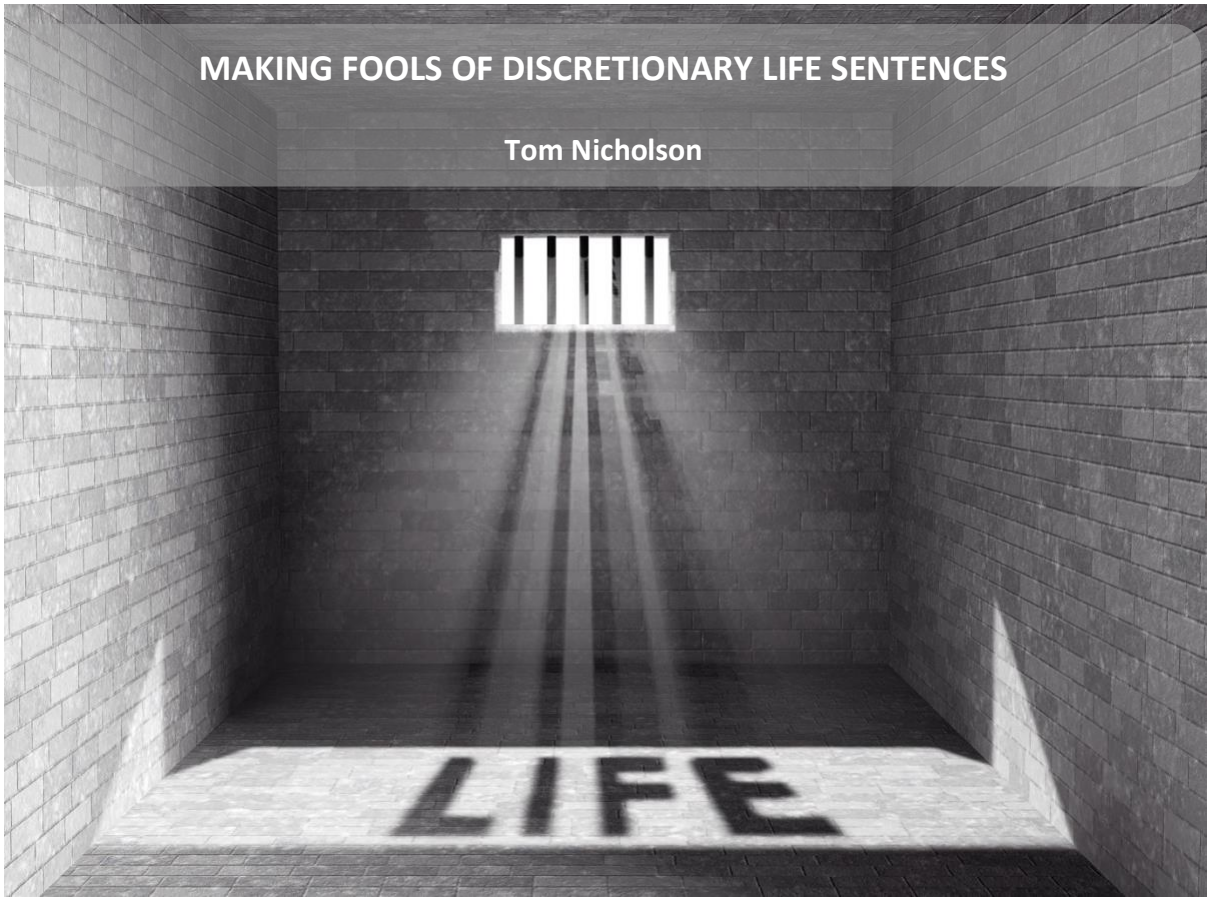

The minimum term for discretionary life sentences should now ordinarily be set at the two-thirds point of a notional determinate sentence, ending the confusion of the last year

In a striking coincidence, the Statutory Instrument the **Release of Prisoners (Alteration of Relevant Proportion of Sentence) Order 2020** came into force in England & Wales on 1 April 2020, April Fools' Day.

You may forgive those of the profession or Bench who missed it. It was after all on day ten of our national lockdown, with a then record toll from Covid-19 of 381 deaths, the stock market nursing its record losses of the previous week, and the country beginning the grim process of coping with the first pandemic in a generation.

The 2020 Order was a piece of subordinate legislation introduced without consultation or transitional provisions, to apply to all offenders sentenced on or after April Fools' Day, whenever the offence was committed. The Explanatory Memorandum explicitly set out that it was to apply only to those sentenced to a standard determinate sentence (SDS) of 7 years or more for a relevant offence, namely a list of violent and sexual offences for which the maximum sentence was life imprisonment.

However the byzantine drafting of the Order has not helped the criminal justice system, nor those who serve in it. Let's set out article 3 in all its glory:

> *"3. In section 244 of the 2003 Act (duty to release prisoners), the reference to one-half in subsection (3)(a) is to be read, in relation to a prisoner sentenced to a term of imprisonment of 7 years or more for a relevant violent or sexual offence, as a reference to two-thirds"*

It will of course be obvious that those sentenced to a determinate sentence of 7 years or more for a serious violent or sexual offence, like rape or section 18 GBH, would now have to serve two-thirds of their sentence before being entitled to release, remaining on licence until the end of their sentence.

The Impact Assessment published with the Order considered that the measure would affect around 1,500 prisoners per year, with around £70m additional prison running costs per year and some £440m required to add extra capacity.

But what of those sentenced to discretionary life imprisonment?

On the face of it, the Government's own Explanatory Memorandum made clear that those sentenced to discretionary life were not caught by the Order, without any obvious explanation as to why not. What this would mean is that the offenders found by the sentencing judge to be **dangerous** – posing a significant risk of serious harm to the public caused by the commission of further specified offences – and having committed an offence so serious that only life imprisonment would suffice (rather than an extended determinate sentence), would have their minimum term calculated with reference to the half-way point of a notional determinate sentence (NDS), unless exceptional circumstances applied, meaning they would be eligible for release at least fourteen months on a sentence of 7 years, and often a number of years earlier, than when their non-dangerous counterparts would be entitled to release.

But the curse of badly drafted legislation struck again. In 2020 a judge setting a minimum term for a discretionary life sentence had to wrestle with section 82A Powers of Criminal Court (Sentencing) Act 2000.

Under section 82A(3), the minimum term must be set "*taking into account…the early release provisions as compared with section 244(1) of the Criminal Justice Act 2003"* (now replaced by an identical provision, section 323 of the Sentencing Act 2020).

Since for an applicable relevant violent or sexual offence, section 244 now means release at the two-thirds point, how can a sentencing judge setting a minimum term ignore the revised effect of section 244 when they are specifically required to take it into account?

For the last year, until the Attorney-General's Reference of ***McWilliams [2021] EWCA Crim 745*** published on 21 May 2021, no one knew the answer. In the meantime, a host of offenders convicted of offences such as rape and attempted murder were sentenced on the basis of the longstanding (but, as it turns out, incorrect) position that the minimum term should be set at the half-way point.

Just how many of the most serious offenders have been sentenced on an incorrect basis is difficult to quantify, but it appears likely to number over twenty of the most serious offenders sentenced in 2020-21.

It is difficult to blame sentencing judges, given that almost all practitioners' texts, including Blackstones 2020, Archbold 2020 and the Crown Court Compendium pointed towards the one-half approach.

In a series of decisions during 2020-21, the Court of Appeal managed to skirt around the impact of the 2020 Order, without providing any proper clarity.

In ***Khan v Secretary of State for Justice [2020] EWHC 2084 (Admin),*** a terrorist case to which the 2020 Order did not apply, the Divisional Court rather elliptically observed in an obiter passage at [31] that the Court would be entitled to 'take into account' the effect of the 2020 Order when sentencing for applicable offences.

In ***McCann; Sinaga; Shah [2020] EWCA Crim 1676***, at paras. 52-66, the Court of Appeal went through all the long-established reasons for retaining the one-half mark for discretionary life sentences, before merely acknowledging the 2020 Order as a 'matter of context'. Since the overwhelming majority of discretionary life sentences would be caught by the Order, it is surprising that the Court did not use the opportunity to point out that the historical position it had laboriously outlined had largely been consigned to the past.

In ***Patel & Others [2021] EWCA Crim 231***, the Court of Appeal set out that for fixed term prisoners caught by the 2020 Order, any sentencing court must, as an important matter of longstanding principle, ignore the increase in the amount of time spent behind bars, whatever the harsh anomalies this might cause. There is no clear reference to indeterminate sentences, though paragraph 1 can be read to mean that the 2020 Order does not apply to them.

In ***Shaikh & Others [2021] EWCA Crim 45***, the Court of Appeal at para. 38 clarified that the obiter passage in *Khan (supra)* meant that the minimum term for applicable offences should be set at two-thirds. However this was another terrorism case, setting out that discretionary life sentences for terrorist offences should ordinarily be set at one-half, since they are excluded from the 2020 Order and even though there would be an obvious anomaly as compared with terrorists sentenced to determinate sentences under the newly inserted section 247A of the Criminal Justice Act 2003, who are required to serve at least two-thirds of any sentence before being eligible for release at the direction of the Parole Board.

As these cases were being heard, in September 2020 the Government published the MOJ White Paper comically entitled "*A Smarter Approach to Sentencing",* in which the MOJ set out its own (erroneous) understanding that tariffs in discretionary life sentences should usually be set at the halfway point of the NDS, something the Government wished to change.

In March 2021, the Government published the Police, Crime and Courts Bill, currently at Committee stage. In an inordinately complex draft section 105, it seems to be suggested that the tariff in all discretionary life sentences should be calculated on the basis of two-thirds of the NDS.

The case of ***McWilliams (supra)*** has finally brought a degree of clarity to this unholy mess some 13 months later. Dame Victoria Sharp's judgment sets out the torturous legislative complexities with which the Courts have had to wrestle. Ultimately the Court concludes as follows:

i) For discretionary life sentences to which the 2020 Order applied, the NDS should ordinarily be calculated with reference to two-thirds;
ii) Parliament's intention to effect such a significant change should have been manifest with sufficient clarity;
iii) The Court is entitled to ascertain the intention and effect of legislation through a close reading of the text itself.

It is notable that the Court is silent about the fact that this interpretation requires it to ignore the 2020 Order's Explanatory Memorandum and the MOJ's White Paper, on the ostensible basis that they do not correctly set out Parliament's true intention.

It is a sensible approach to a difficult situation, and one permitted by Lord Steyn in ***Westminster City Council v National Asylum Support Service [2002] UKHL 38***, who emphasised that it is the words of statute themselves, as enacted by Parliament, that must be understood and applied, rather than any Government-drafted Explanatory Note as to what they wish it meant.

It is worth remembering that the Slip Rule has commonly been utilised to correct errors in the setting of the minimum term, requiring a listing within 56 days of sentence.

We can only hope that Professor Ormerod QC brings his considerable skills to rationalising the custodial sentencing regime, at the very least so that the impenetrable wording of the proposed Police, Crime and Courts Bill might be upgraded, and the Government may no longer need April Fools' Day for its criminal justice legislation.

Tom Nicholson
2 Harcourt Buildings

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