk of automatic executive recall without any court involvement; if permitted to do so, he might also have in mind that like suspended sentences, licence can sometimes have the unintended consequence of significantly increasing the prison population. Similarly, he might, if it were open to him to do so, wish to consider the availability of section 116 Powers of Criminal Courts Act 2000. It seems to us that it would be wrong for him to adjust the manner of expression of his sentences with a view to retaining the power to return a re-offender to prison, but if the present applicant is correct, it is difficult to see why he should be prevented from doing so.

47. Fifth, the attraction of an apparently simple "shortest sentence first" rule is superficial and not borne out on close inspection. There is simply no justification for the proposition that it is to be assumed that the judge will always, in passing sentence, wish to take steps to ensure that the defendant is eligible for HDC at the earliest possible moment; he may desire this consequence or he may not. Moreover, whilst so far as we can see from a number of worked examples it will generally be true that to place the shortest sentence first will either make the HDC date earlier or have no effect upon it, the consequence for the licence period is not, as explained above, consistent. It follows that if it is wrong in principle for the judge not to take into account the effect of the structure of his sentencing on release and licence, he will have to examine the precise effect in every case; a 'shortest first' rule will not suffice. Even if it were open to a court of appeal to graft onto the statutory scheme the further complexity of a 'shortest first' rule, which we do not believe it is, it would not work in every case.

48. Sixth, if eligibility to HDC is something which the court ought to take into consideration when passing consecutive sentences, it is difficult if not impossible to see why it is not also required to take it into account when sentencing co-accused. As we have indicated above, sentences on co-accused which are either side of 12 months are likely to be very common if one has pleaded guilty and the other has not, or if their role in the offence or differing ages justify a difference in sentence. Defendant A, sentenced to 15 months imprisonment after trial, will have his sentence administered under the CJA 2003. He will be eligible to HDC at half his sentence (7 ½ months) less 114 days (just under 3 months) ie at about 4 ½ months. Defendant B, who pleaded guilty to the same offence and whose culpability was similar, is likely to be sentenced to 10 months. He will be governed by the CJA 1991 and will be eligible to HDC at a quarter of his sentence, namely after 2 ½ months. Is the judge to alter his sentence on Defendant A in response to a plea that once HDC is taken into account B has gained a greater net advantage than a third reduction in sentence ? HDC is not available to youths sentenced to Detention and Training Orders. If two co-accused, one just 18 and the a few weeks under 18, are to be dealt with for the same offence, is the judge required to reduce the sentence on the younger to reflect this difference ? We do not believe that a judge should adjust the proper sentences for release considerations or that it should be open to the accused receiving the sentence over 12 months to complain on that ground of objectionable disparity. That would be a recipe for making it impossible to mark proper distinctions between co-accused.

49. Our clear conclusion is that it is not wrong in principle for a judge to refuse to consider early release possibilities when calculating his sentence or framing the manner or order in which they are expressed to be imposed. We are quite satisfied that it is neither necessary, nor right, nor indeed practicable, for a sentencing court to undertake such examinations. Ordinarily, indeed, it will be wrong to do so, although there may be particular cases in which an unusual course is justified. The judge must be left to express his sentences in the most natural and comprehensible manner possible. Very often that will no doubt mean that the principal, and longest, sentence comes first. In other cases it may not, for example because, as in Dunne, the judge follows the chronological or indictment order of offences.

50. We gave leave to both applicants to appeal, because a significant point of principle was raised. It follows, however, that the judge in the case of Round did not fall into any error. It is not now contended that the sentence of Dunne ought to be altered. Both appeals against sentence must be dismissed.

51. We are very conscious that the varying, not to say erratic, effect of the existence of two differing statutory regimes applying to the same defendant is to create real and disturbing anomalies between prisoners who ought in fairness to be treated similarly. We are, however, satisfied that any attempt by this court to impose a rule designed to cure that problem would not only be wrong in principle, given its Parliamentary origin, but would also merely throw up other anomalies elsewhere. In Noone Wall LJ concluded his judgment with a recognition of the enormous difficulties of a sentencing judge in the face of such statutory complexity. Whilst we entirely agree, there is a greater claim to recognition by prisoners who, even

though they have no entitlement to HDC, are caught in the inconsistencies of the statutory regimes. A judgment is not the place to draft provisions which might put prisoners on as level a footing as can properly be achieved, but we cannot leave this case without urging the Ministry of Justice to explore, as a matter of some urgency, practicable methods of doing so.