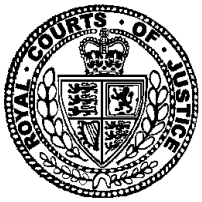

Neutral Citation Number: [2021] EWCA Crim 45

Case No: 202001978 A4 and 202001916

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM CROWN COURT SITTING AT THE CENTRAL CRIMINAL COURT
THE HONOURABLE MR JUSTICE SWEENEY
T20197445, T20187432 AND T20197048

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/01/2021

Before:

THE VICE-PRESIDENT OF THE COURT OF APPEAL (CRIMINAL DIVISION)
LORD JUSTICE FULFORD
MR JUSTICE EDIS
and
MR JUSTICE FOXTON

Solicitor General's References
(R v Safiyyah Shaikh
and
R v Fatah Abdullah)

- -
- -

Approved Judgment

Ms Alison Morgan Q.C. and **Jonathan Polnay** instructed by **the Attorney General's Office** for **the Solicitor General**
Benjamin Newton appearing by representation order for **Safiyya Shaikh**
Richard Thomas appearing by representation order for **Fatah Abdullah**

Hearing date: 16th December 2020
- -

Approved Judgment

Lord Justice Fulford V.P.:

Introduction

This is the judgment of the court to which all members contributed.

1. Her Majesty's Solicitor General seeks leave to refer the sentences of two unconnected terrorist offenders (Shaikh and Abdullah) to the Court of Appeal on the grounds that the life sentences imposed on them with minimum terms of 14 years (Shaikh) and 9 years (Abdullah) are unduly lenient. She submits that, in arriving at the minimum terms, Mr Justice Sweeney as sentencing judge misconstrued or misapplied section 82A of the Powers of Criminal Courts (Sentencing) Act 2000 and sections 244(1) and 247A of the Criminal Justice Act 2003. The Solicitor General submits that the Judge should have arrived at the minimum term taking into account the Terrorist Offenders (Restrictions of Early Release) Act 2020 ("the 2020 Act"), which increased the minimum period before offenders convicted of certain specified offences are eligible for release from a determinate sentence from one half to two thirds of the sentence.

2. For the reasons set out below, we have been unable to accept that submission, although we acknowledge that the statutory scheme for taking into account early release provisions when setting minimum terms gives rise to a number of anomalies.

Shaikh

The Background

3. On 21 February 2020, Safiyya Shaikh pleaded guilty to one count of preparation of a terrorist act, contrary to section 5(1) of the Terrorism Act 2006 (Count 1), and one count of dissemination of terrorist publications, contrary to section 2(1) of the Terrorism Act 2006 (Count 2). On 3 July 2020, she was sentenced to life imprisonment with a minimum term of 14 years' imprisonment on Count 1, and to 8 years' imprisonment in the form of a special sentence with 1 year on licence to run concurrent to the life sentence on Count 2.

The Facts

4. By August 2018, Shaikh had become a leading operator of media channels and groups pledging support for acts of violence in support of Islamic State. She engaged with others, who she believed to be of a similar mindset, to instigate and plan a terrorist attack involving the use of improvised explosives on St Paul's Cathedral and a nearby hotel. In furtherance of her attack plan, she visited the Cathedral to assess its security arrangements and the best place to detonate a bomb. She stated that her intention was to kill herself and as many other people as possible. She conducted a meeting with the wife of the person she believed would supply her with explosive devices. She was unaware that this person and his 'wife' were undercover role players. Her plan was to carry out the attack at Christmas 2019, but she then put this back to Easter 2020. By the time of her arrest she had provided approximate measurements of her size to the role players, on the assumption that they would be making improvised explosive devices for use in the attack. These activities formed the basis of Count 1.

5. At the same time as she was engaging in this attack planning, for a period of at least two months the Offender had been a leading operator/administrator of at least one media channel which disseminated extremist propaganda in support of Islamic State and instructional material encouraging others to carry out acts of terrorism. The extremist material included violent executions carried out by Islamic State and specific instructions on how and where to carry out terrorist attacks. The Offender personally created some of the imagery and video and also instructed others with necessary skills to create material, which she then circulated. She also circulated pro-terrorist documents created by others including Islamic State media. The channels were run with a high degree of secrecy and technical application. These activities formed the basis of Count 2.

The Sentencing Hearings

6. The Sentencing Hearings took place on 22 and 26 June and 2 and 3 July 2020. At the first hearing, the Judge raised the potential impact of the Release of Prisoners (Alteration of Relevant Proportion of Sentence) Order 2020 ("the 2020 Order") which had increased the point at which offenders sentenced to determinate sentences of imprisonment of 7 years or more for certain classes of offence would become eligible for early release from one half to two thirds of the sentence. The Crown submitted that while it had previously been "the norm" to arrive at the minimum term for a discretionary life sentence by halving the notional determinate sentence, the 2020 Act and the 2020 Order had established "a new norm", requiring the minimum term to be two thirds of the notional determinate sentence.

7. By the date of the final sentencing hearing, and in particular following further information which emerged from a telephone call the Offender made from custody on 26 June 2020, it was common ground between the prosecution and the defence that Count 1 fell within Category 2B of the Sentencing Council's Definitive Guideline for Terrorist Offences ("the Guideline"). Category 2B offences have a starting point of life imprisonment with a minimum term of 15 years, and a sentencing range of life imprisonment with a minimum term of 10 to 20 years' imprisonment.

8. On 3 July 2020 the Judge pronounced sentence. He took the starting point for a Category 2B offence of life with a minimum term of 15 years. B. He doubled the minimum term figure to arrive at an identified notional determinate figure of 30 years. He considered the aggravating features (overlapping with the impact of the Count 2 offending because he intended to impose concurrent sentences), and adjusted the notional determinate figure up to 42 years. He reduced this figure by one third for the offender's guilty pleas down to 28 years. He then considered the dangerousness provisions, concluding that the offender was dangerous and that only a life sentence was appropriate. He then halved the notional determinate figure of 28 years to arrive at the minimum term of 14 years.

9. On 29 July and 3 August 2020, pursuant to section 155 of the Powers of Criminal Courts (Sentencing) Act 2000, the case was listed before the Judge under the slip rule. The Judge was invited by the Crown to consider whether it remained appropriate to halve the appropriate notional determinate sentence when identifying the correct minimum term to be imposed, in light of the effect of the 2020 Order and the 2020 Act, which for the offences to which they applied required the offender to serve two-

thirds of any determinate sentence prior to being eligible for release (albeit under the 2020 Order only if the sentence of imprisonment was for 7 years or more). The Judge declined to alter the minimum term imposed on the Offender. He concluded that he was bound by the decisions of the Court of Appeal in R v Szczerba [2002] 2 Cr App R (S) 387 and R v Burinskas [2014] 2 Cr App R (S) 45 that, save in exceptional circumstances, the minimum term should be arrived at by dividing the notional determinate sentence in half, and that only direct legislation could alter that position. He also referred to his duty (unless contrary to the interests of justice) to follow the Guideline which is predicated in relation to life sentences on division by a half. The Judge concluded:

> "That is not to say, if I am wrong about the need for direct legislation, that there is no merit in the prosecution argument. Both that and the desirability of a new norm, or generally in respect of certain offences, as opposed to a mish-mash of contradictory decisions and the effect of the relevant guideline are all matter for the Court of Appeal to consider if there is a reference and if they think it appropriate to do so."

10. The Solicitor General does not take issue with the Judge's decision that the appropriate notional determinate sentence was 28 years. However, he submits that the Judge should have arrived at the minimum term by taking two thirds, rather than one half, of that figure.

Abdullah

The Background

11. On 20 March 2020, Abdullah pleaded guilty to counts of preparation for giving effect to an intention to assist others to commit terrorist act, contrary to section 5(1)(b) of the Terrorism Act 2006 (Count 1) and inciting terrorism overseas, contrary to section 59 of the Terrorism Act 2000 (Count 2).

12. On 26 June 2020 he was sentenced to life imprisonment with a minimum term of 9 years' on each count, to run concurrently.

The Facts

13. The Offender incited a terror cell, based in Germany, to commit terrorist atrocities that would have caused mass fatalities. His encouragement was not limited to words. He researched, obtained and tested explosives in order to teach the German cell to carry out the terrorist attacks to maximum effect.

14. The Offender was born in the Kurdish part of Iran. He came to the United Kingdom in 2005 and was granted asylum, in 2010. By the late Summer or early Autumn of 2018, he had become an Islamic extremist and supporter of Islamic State. He became connected with two cousins, Ahmed Hussein and Omar Babek, who had travelled from Iraq to Germany in 2015. The Offender sent Hussain and Babek various communications which contained a detailed discussion of preparations for carrying out a terrorist attack, including information as to the construction and detonation of an explosive device. The Offender also purchased items to assist him in giving instructions to Hussain and Babek about the construction of explosive devices.

15. On the 27 February 2020 Abdullah signed a Defence Case Statement in which he admitted an offence contrary to section 5(1)(b) of the Terrorism Act 2006 (Count 1 at that date being an offence contrary to section 5(1)(a)) and to Count 2, in its existing form. Those pleas were acceptable to the Crown. On 20 March 2020, Count 1 was amended and the Offender was arraigned and pleaded guilty to both counts.

The Sentencing Hearings

16. The sentence hearing commenced on 26 June 2020. After hearing submissions, the Judge adjourned the hearing to 7 July 2020 to consider his sentence and so that further information and submissions could be provided by the prosecution and defence.

17. The prosecution submitted that the offending behaviour fell within Category B1 of the Guideline. An offence falling within Category B1 has a starting point (subject to any issue of dangerousness) of life imprisonment, with a minimum term of 25 years' custody and a range of a life imprisonment with a minimum term of 20-30 years' custody. The defence submitted the offence fell within Category C2, with a starting point of 15 years' custody and a category range of 10 to 20 years' custody. In submitting that a determinate sentence should be imposed the defence drew the judge's attention to the 2020 Act, indicating that should a special sentence of imprisonment for an offender of special concern be imposed, the 2020 Act "will mean the defendant will have to serve two thirds of the custodial period before he is eligible to be referred to the Parole Board".

18. The Judge held that the offence fell on the cusp of categories C2 and B2, and he adopted a starting point of 20 years' imprisonment. After considering aggravating and mitigating factors, he held that the appropriate notional determinate sentence after trial was 22 years' imprisonment. He reduced this by 4 years to reflect the Offender's guilty pleas, arriving at a notional determinate sentence of 18 years' imprisonment. The Judge concluded that the Offender was "dangerous" and that a life sentence was "self-evidently" required. He halved that notional determinate sentence to reach a minimum term of 9 years' imprisonment.

19. On 9 July 2020 the prosecution invited the Judge to exercise his powers under the Powers of Criminal Courts (Sentencing) Act 2000, section 155(1) to vary the sentence, arguing that as a result of the modification to the Criminal Justice Act 2003 made by the 2020 Order, it was now appropriate to impose a minimum term that was two-thirds of the notional determinate sentence. Submissions were made orally on 29 July 2020 and in writing on the following day, 30 July 2020.

20. The Judge handed down judgment on 3 August 2020. He held that only direct legislation could alter the percentage of the notional term after trial which should be used in calculating the minimum term, and that there had been no such legislation. On that basis, he concluded that it was not appropriate for him to increase the minimum terms imposed. Once again, the Solicitor General does not challenge the Judge's conclusion that the appropriate notional determinate sentence was 18 years. He contends that the Judge should have set the minimum term at two thirds of that notional determinate sentence (12 years) rather than at half.

The Legislative History

21. In order to address the Solicitor General's arguments, it is necessary to set out the legislative history of section 82A of the Powers of Criminal Courts (Sentencing) Act 2000 and the associated provisions of the Criminal Justice Act 2003.

The Original Provisions

22. Before section 82A came into force on 30 November 2000, there was already a requirement to fix the minimum term for a life sentence on a basis which reflected the early release provisions applicable to determinate sentences. The appeal in R v Szczerba [2002] EWCA Crim 440 concerned a life sentence imposed before the coming into force of section 82A, at a time when prisoners sentenced to determinate sentences of over 4 years were eligible for release on licence after serving half of their sentence, with the Secretary of State under a duty to release a prisoner on licence after two-thirds of a determinate sentence had been served. One of the grounds of appeal was that the sentencing judge had set the minimum term (6 years) at a level above half of the notional determinate sentence of 11 years. The Court of Appeal addressed this submission as follows:

> "[31] Finally, Mr Fitzgerald submits that there was no reason for the recorder to take, as the specified period to be served, a higher proportion of the determinate term than one half, which the recent authorities show should be the norm in the absence of exceptional circumstances (see Marklew and Lambert [1999] 1 Cr App R (S) 274 and McQuade [2002] 1 Cr App R (S) 128 (p.540). Indeed, Mr Fitzgerald goes further and submits that one-half of the notional determinate sentence should be the invariable rule.
>
> [32] In our judgment, as Marklew and Lambert makes plain, whether the specified period should be half or two-thirds of the determinate term, or somewhere between the two, is essentially a matter for the exercise of the sentencing judge's discretion. But that discretion must be exercised in accordance with principle. We accept that half should normally be taken. Some of the decisions in this Court, in which the Court has taken a higher proportion, are not, as it seems to us, obviously explicable, save on the basis that the relevant principles were not always argued or addressed.
>
> [33] There are, however, circumstances in which more than half may well be appropriate. Dr Thomas identified two examples. In Hayward [2000] 2 Cr App R(S) 418 a life sentence was imposed on a serving prisoner for an offence committed in prison. In such a case the term specified can appropriately be fixed to end at a date after that on which the defendant would have been eligible for release on licence from his original sentence. This may involve identifying a proportion of the notional determinate term up to two-thirds. Another example is where a life sentence is imposed on a defendant for an offence committed during licensed release from an earlier sentence, who is therefore susceptible to return to custody under section 116 of the Powers of Criminal Courts (Sentencing) Act 2000. In such a case the specified period could properly be increased above one-half, to reflect the fact that a specified period cannot be ordered to run consecutively to any other sentence.

…

[35] But, as we have said, unless there are exceptional circumstances, half the notional determinate sentence should be taken (less, of course, time spent in custody) as the period specified to be served. If a judge specifies a higher proportion than one-half, he should always state his reasons for so doing."

23. As originally enacted, section 82A provided:

"(1) This section applies if a court passes a sentence in circumstances where the sentence is not fixed by law.

(2) The court shall… order that the provisions of section 28(5) to (8) of the Crime (Sentences) Act 1997 (referred to in this section as the "early release provisions") shall apply to the offender as soon as he has served the part of his sentence which is specified in the order.

(3) The part of his sentence shall be as such as the court considers appropriate taking into account—

(a) the seriousness of the offence…

(b) the effect that the following would have had if the court had sentenced the offender to a term of imprisonment— (i) section 240ZA of the Criminal Justice Act 2003 (crediting periods of remain in custody) (ii) … (iii) any direction which the court would have given under section 24) of the Criminal Justice Act 2003 (crediting periods of remand on bail subject to certain types of condition).

(c) the early release provisions as compared with section 33(2) and section 35(1) of the Criminal Justice Act 1991".

24. Section 33(2) of the Criminal Justice Act 1991 imposed a duty on the Secretary of State to release short-term prisoners after they had served half of their sentence (such release to be on licence in the case of sentences in excess of one year) and long-term prisoners after serving two-thirds of their sentence. Section 35 of the 1991 Act provided that once a long-term prisoner had served half of his sentence, the Secretary of State might, on the recommendation of the Parole Board, release the prisoner on licence.

The Criminal Justice Act 2003

25. On 18 December 2003, when the Criminal Justice Act 2003 came into force, section 82A(3)(c) was amended to refer to "the early release provisions as compared with section 244(1) of the Criminal Justice Act 2003". Section 244(1) provided:

> "As soon as a fixed-term prisoner, other than one to whom section 247 applies, has served the requisite custodial period, it is the duty of the Secretary of State to release him on licence under this section."

26. The "requisite custodial period" was defined in section 244(3). When brought into force on 31 December 2003, section 244(3) provided:

> "(3) In this section "the requisite custodial period" means—
>
> (a) in relation to a person serving a sentence of imprisonment for a term of twelve months or more or any determinate sentence of detention under section 91 of the Sentencing Act, one-half of his sentence,
>
> (b) in relation to a person serving a sentence of imprisonment for a term of less than twelve months (other than one to which an intermittent custody order relates), the custodial period within the meaning of section 181,
>
> (c) in relation to a person serving a sentence of imprisonment to which an intermittent custody order relates, any part of the term which is not a licence period as defined by section 183(3), and
>
> (d) in relation to a person serving two or more concurrent or consecutive sentences, the period determined under sections 263(2) and 264(2)."

Section 247 – which was excluded from the scope of section 244 – regulated the early release of prisoners serving extended sentences, and had its own definition of "requisite custodial period".

27. The structure of section 244 was amended by the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("LASPO 2012") which came into force on 3 December 2012:

i) The words "for the purposes of this section" were inserted after the words "requisite custodial period" in section 244(1).

ii) The "requisite custodial period" which had originally featured in section 244(3)(b) (sentences of imprisonment of less than 12 months) was removed from that section and became sections 243A with its own definition of "requisite custodial period", and section 244(1) was amended so that it would not apply to prisoners subject to section 243A (Schedule 14, para 6(2)(b) of LASPO 2012).

iii) Section 244(1) was amended to exclude from its ambit prisoners subject to the new-style extended sentences introduced by section 246A of the Criminal Justice Act 2003 (Section 125, LASPO 2012).

iv) The "requisite custodial period" which had originally featured in section 244(3)(c) (prisoners subject to intermittent custody orders) was removed from that section (Schedule 10 para 21(3)(a)).

28. Section 244(1) was in this form when this Court heard the appeal in Burinskas, a decision which featured prominently in the argument before us.

The Decision in Burinskas

29. In Attorney General's Reference (No 27 of 2013) (R v Burinskas) [2004] EWCA Crim 354, the Court heard a number of appeals concerned with extended and life sentences. In that latter context, the Court noted at [33] that the purpose of section 82A was "to require the sentencing judge to identify the sentence that would have been appropriate had a life sentence not been justified and to reduce that notional sentence to take account of the fact that had a determinate sentence been passed the offender would have been entitled to early release".

30. At [34], the Court stated that "when imposing a discretionary life sentence judges reduce the notional sentence by one half to reach the minimum term", noting "that approach was endorsed in R v Szczerba", although there might be exceptional cases in which the reduction might be less than one half. At [35-37], the Court addressed an argument that setting the minimum term by reducing the notional determinate sentence by half might in some cases lead to a minimum term which was less than the "requisite custodial period" for prisoners serving non-life sentences for the same offence. Given the significance of this aspect of the Court's decision for the present appeal, we have set out this passage of the judgment in full:

> "[35] A number of advocates drew to our attention what they described as an anomaly caused by the provisions for early release in respect of the new extended sentences. The effect is that a life prisoner may serve less time in prison than an offender serving the custodial term of an extended sentence even though the appropriate custodial term is the same. Offender A, subject to a life sentence, is given a minimum term of five years on the basis that but for the life sentence he would have been sentenced to a ten-year determinate sentence. He serves five years before being considered for parole. He may be released at that stage. Offender B is made the subject of an extended sentence. The appropriate custodial term is ten years. Offender B is not eligible for release until he has served two thirds of his sentence. Even if he is released at that point he will have spent longer in prison than the life prisoner who has been released at the first opportunity. Thus the first opportunity for release occurs sooner for the life prisoner than for the prisoner serving an extended sentence.
>
> [36] We understand the argument, but the position is more complex. A life prisoner is not entitled to release at the end of the minimum term. He must wait until the Parole Board consider that it is safe to release him. In some cases that date is years after the minimum term has expired. The prisoner serving an extended sentence is entitled to be released at the end of the custodial period without any further assessment of risk. Where the custodial term is less than ten years the entitlement arises at the two thirds point.

> [37] There is an argument that if the alternative to a life sentence is an extended sentence rather than a determinate sentence then it is the extended sentence, with its longer time to serve, that should form the basis of the calculation of the minimum term in a life sentence. That would reduce the notional determinate sentence by one third rather than one half and would lead to an increase in the minimum term to be served in life cases of one third. There are four difficulties with that approach: (i) an extended sentence is not necessarily an alternative to a life sentence under section 225; (ii) an extended sentence is not an alternative to a life sentence imposed under section 224A; (iii) the sentencing judge must compare the early release provisions at section 244(1) —which are concerned with determinate sentences; (iv) a measure which increases minimum terms in life sentences by one third is, in our judgment, a matter for Parliament."

The Court's reference in the last sentence of [37] to increasing "minimum terms in life sentences by one third" was a reference to an increase from one half (three sixths) to two thirds (four sixths), a proportionate increase of one third.

31. There was a further attempt to argue that the minimum term in life sentences should be fixed by reference to the release provisions for extended sentences in Attorney General's References No 688 of 2019 (McCann) and No 5 of 2020 (Sinaga) [2020] EWCA Crim 1676. The Court addressed this submission at [52]:

> "Ms Whitehouse QC, following the Solicitor General in the cases of McCann and Sinaga, submits that we should take into account the current release provisions for extended sentences, where prisoners serve at least two thirds of the custodial term, rather than the release provisions for determinate sentences, where they usually serve half. However, for the reasons set out in Attorney General's Reference (No 27 of 2013) (R v Burinskas) [2014] EWCA Crim 334; [2014] 2 Cr App R(S) 45 at [37], we do not accept the submission".

32. We accept that the decisions in Burinskas and McCann were concerned with a comparison between extended sentences and the minimum terms in life sentences, and that aspects of the reasoning in Burinskas are specifically directed to the particular character of extended sentences. However, it is clear that the Court in Burinskas did not regard the specific reference in section 244(1) to section 247 (for the purpose of excluding prisoners subject to section 247 from the operation of section 244(1)) as providing a sufficient basis for concluding that a court should take account of the "requisite custody period" under section 246A in a case where the alternative to a life sentence was an extended sentence. The Court was also clear that any increase in the minimum term for life sentences required Parliamentary sanction. That reasoning was approved in McCann.

33. A further amendment to section 244 was made by Schedule 1(1) of the Criminal Justice and Courts Act 2015. That Act introduced a new section 236A into the Criminal Justice Act 2003, creating a special custodial sentence for "certain offenders of particular concern", and a separate regime for the release on licence of prisoners serving such sentences in section 244A. Section 244(1) was amended to remove prisoners who were subject to section 244A from its scope.

The Recent Enactments

34. In 2020, there were two amendments affecting early release of prisoners which adopted different legislative techniques.

35. The first, chronologically, is the 2020 Act which came into force on 26 February 2020. Section 1 of the 2020 Act inserted a new section 247A into the Criminal Justice Act 2003. Section 247A provides that the "requisite custodial period" before an Offender was eligible for release on licence for many terrorism offences for all types of sentences (including determinate terms of imprisonment, but excluding life imprisonment) would be two-thirds of the sentence imposed. The offences for which Shaikh and Abdullah were convicted are subject to the 2020 Act.

36. As well as introducing section 247A into the Criminal Justice Act 2003, the 2020 Act amended section 244(1) so that the Secretary of State's duty under that section to release a prisoner on licence once the prisoner had completed "the requisite custodial period for the purposes of this section" did not apply to a prisoner subject to section 247A (thereby adding section 247A to the existing "carve-outs" from section 244(1) for sections 244A, 246A and 247).

37. The second amendment was effected by a statutory instrument on 1 April 2020, and changed the provisions relating to the early release of prisoners serving sentences for certain violent and sexual offences. Paragraph 3 of the 2020 Order provides:

> "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."

38. In Khan v Secretary of State for Justice [2020] EWHC 2084 (Admin) at [31], the Divisional Court observed in an obiter passage that the effect of the 2020 Order was that, when setting the minimum term for a life sentence imposed for sexual and violent offences, the minimum term would reflect the two thirds minimum custody period.

39. The offences to which the 2020 Order applies are those "listed in Part 1 or 2 of Schedule 15 to the 2003 Act for which a sentence of life imprisonment may be imposed". The offences for which Shaikh and Abdullah were convicted are listed in Part 3 of Schedule 15 and do not fall within the scope of the 2020 Order.

The Guideline

40. Section 125(1) of the Coroners and Justice Act 2009 requires a court, in sentencing an offender, to follow any sentencing guidelines which are relevant to the offender's case unless the court is satisfied that it would be contrary to the interests of justice to do so.

41. The Guideline applies to all offenders sentenced after 27 April 2018. For those offences for which the maximum sentence is life, the Guideline categories provide starting points and ranges for minimum terms, as well as starting points and ranges for determinant sentences. For Category 2B offences, the Guideline provides for life

sentences, with a starting point minimum term of 15 years, and a range of minimum terms of 10 to 20 years. The starting points and ranges in the Guideline broadly reflect those established by the pre-Guideline decision in R v Kahar [2016] EWCA Crim 568, and the minimum terms suggested in the Guideline are predicated on the division of the notional determinate term by half. If the submissions of the Solicitor General are right, then the Guideline would have to be applied on the basis that the minimum terms in it should be reassessed so that they reflect two thirds of the notional determinate sentence. Those submissions are based on the construction of legislation passed after the Guideline came into effect, and on binding decisions of this Court about the exercise of discretion in this area. We consider that the Guideline provides no assistance in dealing with the issues before us. However the sentences in the Guideline are calculated, the Court is obliged to apply legislation and to follow binding precedent in this area.

The Sentencing Act 2020

42. With effect from 1 December 2020, section 82A was repealed and its provisions re-enacted in identical terms as section 323 of the Sentencing Act 2020. As we are concerned with a challenge to the sentences passed by the Judge, and because it assists when setting out the relevant legislative history, we have and will refer to the relevant provisions by reference to the legislation in force when the sentences were pronounced.

The Solicitor General's applications

43. In Attorney General's Reference (No 60 of 2012) [2012] EWCA Crim 2746, Hughes LJ stated at [19]:

> "The procedure for referring cases under section 36 of the Criminal Justice Act 1988 is designed to deal with cases where judges have fallen into gross error, where errors of principle have been made and unduly lenient sentences have been imposed as a result."

44. In this case, Ms Morgan QC and Mr Polnay for the Solicitor General submitted that the Judge had made an error of principle. The Solicitor General's primary argument before us was that the amendments to the Criminal Justice Act 2003 effected by the 2020 Act – the introduction of section 247A, and the removal of prisoners who are subject to section 247A from the scope of section 244(1) – required the Judge, when setting the minimum term under section 82A of the Powers of Criminal Courts (Sentencing) Act 2000, to "take into account" the fact that the Offenders would not have been entitled to release until they had served two-thirds of the notional determinate sentence.

45. In the alternative, Ms Morgan Q.C. and Mr Polnay submitted that, following the coming into force of the 2020 Act, the Judge should have exercised his discretion under section 82A by setting the minimum terms at two thirds of the notional determinate sentence.

46. These submissions were resisted by Mr Newton and Mr Thomas for the Offenders. They argue that the Judge was right to conclude that only direct legislation could alter the percentage of the notional term after trial which should be used in calculating the

minimum term, and that the amendments made to the Criminal Justice Act 2003 by the 2020 Act did not satisfy that requirement. In relation to the Solicitor General's alternative argument, they accept that the sentencing judge has a discretion in exceptional cases to depart from the "one half" norm in section 244(3) of the Criminal Justice Act 2003 when fixing the minimum term of a life sentence. However, they submitted that the Solicitor General's argument would not involve a departure from the one half norm only in exceptional cases, but in every case in which the two thirds provision introduced by the 2020 Act applied.

47. Finally, Mr Thomas submitted that even if the Solicitor General was correct in either argument, such that the 2020 Act and/or the 2020 Order had established a "new norm" of two thirds of the notional determinate sentence, the Judge had exercised his discretion under section 82A to fix the minimum term on the facts of Abdullah's case on the basis of one half of the determinate sentence, and the exercise of that discretion could not be said to involve any error of principle or to have led to the imposition of a sentence which was unduly lenient.

48. We were very grateful to all counsel for the quality of their submissions, and for helping us navigate the complicated legislative history of this area of the law. We now consider the Solicitor General's arguments in turn.

Does section 82A(3)(c) require the sentencing judge to take into account the early release provisions in section 247A in fixing the minimum term?

49. This part of the Solicitor General's argument involves reading the requirement in section 82A(3)(c) to "take into account" the early release provisions as compared with section 244(1) of the Criminal Justice Act 2003 as extending not only to the early release provisions provided for in section 244(1) itself, but also those specifically exempted from section 244(1).

50. However, we have concluded that the reference in section 82A(3)(c) to "the early release provisions as compared with section 244(1)" is naturally to be interpreted as a reference to release after "the requisite custodial period" referred to in section 244(1), and defined in section 244(3). That is the "requisite custodial period *for the purposes of this section"*, and the only "requisite custodial period" for which section 244(1) provides. In our view, it would be a bold reading of section 82A(3)(c) to interpret it as extending it not simply to the early release provisions provided for in section 244(1), but to other early release provisions appearing elsewhere merely because they have been expressly carved out from section 244(1).

51. We are fortified in this conclusion by the decision in Burinskas, itself approved in McCann, that the express carve-out of section 247 from the operation of section 244(1) did not have the effect that, in those cases where the alternative to a life sentence was an extended sentence, the judge should take into account the early release provisions which would have applied to the extended sentence in fixing the minimum term. Further, as the Court noted in Burinskas, an increase in the minimum term for a life sentence from one half to two thirds is a matter for Parliament. We do not consider that the amendment of section 244(1) to add a further carve-out from the operation of that section for prisoners subject to section 247A can be said to manifest Parliamentary sanction for such a significant alteration in the minimum term regime.

52. We acknowledge that this conclusion entails that the legislative structure of the 2020 Act (creating a new early release regime in section 247A and then removing those subject to that regime from the operation of section 244(1)) has a different effect so far as the setting of minimum terms is concerned to that adopted by the 2020 Order (which amended the definition of "relevant custodial period" in section 244(1) itself). However, different forms of statutory language do have different consequences. Ms Morgan QC for the Solicitor General realistically accepted that if the "carve out" of section 247A from the section 244(1) regime had been effected by a provision within section 247A itself, rather than by an amendment to the terms of section 244(1), the Solicitor General's primary argument would not have been open.

53. We also accept that our conclusion gives rise to the anomaly identified in Burinskas that the minimum term for a prisoner sentenced to a life sentence to which the 2020 Act applies may in some cases be lower than the requisite custodial period for a prisoner sentenced to a determinate sentence for the same offence, and that, for the same reason, there is an anomaly when comparing the minimum terms with the requisite custodial period for the determinate sentences in the Guideline. While those anomalies are in part answered by the differences between life sentences and other forms of sentence identified by the Court of Appeal in Burinskas at [36], they remain nonetheless. However, the avoidance of those anomalies does not, in our view, constitute a sufficient basis for adopting an interpretation of section 82A which increases the minimum term for life sentences from one half to two thirds in the absence of direct legislation to that effect.

Should the Judge have set a minimum term of two thirds of the notional determinate sentence in the exercise of his sentencing discretion?

54. It is well-established that, even though the minimum term of a life sentence is in the vast majority of cases established by taking half of the notional determinate sentence for the offence, it is open to the sentencing judge in the exercise of his or her sentencing discretion to adopt a higher proportion. The existence of that discretion has been confirmed in many authorities. It is also well-established that it is only in exceptional cases that the judge should depart from the relevant custodial period set out in section 244(3). Thus the Court in Szczerba at [35] said that "unless there are exceptional circumstances, half the notional determinate sentence should be taken". The Divisional Court in R (Khan) v Secretary of State for Justice summarised the correct approach at [31] as follows:

> "The application of s.82A(3)(c) will ordinarily, but not always, result in a reduction of the notional determinate sentence by half, but there may be exceptional circumstances in which more than half may be appropriate: R v Szczerba [2002] EWCA Crim 440; [2002] 2 Cr App R (S) 86, [33]; R v Jarvis [2006] EWCA Crim 1985, [19]".

Finally, this Court in McCann at [54] noted that:

> "Although section 244 would appear to afford judges a wide margin of discretion, the jurisprudence indicates that the court should only depart from

> setting the custodial period as a half of the sentence in 'exceptional circumstances'".

55. Minimum terms calculated using a higher proportion of the determinate sentence than one half have generally been imposed to address a particular feature of the offender or his or her sentencing history. Sometimes it is appropriate to adopt a figure of more than half of the notional determinate sentence to ensure the life sentence takes effect appropriately in conjunction with an existing sentence. For example in R v Hayward [2000] 2 Cr App R (S) 418, a life sentence was imposed on a serving prisoner for an offence committed in prison, and the Court held that the minimum term could be set on a basis which ensured it expired after the date on which the defendant would have been eligible for release on licence for his original sentence. The Court in Szczerba at [33] identified a life sentence imposed for an offence committed during the licensed release from an earlier sentence as another example (to reflect the fact that the minimum term could not be ordered to run consecutively to any other sentence). In other cases, it may (exceptionally) be appropriate to calculate the minimum term by taking more than half of the notional determinate sentence because of the offender's particular history of offending: for example R v Rossi [2014] EWCA Crim 2081 in which the offender had already served two life sentences. This Court in McCann at [60] noted that "a defendant's grave antecedents or the extent and seriousness of the offences for which he or she is to be sentenced may be relevant … to whether there are persuasive circumstances that justify a departure from the usual one-half approach".

56. In this case, however, the Solicitor General does not contend that there is any particular feature of these offences or the sentencing history of these Offenders which justifies determining the minimum term by taking two thirds, rather than one half, of the notional determinate sentence. Rather it is contended that a sentencing judge is obliged to exercise the sentencing discretion on this basis in every case to which the 2020 Act applies. However, that approach would not constitute the exercise of a discretion to depart from the general rule in exceptional cases, but the adoption of a new rule. As the Court noted in Burinskas, a change of this kind to the calculation of the minimum term in life sentences is a matter for Parliament, not for the discretion of the sentencing judge.

57. Finally, if we had accepted the Solicitor General's submission that the calculation of the minimum terms for life sentences imposed for terrorist offences should ordinarily reflect the requisite custodial period provided for by section 247A, we would not have accepted Mr Thomas' submission that the Judge had exercised his sentencing discretion under section 82A to depart from that general position so far as Abdullah is concerned. It is clear from the Judge's sentencing remarks that his sentence had not been arrived at on the basis that there were exceptional features of Abdullah's case that justified setting the minimum term by reference to a lower proportion of the notional determinate sentence than would otherwise be appropriate. Rather the Judge determined that there was no reason to depart from the norm in fixing a minimum term under section 82A, which the Judge held involved taking one half of the notional determinate sentence. For the reasons we have given in this judgment, we agree with him.

Conclusion

58. For these reasons, we give the Solicitor General leave to challenge the sentences imposed by the Judge on Shaikh and Abdullah, but dismiss the applications.