Trinity Term
[2010] UKSC 30
On appeal from: 2008 EWCA Civ 1097

JUDGMENT

R (on the application of Noone) (FC) (Appellant) *v* The Governor of HMP Drake Hall and another (Respondents)

before

Lord Phillips, President
Lord Saville
Lord Brown
Lord Mance
Lord Judge

JUDGMENT GIVEN ON

30 June 2010

Heard on 11 and 12 May 2010

Appellant	*Respondent*
Pete Weatherby Andrew Fitzpatrick (Instructed by Prisoners Advice Service)	Nigel Giffin QC Steven Kovats (Instructed by Treasury Solicitor)

LORD PHILLIPS

1. The road to hell is paved with good intentions. In this case the good intentions were to introduce mandatory rehabilitation for very short term prisoners by coupling time spent in custody with a release period under licence. This was known as "custody plus". Hell is a fair description of the problem of statutory interpretation caused by transitional provisions introduced when custody plus had to be put on hold because the resources needed to implement the scheme did not exist. The problem arises when sentences of less than 12 months and more than 12 months are imposed consecutively.

The 1991 Act - Early Release

2. In explaining this problem I shall refer only to the most relevant of statutory provisions thereby simplifying the picture. The Criminal Justice Act 1991 ("the 1991 Act") introduced for the first time a scheme in which it was mandatory for the Secretary of State to release prisoners part way through the period of their sentence. A prisoner sentenced to less than 12 months imprisonment had to be released unconditionally after serving half his sentence (section 33(1)(a)). A prisoner sentenced to between 12 months and 4 years imprisonment had to be released on licence after serving half his sentence (section 33(1)(b)). A prisoner sentenced to a determinate term of 4 years or more imprisonment had to be released on licence after serving two-thirds of his sentence (section 33(2)).

3. This early release scheme might have raised problems in relation to the practice of imposing sentences to be served consecutively. These problems were solved by section 51(2) of the 1991 Act, as amended by section 101 of the Crime and Disorder Act 1998, which provided:

> "For the purposes of any reference in this Part, however expressed, to the term of imprisonment to which a person has been sentenced or which, or part of which, he has served, consecutive terms and terms which are wholly or partly concurrent shall be treated as a single term if—
>
> (a) the sentences were passed on the same occasion; or

(b) where they were passed on different occasions, the person has not been released under this Part at any time during the period beginning with the first and ending with the last of those occasions."

4. Section 33(5) of the 1991 Act defined prisoners sentenced to less than 4 years imprisonment as "short term prisoners" and prisoners sentenced to 4 years imprisonment or more as "long term prisoners". For the purpose of this appeal the more significant distinction is between prisoners serving sentences of less than 12 months, whom I shall describe as "under 12 month prisoners" and prisoners serving sentences of 12 months or more, whom I shall describe as "over 12 month prisoners".

Home Detention Curfew

5. In 1998 under the Crime and Disorder Act additional provisions were inserted by amendment into the 1991 Act, which added a degree of complication to the release provisions for short term prisoners serving a sentence of imprisonment of three months or more. Under section 34A after such a prisoner had served "the requisite period" the Secretary of State was given power to release the prisoners on licence under conditions that required them to live at home, subject to a curfew. I shall describe this as "HDC release". The "requisite period" was so defined as to produce a sliding scale under which the prisoner might be released before what would otherwise have been his mandatory release date. The longer the sentence the longer the potential period of HDC release until this peaked at its maximum of 135 days in respect of a sentence of 18 months or more. A charitable interpretation of the purpose of the introduction of HDC would be that it was intended to facilitate rehabilitation in the community. A more cynical view would be that it was intended to provide the Home Secretary with a safety valve to deal with the pressure on prison accommodation. At all events the Home Secretary made such generous use of this power that short term prisoners were able to look forward with some confidence to being granted HDC release.

Licence expiry

6. Section 37 of the 1991 Act provided that, for both short and long term prisoners released on licence, the licence would remain in force until three quarters of the sentence period had elapsed. When an under 12 month prisoner was released under HDC his licence period ended once half the sentence period had elapsed.

The appellant's sentence

7. I now turn to the position of the appellant Miss Rebecca Noone. On 23 May 2007 she was sentenced at Stafford Crown Court for a number of offences as follows:

(a) Theft – 22 months imprisonment.

(b) Three further offences of theft – 4 months imprisonment on each count concurrent to one another but consecutive to the 22 month sentence.

(c) Contempt of Court – 1 month imprisonment consecutive to all the other sentences.

8. Had the provisions of the 1991 Act been applied to this sentence, its implications would have been easy to appreciate. The sentences would have been aggregated pursuant to section 51(2) to produce a total of 27 months. The appellant would have been entitled to be released after serving half this sentence, that is on her "conditional release date". But she could have looked forward with confidence to HDC release 135 days before that date.

9. On 24 May 2007 the appellant was given a release date notification which advised her that this was precisely what she could expect – that is:

Eligibility for HDC: 15.1.2008

Conditional release date: 28.5.2008

This notification also informed the appellant that her licence would expire on the same day that her sentence would expire – that is 13 July 2009. This conflicted with the provision of section 37 of the 1991 Act under which the licence would have been due to expire after three quarters of the sentence period.

10. On 18 July 2007 the appellant was given a fresh notification which put back the date of her eligibility to HDC to 20.4.2008 but advanced both her licence and her sentence expiry date to 10.2.2009. The appellant brought these proceedings in order to challenge this notification.

11. The reason for the confusion as to the date when the appellant would become eligible to HDC and the date on which her licence and her sentence would expire was that those in Drake Hall Prison responsible for the appellant's release were grappling with the implications of the Criminal Justice Act 2003, to which I now turn.

The Criminal Justice Act 2003

12. One particular objective of the Criminal Justice Act 2003 ("the 2003 Act") was the rehabilitation of offenders. With this objective in mind, those who drafted the Act set out to achieve, among other things, the following:

1) the introduction of custody plus for under 12 month prisoners, and

2) the increase of the licence period to make this co-extensive with the period of the sentence.

Rather than attempt to summarise the relevant provisions of the 2003 Act, I shall set them out verbatim.

13. Section 181 was the section which made provision for custody plus. It began as follows:

> "Prison sentences of less than 12 months
>
> (1) Any power of a court to impose a sentence of imprisonment for a term of less than 12 months on an offender may be exercised only in accordance with the following provisions of this section unless the court makes an intermittent custody order (as defined by section 183).
>
> (2) The term of the sentence –
>
> (a) must be expressed in weeks,
> (b) must be at least 28 weeks,
> (c) must not be more than 51 weeks in respect of any one offence, and
> (d) must not exceed the maximum term permitted for the offence.
>
> (3) The court, when passing sentence, must –

(a) specify the period (in this Chapter referred to as 'the custodial period') at the end of which the offender is to be released on a licence, and
(b) by order require the licence to be granted subject to conditions requiring the offender's compliance during the remainder of the term (in this Chapter referred to as 'the licence period') or any part of it with one or more requirements falling within section 182(1) and specified in the order.

(4) In this Part 'custody plus order' means an order under subsection (3)(b).

(5) The custodial period –

(a) Must be at least 2 weeks, and
(b) In respect of any one offence, must not be more than 13 weeks.

(6) In determining the term of the sentence and the length of the custodial period, the court must ensure that the licence period is at least 26 weeks in length.

(7) Where a court imposes two or more terms of imprisonment in accordance with this section to be served consecutively –

(a) the aggregate length of the terms of imprisonment must not be more than 65 weeks, and
(b) the aggregate length of the custodial periods must not be more than 26 weeks."

Section 182 set out the various requirements that could be imposed by way of licence conditions.

14. Custody plus has never been introduced and it is very unlikely that it ever will be. For this reason sections 181 and 182 have not been brought into force. The provisions of section 181 impacted on subsequent provisions of the Act, including the following provisions for release on licence.

"244 Duty to release prisoners

(1) As soon as a fixed-term prisoner, other than a prisoner 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.

(2) Subsection (1) is subject to section 245.

(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,
>
> . . .
> (d) in relation to a person serving two or more concurrent or consecutive sentences none of which falls within paragraph (c), the period determined under sections 263(2) and 264(2)."

Section 244(3)(b) has not been brought into force.

15. Section 246 of the 2003 Act makes provision for eligibility for HDC in terms of even greater complexity than those of section 34A of the 1991 Act:

"246 Power to release prisoners on licence before required to do so

(1) Subject to subsections (2) to (4), the Secretary of State may—

> (a) release on licence under this section a fixed-term prisoner, other than an intermittent custody prisoner, at any time during the period of 135 days ending with the day on which the prisoner will have served the requisite custodial period, and
> (b) release on licence under this section an intermittent custody prisoner when 135 or less of the required custodial days remain to be served.

(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 requisite custodial period.

(3) Subsection (1)(b) does not apply in relation to a prisoner unless—

(a) the number of required custodial days is at least 42, and
(b) the prisoner has served—
(i) at least 28 of those days, and
(ii) at least one-half of the total number of those days.

. . .

(6) . . .

'the requisite custodial period' in relation to a person serving any sentence other than a sentence of intermittent custody, has the meaning given by paragraph (a), (b) or (d) of section 244(3);"

16. Section 249 deals with the duration of a licence. It provides:

"(1) Subject to subsections (2) and (3), where a fixed-term prisoner is released on licence, the licence shall, subject to any revocation under section 254 or 255, remain in force for the remainder of his sentence."

Section 250 makes provision for licence conditions in relation to both under 12 month and over 12 month sentences.

17. Section 263 deals with concurrent sentences. It provides:

"263 Concurrent terms

(1) This section applies where—

(a) a person ('the offender') has been sentenced by any court to two or more terms of imprisonment which are wholly or partly concurrent, and
(b) the sentences were passed on the same occasion or, where they were passed on different occasions, the person has not been released under this Chapter at any time during the period beginning with the first and ending with the last of those occasions.

(2) Where this section applies—

(a) nothing in this Chapter requires the Secretary of State to release the offender in respect of any of the terms unless and until he is required to release him in respect of each of the others,
(b) section 244 does not authorise the Secretary of State to release him on licence under that section in respect of any of the terms unless and until that section authorises the Secretary of State to do so in respect of each of the others,
(c) on and after his release under this Chapter the offender is to be on licence for so long, and subject to such conditions, as is required by this Chapter in respect of any of the sentences.

(3) Where the sentences include one or more sentences of twelve months or more and one or more sentences of less than twelve months, the terms of the licence may be determined by the Secretary of State in accordance with section 250(4)(b), without regard to the requirements of any custody plus order or intermittent custody order."

18. Section 264 is a critical provision in the context of this appeal. It deals with consecutive sentences. It provides:

"264 Consecutive terms

(1) This section applies where—

(a) a person ('the offender') has been sentenced to two or more terms of imprisonment which are to be served consecutively on each other, and

(b) the sentences were passed on the same occasion or, where they were passed on different occasions, the person has not been released under this Chapter at any time during the period beginning with the first and ending with the last of those occasions, and
(c) none of those terms is a term to which an intermittent custody order relates.

(2) Nothing in this Chapter requires the Secretary of State to release the offender on licence until he has served a period equal in length to the aggregate of the length of the custodial periods in relation to each of the terms of imprisonment.

(3) Where any of the terms of imprisonment is a term of twelve months or more, the offender is, on and after his release under this Chapter, to be on licence—

(a) until he would, but for his release, have served a term equal in length to the aggregate length of the terms of imprisonment, and
(b) subject to such conditions as are required by this Chapter in respect of each of those terms of imprisonment.

(4) Where each of the terms of imprisonment is a term of less than twelve months, the offender is, on and after his release under this Chapter, to be on licence until the relevant time, and subject to such conditions as are required by this Chapter in respect of any of the terms of imprisonment, and none of the terms is to be regarded for any purpose as continuing after the relevant time.

(5) In subsection (4) 'the relevant time' means the time when the offender would, but for his release, have served a term equal in length to the aggregate of—

(a) all the custodial periods in relation to the terms of imprisonment, and
(b) the longest of the licence periods in relation to those terms.

(6) In this section—

(a) 'custodial period'—
(i) in relation to an extended sentence imposed under section 227 or 228, means the appropriate custodial term determined under that section,

(ii) in relation to a term of twelve months or more, means one-half of the term, and
(iii) in relation to a term of less than twelve months complying with section 181, means the custodial period as defined by subsection (3)(a) of that section;
(b) 'licence period', in relation to a term of less than twelve months complying with section 181, has the meaning given by subsection (3)(b) of that section."

Subsections (4) and (5) have not been brought into force.

19. Section 265 provides:

"265 Restriction on consecutive sentences for released prisoners

(1) A court sentencing a person to a term of imprisonment may not order or direct that the term is to commence on the expiry of any other sentence of imprisonment from which he has been released early under this Chapter."

This reflects sentencing policy that a prisoner should not be released under licence under one sentence before the commencement of the custodial period of a consecutive sentence.

The Transitional Provisions

20. The Criminal Justice Act 2003 (Commencement No.8 and Transitional and Saving Provisions) Order 2005 brought into force as from 4 April 2005 provisions of the Act that related to over 12 month sentences, as set out in Schedule 1. At the same time sections 32 to 51 of the 1991 Act were repealed. Schedule 2 set out Transitional and Saving Provisions. Paragraph 14 provided:

"Saving for prisoners serving sentences of imprisonment of less than 12 months

14. The coming into force of sections 244 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)."

The interpretation of this paragraph ("Paragraph 14") lies at the heart of this appeal.

21. Paragraph 14 serves one obvious purpose. Because section 181 and section 244(3)(b) had not been brought into force and sections 32 to 51 of the 1991 Act were repealed there was no provision for early release, or eligibility for HDC release, for prisoners serving under 12 month sentences. Paragraph 14 was clearly intended to make provision for such sentences, at least when not imposed concurrently or consecutively with over 12 month sentences, to continue to be dealt with exclusively under the 1991 Act. If imposed consecutively to other under 12 month sentences, these would be aggregated pursuant to the provisions of section 51(2) of the 1991 Act and the provisions of section 33 and section 34A applied to the aggregate. This would produce a similar result to that produced by sections 244 and 246 of the 2003 Act in relation to over 12 month sentences.

The Enigma

22. The terms of paragraph 14 raise two questions:

1) What is the object and effect of the words in brackets – "(whether or not such a sentence is imposed to run concurrently or consecutively with another such sentence)"?

2) Where sentences of under and over 12 months are ordered to be served consecutively, how are they to be linked together and how are provisions as to early release, release on HDC and licence to operate in relation to each sentence?

23. The words in brackets focus on the effects of concurrent and consecutive sentences. One object that they may have been intended to serve is to make it clear that the provisions of sections 263 and 264 of the 2003 Act are to have no application to sentences which are all of less than 12 months. It is plain, as Mr Giffin QC for the respondents conceded that the word "such" in the sentence in brackets relates to sentences of less than 12 months. The fact that the words in brackets do not relate to under 12 month sentences which are imposed to run consecutively with over 12 month sentences helps, I believe, to answer the second

question that forms part of the enigma. Before turning to this I shall set out the way in which the Secretary of State suggests that this question should be answered and then summarise the answers to it given by the courts below.

The Policy of the Secretary of State

24. The National Offender Management Service, setting out the policy of the Secretary of State, gave the following instructions to prison establishments as to how to calculate sentences and administer the HDC scheme:

> "the 1991 Act applies (and the 2003 Act does not apply) to all sentences of under 12 months whenever the offences are committed, and so the provisions of the 1991 Act are applied to 'single term' all [sic] sentences of under 12 months, the release date to be calculated in accordance with that Act. The 2003 Act plainly applies for this purpose to all sentences of 12 months or more where the offence was committed on or after 4 April 2005, and so the custodial periods of such consecutive sentences of 12 months or more must be aggregated, the release dates calculated in accordance with that Act. . . . There will of course be 'transitional' cases where a number of consecutive sentences are given, some being 12 months or more and some being under 12 months. We take the position that the 1991 Act therefore applies to those sentences under 12 months and the 2003 Act applies to those of 12 months or more where the offence was committed on or after 4 April 2005. The consecutive sentences that are 'single- termed' under the 1991 Act, and the aggregated sentences under the 2003 Act are treated as two separate sentences – ie one 1991 Act sentence and one 2003 Act sentence. . . . Eligibility for HDC is calculated by reference to the custodial term being served. So for example under the 1991 Act, a prisoner is not eligible for release on HDC until he has served the 'requisite period' – ie the requisite custodial term, as specified in section 34A(3) of the 1991 Act. Similarly, a prisoner sentenced under the 2003 Act is not eligible for HDC until he has served the requisite custodial period in section 246 of the 2003 Act . . . A prisoner only becomes eligible for HDC after the requisite custodial part of the last sentence has been served."

25. Under these instructions the licence period and the HDC eligibility depended entirely on the order in which the consecutive sentences fell to be served. As to this prison governors were instructed to proceed on the basis that sentences were to be served in the order imposed by the court.

Mitting J's decision

26. Mitting J [2008] EWHC 207 (Admin) held that the Secretary of State could not lawfully lay down such a policy. He held at para 32:

> "The only policy capable of giving effect to the policy of the 2003 Act and to the rational expectations of prisoners dealt with under both Acts is to ensure that they are not disadvantaged in relation to Home Detention Curfew, but are subject to the maximum period of licence on release which can lawfully be imposed."

Mitting J directed the first respondent forthwith to consider whether the appellant should be released on HDC, and she was so released on 8 February 2008.

The decision of the Court of Appeal

27. The leading judgment of the Court of Appeal [2008] EWCA Civ 1097; [2009] 1 WLR 1321 was delivered by Scott Baker LJ. He agreed with Mitting J that the Secretary of State had had no jurisdiction to issue the policy direction. He held, however, that fortuitously the Secretary of State's policy direction reflected the position in law. It was for the judge in his discretion, recognised by section 154 of the Powers of Criminal Courts (Sentencing) Act 2000, to direct how and in what order consecutive sentences should be served, but in the absence of any express direction there was a inference that sentences should be served in the order in which they were imposed. His conclusions appear in the following passage of his judgment:

> "53. Assuming the judge has said no more than that one sentence is to be consecutive to another, it is necessary to construe in a common sense way what section 154 direction the judge is to be taken to have given as to when the second sentence should commence. It seems to me obvious that the second sentence starts at the point at which release from the first sentence would otherwise occur as of right ie the conditional release date of the first sentence. The other theoretical options are unrealistic. The judge could not intend the second sentence to start when there is merely the possibility of release on a discretionary basis from the first sentence and the direction might or might not be exercised in the prisoner's favour. Nor could the judge intend the second sentence to start only at the sentence expiry date of the first sentence because the consequences would be that the prisoner would be released on licence from the first

> sentence and later recalled to start serving the second sentence. Accordingly, the second sentence begins, by virtue of the section 154 direction, at the conditional release date of the first sentence and the prisoner is to be treated as eligible for release on HDC and/or release on licence in accordance with the statutory provisions applicable to the second sentence. Those provisions will be those of the 1991 Act where the second sentence is less than 12 months and those of the 2003 Act where the second sentence is 12 months or more."

Submissions

28. Mr Weatherby for the appellant made the following powerful attack on the result reached by the Court of Appeal.

> i) It is at odds with the legislative intention. It produces a result which differs from the uniform approach to consecutive sentences of both the 1991 Act and the 2003 Act. The transitional provisions could not possibly have been intended to produce this result.
>
> ii) It leaves a legislative lacuna as to the way in which consecutive sentences should function where some are for less than 12 months and some are for more.
>
> iii) To infer that an order that two sentences are to be consecutive directs that the second should start when the custodial part of the first ends has no basis in law and converts a sentence that is directed to be consecutive into a sentence which is in part concurrent.

29. There is force in these submissions. To them could be added that the decision of the Court of Appeal opens the door to the possibility of capricious results, places a near intolerable burden on the sentencer and does not readily cater for the position where a series of sentences is imposed of which some are over and some are under 12 months.

30. Mr Weatherby submitted to us, as he did to the courts below, that it was possible so to interpret paragraph 14 as to provide that the 1991 Act determines the release date, and thus the custodial period and eligibility to HDC, of all under 12 month sentences, but that when such a sentence is imposed consecutively to a sentence of over 12 months, the effect of the two together is determined by section 264 of the 2003 Act.

31. Mr Giffin did not seek to challenge the submission that the decision of the Court of Appeal, and the prior policy of the Secretary of State, produced capricious and anomalous results. Nor did he suggest that there was any principle or policy that justified such results. He simply submitted that it was not possible on the wording of the relevant provisions of the 2003 Act and of paragraph 14 to reach the solution for which Mr Weatherby contended.

Conclusions

32. The decisions of the courts below and the submissions of Mr Giffin offer no explanation whatsoever for the words in brackets in paragraph 14. I have already said that I think it significant that those words draw an implicit but clear distinction between under 12 month sentences imposed concurrently or consecutively with other similar ("such") sentences and under 12 month sentences imposed concurrently or consecutively with sentences of over 12 months. The clear indication is that they are to receive different treatment. The draftsman has been too economical with his language to make his intention readily apparent. I have reached the conclusion that to give true effect to the wording of paragraph 14, and in particular the words in brackets, it should be read as follows:

> The coming into force of sections 244 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 (*other than a sentence which is imposed to run concurrently or consecutively with a sentence of twelve months or more).*

33. The effect of this is that the provisions of the 1991 Act apply to sentences of under 12 months provided that these are not imposed concurrently or consecutively with sentences of 12 months or over, and the 2003 Act will apply to sentences of under twelve months that are imposed concurrently or consecutively with sentences of 12 months or over. I believe that this reading clarifies the intention of the draftsman of paragraph 14, but some problems remain in relation to the application of the 2003 Act to concurrent and consecutive sentences which combine sentences of less than and more than 12 months. I turn to the 2003 Act to examine how these can be resolved.

Concurrent sentences: sections 244 and 263(2)

34. Section 244 deals with the duty of the Secretary of State to release on licence. This duty applies when the prisoner has served "the requisite custodial

period". What is the "requisite custodial period" in the case of concurrent sentences? Section 244(3)(d) applies so it is necessary to refer to section 263(2). Section 263(2) requires reference back to section 244 to see when the Secretary of State is required to release the prisoner on licence in respect of each individual sentence. Section 244(3)(a) provides that, in the case of a sentence of 12 months or more, this is after serving one half of the sentence. There is, however, no provision that supplies the answer in respect of sentences of less than twelve months, because section 244(3)(b) has not been brought into force. We are, however, dealing with the hypothetical question of when the Secretary of State would have been required to release the prisoner had his sentence not been imposed concurrently with the longer, over 12 month, sentence. Section 33(1) of the 1991 Act applies in that hypothetical situation and provides the answer that the prisoner would have to be released after serving half his sentence. Thus section 244, when read with section 263(2) must be read as requiring the prisoner to be released on licence when he has served one half the shorter and one half the longer of the concurrent sentences. In practice, of course, it will always be the longer, over 12 month, sentence that constitutes the "relevant custodial period" which governs release, so the problem of ascertaining the release date for the shorter sentence is somewhat academic.

Consecutive sentences: sections 244 and 264(2)

35. Once again section 244(3)(d) applies. This time it is necessary to refer to section 264(2) in order to identify the "requisite custodial period" in the case of consecutive sentences. This subsection requires one to identify the "custodial period" in relation to each sentence. Section 264(6)(a)(ii) provides the answer in respect of the over 12 month sentence. It is half the sentence. But there is no definition of "custodial period" for the under 12 month sentence or sentences, because section 181, which would have determined this, has not been brought into force. The "custodial period" in relation to an under 12 month sentence is, however, obvious. It is the half of the sentence that the prisoner would have had to serve before release, had his sentence not been imposed consecutively with an over 12 month sentence. The "relevant custodial period" is the amalgam of all the individual custodial periods.

HDC release: section 246

36. This section gives the Secretary of State power to release a prisoner on licence up to 135 days before the day on which he will have served the "requisite custodial period", subject to the restrictions in subsections (2), (3) and (4). Section 246(6) provides that "requisite custodial period" has the meaning given by paragraph (d) of section 244(3) in the case of a prisoner serving consecutive

sentences. Thus this period is determined in the manner that I have described in the previous paragraph.

37. The effect of this interpretation of paragraph 14, coupled with the relevant provisions of the 2003 Act, provides uniformity of approach, regardless of the order in which the individual sentences were imposed, qualifies the prisoner for the maximum grant of HDC release, but at the same time subjects the prisoner to the latest sentence and licence expiry date.

38. In the present case, the first release date notification, given to the appellant on 24 May 2007, was correct.

39. I am encouraged that Lord Mance has reached the same result by a similar process of reasoning.

40. For these reasons I would allow this appeal.

LORD SAVILLE

41. I would allow this appeal. For the reasons given by Lord Phillips and Lord Mance, I have no doubt that by one route or another the legislation must be construed so as to avoid what would otherwise produce irrational and indefensible results that Parliament could not have intended.

42. I would also associate myself with the observations of Lord Brown in his judgment.

LORD BROWN

43. In common with Lord Phillips and Lord Mance I too would allow this appeal. The construction of this legislation, in particular the transitional and saving provisions of the 2005 Order, adopted hitherto has led to the most astonishing consequences which no rational draftsman can ever have contemplated, let alone intended. Suppose the judge passes an 18-month sentence with 6 months consecutive: the prisoner becomes eligible for HDC release 45 days before his mandatory release date. But suppose the sentence had been imposed as 6 months imprisonment with 18 months consecutive (i.e. pronounced in a different order):

HDC eligibility is then 135 days before the same mandatory release date. Or suppose the sentence is passed as 2 years imprisonment for the more substantial offence with 6 months concurrent for the lesser offence: again, HDC eligibility is 135 days. Or suppose that a prisoner whilst still serving the custodial part of an 18-month sentence (with the prospect of HDC release 135 days before his mandatory release after 9 months) is sentenced to a consecutive term of 1 month imprisonment. He would thereupon lose all prospect of HDC release, there being no such eligibility on a term under 3 months. These examples can easily be multiplied but the point is surely obvious: it can never have been Parliament's intention that HDC eligibility (and, as a corollary, the licence period following release) should depend on such vagaries of sentencing practice.

44. One can but pay tribute to the succession of judgments which have sought to grapple with the intractable problems of construction thrown up by these ill-conceived transitional provisions – notably those of Dobbs J in *R (Highton) v Governor of Lancaster Farms Young Offender Institution* [2007] EWHC 1085 (Admin), Scott Baker LJ (concurred in by Wall LJ and Sir Anthony Clarke MR) in the present case, and Hughes LJ, President of the Criminal Division of the Court of Appeal, giving the judgment of that Court in *R v Round* [2009] EWCA Crim 2667 – and, of course, one understands why they felt driven to the conclusion they arrived at. But the judgments serve also to underline the absurdities of that conclusion. As, indeed, Hughes LJ observed in *Round* (para 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."

45. To my mind the problems created by the Court of Appeal's construction of this legislation are, quite simply, intolerable. Nor, generally, has it been open to sentencing judges to mitigate them. To quote again from the Court's judgment in *Round* (para 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."

46. In these circumstances the Senior Presiding Judge's letter circulated to all Crown Courts, referring to the Court of Appeal's decision in the present case and enclosing a note from the Prison Service explaining how these sentences are in fact dealt with, could do little if anything to improve the situation. Either sentencing judges should pay heed to such information and adjust their sentencing practices accordingly to produce what they conceive to be the fairest result, or they should ignore it and carry on as usual. They cannot do both. That, however, is essentially by the way. Henceforth, on this court's construction of the legislation, the order in which sentences are imposed will make no difference whatever.

47. As to the precise route by which this plainly preferable construction is to be reached, I am entirely content to follow that taken by Lord Phillips and Lord Mance – or, indeed, supposing there to be any substantial difference between them, either of these routes. Both judgments to my mind offer perfectly cogent approaches to the various legislative provisions in play and, so absurd is the alternative conclusion hitherto arrived at, almost any coherent alternative construction will suffice.

48. Had paragraph 14 of Schedule 2 to the 2005 Order really been drafted unambiguously to refer to all under 12 months sentences, even those imposed consecutively or concurrently with over 12 months sentences, there just might have been no alternative but to accept the Court of Appeal's construction and dismiss this appeal. As both Lord Phillips and Lord Mance amply demonstrate, however, that is very far from the case. Indeed, for this to be the case, to my mind it would have been necessary for the words in parenthesis in paragraph 14 expressly to *include*, rather than (as they appear to do) implicitly *exclude*, consecutive or concurrent terms of both under 12 months and over 12 months. It is, after all, precisely this situation which produces the bizarre consequences which Mr Giffin QC recognises, indeed asserts, flow from his contended for construction of paragraph 14. The appeal must accordingly be allowed.

LORD MANCE

49. The appellant was on 23 May 2007 sentenced for five offences, all committed on or after 4 April 2005, the date when much of the Criminal Justice Act 2003 came into force. For one offence of theft, she received 22 months imprisonment, for three further offences, 4 months imprisonment on each, concurrent to one another but consecutive to the 22 months sentence, and for

contempt, 1 month consecutive to all the other sentences: a total of 27 months. Prior to sentence, the appellant had been on remand in custody for 40 days, i.e. since 13 April 2007.

50. The appeal concerns the inter-relationship of provisions in the Criminal Justice Acts 1991 and 2003. The 2003 Act was conceived as a coherent whole, containing sentencing provisions replacing and making irrelevant reference to those of the former Act. In the event, certain provisions – particularly those governing early release under sentences of less than 12 months - have never (for resource reasons) been brought into force. The 1991 Act, and in particular sections 33 to 51 relating to early release, thus had to be given a continued application in relation to sentences of less than 12 months.

51. The appeal arises from the fact that the appellant was sentenced both to sentences of less than 12 months and to a longer (22-month) sentence. The issue is, in short: how far, and how, does either or both of the schemes in the 1991 and 2003 Acts apply? The issue does not affect the appellant's conditional release date ("CRD") - the date when she was *entitled* to be released. But it does affect the earlier date upon which she became eligible for home detention curfew ("HDC") as well as her sentence and licence expiry date ("SLED") after release. The effect can be illustrated by the prison authorities' own change of mind. On 24 May 2007, the appellant was given a notification slip informing her of a HDC date of 15 January 2008, a CRD of 28 May 2008 and a SLED of 13 July 2009. On 18 July 2007 this was replaced by a slip notifying her of a HDC date of 20 April 2008, a CRD as before of 28 May 2008 and a SLED of 10 February 2009.

52. The dates on the first slip were arrived at by combining all the sentences (giving a total term of 27 months), taking the half way point of that term (28 May 2008) as the CRD under section 244(3)(a) of the 2003 Act and deducting 135 days from that point under section 246(1)(a) in order to arrive at the HDC date of 15 January 2008. The licence period was treated as running to the end of the full 27-month term under sections 249(1) and 264(3). The appellant maintains that this approach was correct.

53. The dates on the second slip were arrived at by treating the 22-month sentence as subject to the 2003 Act, and the four shorter sentences as subject in all respects to the 1991 Act and by treating the longer term as commencing first because the sentencing judge pronounced it first. Thus, the 22-month sentence, running first as a separate sentence subject to the 2003 Act, reached its CRD under section 244(3)(a) after 11 months, i.e. on 13 March 2008. The four short sentences subject to the 1991 Act fell by section 51(2) of that Act to be treated as a single term of 5 months. This term was treated as running from the CRD under the 22-month sentence, i.e. from 13 March 2008, and as having under section 34A(4)(b)

of the 1991 Act a HDC date after "a period equal to one-quarter of the term", that is after 1¼ months, and so on 20 April 2008. The SLED date was stated as 10 February 2009, when the 22-month sentence expired (the 5-month term of the shorter sentences having by then long since expired, on 13 August 2008).

54. Mr Giffin QC for the Secretary of State accepted in oral submissions that even the second slip might not strictly be correct, since, if the 22-month sentence is treated as a separate sentence running independently until 13 March 2008 and the remaining 5 months sentences only began running from that date, then strictly the 22-month sentence should under section 246(1)(a) of the 2003 Act have attracted its own HRD 135 days before 13 March 2008 (i.e. on or about 1 November 2007). However, he submitted that the Secretary of State would never in fact have exercised a discretion to release a prisoner on home detention curfew between 1 November 2007 and 13 March 2008 when the 5-month sentence remained to be served after 13 March 2008, with the result that the second slip could, for practical purposes, be taken as correct.

55. The existence in law, but the loss for practical purposes, of the period of eligibility for HRD under the 22-month sentence is only one of a number of striking anomalies arising from the general approach taken by the second slip. An offender would be deprived of a substantial period during which he might otherwise ask for release on home detention curfew, simply because he was made subject to a second, consecutively running sentence, however short. This second sentence might indeed be imposed at a later date while the offender was already serving the first sentence, and its effect would then be sharply to reduce the period of eligibility to HDC, or even (since there was under s34A(4)(a) of the 1991 Act no eligibility to HDC in the case of any term of less then 3 months) to eliminate it altogether.

56. A second anomaly is that the approach in the second slip treats the 5-month term, as from the CRD of the 22-month sentence, as running concurrently with the 22-month sentence. Such a result could be achieved, by express direction under section 154(1) of the Powers of Criminal Courts (Sentencing) Act 2000. But here it would, on its face, be contrary to the sentencing judge's direction that the sentences should run consecutively. It also has the effect that any licence period under the 5-month term (in particular, the licence period which would run until the two and a half month point, if the offender were to be released under section 34A(4)(b) on his HDC date after serving one-quarter of that term) runs concurrently with the longer licence period under the 22-month sentence, and is effectively submerged in it and lost. The matter is even more complex, because there may well be cases where, for example, the first and third sentences passed during a judge's sentencing exercise are for periods of 12 months or more, whereas the second and fourth sentences are for periods less than 12 months. The solution to this advanced by the Secretary of State and Court of Appeal is to combine all

sentences of 12 months or more and treat them as commencing with the first such sentence passed, and likewise to combine all sentences of less than 12 months and treat them as commencing with the first sentence of less than 12 months passed. But this solution is only achieved by departing from the rule otherwise adopted under the approach of the second slip, that sentences should be taken in the order pronounced.

57. A third anomaly is that the approach in the second slip has radically different effects according to which sentence is treated as being served first. If the 5-month term of the four shorter sentences were taken first and the 22-month sentence were treated as running from the CRD (after 2½ months, on or about 28 June 2007) of that 5-month term, then the offender would under section 264(1)(a) be eligible for home detention curfew 135 days before the half-way point (28 May 2008) of the 22-month sentence, i.e. on 13 January 2008. Which way around sentences are treated as being served depends, on the construction advanced by the Secretary of State and accepted by the Court of Appeal, upon which way around the sentencing judge expresses them, or at least (see the previous paragraph) in which order he expresses the first sentence with which he deals in each category (less than 12 months and 12 months or more). Judges in their sentencing remarks commonly take the longest sentence first, which leads to the least favourable result regarding HDC for offenders in the situation presently under consideration.

58. Mitting J thought that the third anomaly should have been resolved by the Secretary of State adopting a policy ensuring that offenders were "subject to the maximum period of licence on release which can lawfully be imposed" (para 32). He declared invalid the Secretary of State's existing policy (according to which the first imposed sentence was treated as running first), and the Secretary of State thereupon decided to release the offender on HDC on 8 February 2008 (later determining that the time spent on release would count towards the custodial part of her sentence, whatever the outcome of any appeal). The Court of Appeal considered, rightly, that the Secretary of State had no power by way of policy statements to dictate matters such as eligibility for release on licence or the amount of time spent on licence with liability to recall. However, it also considered that the Secretary of State's policy of taking the sentences in the order passed reflected the correct legal position.

59. In *R v Round and Dunn* [2009] EWCA Crim 2667 the Court of Appeal loyally followed the authority of the Court of Appeal in the present case, and, after comprehensive examination of the complexities and possibilities to which it gave rise, rejected an argument that sentencing judges should structure their remarks to make the shortest sentence first. It was not incumbent on such a judge, indeed it was "ordinarily" wrong, "to consider early release possibilities when calculating his sentence or framing the manner or order in which they are [sic] expressed to be imposed" (para 49). There was "a statutory anomaly, perpetrated (however

accidentally) by the Executive and contrary to the discernible policy of Parliament" (para 33), and "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" (para 51). But the judge "must be left to express his sentences in the most natural and comprehensible manner possible" (para 49).

60. A fourth and fundamental anomaly is that the approach taken in the second slip is quite different in nature and leads to quite different results *both* to any applying under the 1991 Act, when that was the only relevant piece of legislation, *and* to any which would have applied under the 2003 Act had that come fully into effect (as must have been envisaged when it was enacted). In short, the transitional provisions bringing the 2003 Act into force in many respects, but keeping the 1991 Act in force in some other respects, are said to have achieved a result which Parliament did not intend by either Act. Under the 1991 Act, all the sentences, of whatever length, would have fallen under section 51(2) to be treated as a single term. The early release provisions, in particular sections 33 and 34A, would then have applied to that single term. The CRD would have been after one-half of the term in the case of a short-term prisoner sentenced to less than twelve months or two-thirds in the case of a long-term prisoner sentenced to four years or more (section 33(1) and (2)). The HDC date for short-term prisoners would have been on a scale ranging up to 135 days before the CRD. After the CRD, prisoners subject to a term of less than 12 months were to be released unconditionally (sections 33(1)(a) and 33A(1)), while prisoners whose term was for a term of 12 months or more remained on licence until the three-quarters date of their nominal term (section 37(1)).

61. Under the 2003 Act, a different approach was adopted, with largely similar, but in certain respects different, consequences. Instead of treating all sentences passed as a single term, the 2003 Act treats them as separate, and then under sections 244 and 264 aggregates the custodial periods of all sentences to arrive at the CRD, with the HDC date arising 135 days before the CRD (section 246(1)(a)). In relation to any sentence of 12 months or over, the custodial period is under section 244(3)(a) one-half (in contrast to the position under the 1991 Act, where it was two-thirds for long-term offenders serving four years or more). Further, under sections 244(1) and 249(1), the licence remains in force for the whole nominal period of any sentences (in contrast to the position under the 1991 Act, which entitles a prisoner serving a sentence or sentences constituting a single term of less than 12 months to be released unconditionally after serving one-half of that term and under which the licence in respect of any longer term only lasts until the three-quarters date).

62. Against this background, I turn to the statutory instrument which has been the main focus of this appeal. This is the Criminal Justice Act 2003

(Commencement No. 8 and Transitional and Saving Provisions) Order 2005 (S.I. 2005 No. 950) ("the 2005 Order"). In consequence of the decision not to introduce provisions of the 2003 Act and to continue the application of the 1991 Act relating to sentences of less than 12 months, the 2005 Order:

i) did not include (in Schedule 1, listing provisions to come into force on 4 April 2005) section 181 of the 2003 Act, which would have regulated the permissible term of any sentence less than 12 months and required the court when passing such a term to specify a period, referred to as "the custodial period", of a length also regulated by the section, at the end of which the offender was to be released on licence for the remainder of the nominal term;

ii) did bring into force section 244(1), (2) and (3)(a) and (d), which requires the Secretary of State to release fixed-term prisoners on licence after they had served "the requisite custodial period", and defines this period in relation to any person serving a term of 12 months or more as one-half of his sentence, and in relation to a person serving two or more concurrent or consecutive sentences as the period determined under (so far as material) section 264(2); but did not bring into force section 244(3)(b) and (c), which would have defined "the requisite custody period" for sentences of less than 12 months (and for intermittent custody orders);

iii) also brought into force section 264(1) to (3), (6) and (7), regulating the situation of a person sentenced to two or more consecutive sentences on the same occasion or in circumstances where the prisoner remained in custody at any time during the period beginning with the first and ending with the last occasion on which they were passed. Section 264(2) provides

> "Nothing in this Chapter requires the Secretary of State to release the offender on licence until he has served a period equal in length to the aggregate of the length of the custodial periods in relation to each of the terms of imprisonment."

and section 264(6)(a)(ii) defines the "custodial period" as meaning, in relation to a term of 12 months or more, one-half of that term; section 264(3) reads:

> "Where any of the terms of imprisonment is a term of twelve months or more, the offender is, on and after his release under this Chapter, to be on licence—

> (a) until he would, but for his release, have served a term equal in length to the aggregate length of the terms of imprisonment, and
>
> (b) subject to such conditions as are required by this Chapter in respect of each of those terms of imprisonment."

iv) did not bring into force section 264(4) and (5), providing that "[w]here each of the terms of imprisonment is a term of less than twelve months", the offender was on and after release to be on licence until "the relevant time", defined as the aggregate of all the custodial periods and the longest of the licence periods in relation to such terms; though it did, as section 264(6)(a)(iii), bring into force a definition of "custodial period" as meaning, "in relation to a term of less than 12 months complying with section 181, …. the custodial period as defined by subsection (3)(a) of that section". This definition was, however, otiose or inoperable since section 181 was not brought into force (see point (i) above);

v) included among the Transitional and Saving Provisions contained in Schedule 2 was the following provision (para 14), which is critical for present purposes:

> "**Saving for prisoners serving sentences of imprisonment of less than 12 months**
>
> 14. The coming into force of sections 244 to 268 …., 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)."

63. Under Schedule 2, para 14 it is at least clear that, in a case where an offender is subject to one sentence of less than 12 months and no other sentence at all, the full regime of sections 31 to 51 of the 1991 Act continues to apply. Likewise, in a case where an offender is subject to several sentences each of less than 12 months. Their total term may amount to 12 months or more, but they will still be treated as a single term under section 51(2) of the 1991 Act. The problem comes when there is (as in the present case) a series of consecutive sentences, some of less than 12 months and at least one of 12 months or more.

64. Mr Giffin submits that the language is clear: the coming into force of sections 244 to 268 of the 2003 Act (so far, that must mean, as Schedule 1

otherwise brings them into force) and the repeal of sections 33 to 51 of the 1991 Act "is [sic] of no effect in relation to any sentence of imprisonment of less than twelve months". So in this situation, he submits and the Court of Appeal accepted, any and every sentence of less than twelve months must be segregated from any other sentence(s) to which it is concurrent or consecutive (whether such other sentences are for less than 12 months or for 12 months or more) and must remain subject to the 1991 Act. On the other hand, in relation to any sentences of 12 months or more, there is nothing in para 14 to prevent the coming into force of sections 244 to 268 or the repeal of sections 33 to 51 having effect, and any such sentences are therefore subject to, in particular, section 244(1) and (3), section 246(1)(a) and section 264(1) to (3), (6) and (7) of the 2003 Act. Two separate regimes have to be applied entirely separately, and there is, contrary to the scheme of both Acts, no mechanism for combining or aggregating sentences, or any aspect of sentences, which are subject to different regimes. Mr Giffin does not deny that this construction leads to the anomalies identified in paras 55 to 60 above. But he says that the wording compels it. *Summum jus, summa injuria.*

65. Any suggestion that para 14 could be read as maintaining the 1991 Act in force for sentences of 12 months or more *as well as* sentences of less than 12 months, whenever these happened to be passed concurrently or consecutively with each other, conflicts with the fact that para 14 only applies "in relation to any sentence of imprisonment of less than 12 months". It is also inconceivable that the legislator could have intended that the mere passing of, say, a three month sentence to follow a 4 year sentence could take both outside the scheme of the 2003 Act, with all that this would entail (for example, the requirement to serve two-thirds of the sentence under section 33(2) of the 1991 Act, rather than half under section 244(3)(a) of the 2003 Act, before the CRD, and the shorter licence period under the 1991 Act).

66. At first sight, the bracketed words in para 14 provide a simple answer to the construction advanced by Mr Giffin and accepted by the Court of Appeal as set out in para 64 above. The bracketed words "whether or not such a sentence is imposed to run concurrently or consecutively with another such sentence" contemplate only two situations: one where the only sentence passed is a sentence of less than 12 months, the other where such a sentence is passed concurrently or consecutively with one or more other sentences each also of less than 12 months. They therefore suggest that, despite the initial generality of the phrase "in relation to any sentence of imprisonment of less than 12 months", the author was not dealing with the situation of a sentence of less than 12 months passed concurrently or consecutively with one or more sentences of 12 months or more. This would be understandable, since it would mean that the provisions of sections 244 to 268 brought into force under Schedule 1 would apply in this situation. They include provisions which expressly contemplate and provide for the situation, in particular section 263(3), providing that where concurrent sentences "include one or more sentences of

twelve months or more and one or more sentences of less than twelve months, the terms of the licence may be determined by the Secretary of State in accordance with section 250(4)(b) …..", and section 264(3), commencing "Where any of the terms of imprisonment is a term of 12 months or more ….".

67. Unfortunately, this simple answer faces the difficulty that, in order to apply section 264(2) and (3) to situations where there are sentences of a length falling either side of 12 months, it must be possible to identify a "custodial period" in relation to the sentence or sentences of less than 12 months. The provisions of section 181 and 244(3)(b) were intended to identify this under the 2003 Act, but they have never been brought into force, and, without them, the definition in section 264(6)(a)(iii), which was intended under the scheme of the 2003 Act to apply the definition of "custodial period" contained in section 181 to the earlier subsections of section 264, is inoperable (para 62(iv) above). Further, if situations where there are sentences both of less than 12 months and of 12 months or more are in every respect outside the reach of para 14, that also means that sections 33 to 51 of the 1991 Act were repealed in their entirety "in relation to any sentence of less than 12 months" passed concurrently and consecutively with sentences of 12 months or more, so that it becomes on the face of it impossible to derive any "custodial period" from section 33(1)(a) of the 1991 Act.

68. Nevertheless, it is clear that the author of para 14 had in mind two things. First, sections 181, 244(3)(b) and (c) and 264(4) and (5) had not been brought into force and it was therefore important to preserve the regime of the 1991 Act in respect of any individual sentence of less than 12 months. Second, he needed to address cases where there were two or more sentences each of less than 12 months. Section 264(4) and (5) of the 2003 Act were originally intended to address such situations. But they could not be brought into effect or applied to such situations, so long as section 181 was not in effect. Had section 264(4) and (5) come into force without section 181, the approach which they embody would have led to there being no licence period after the CRD at all. This is because section 264(5) requires regard to be had to the aggregate of all the custodial periods and the longest individual licence period under any of the relevant sentences, viewed individually. In the absence of section 181, there would be no such licence period. (Equally, if it had been provided that the sentences of less than 12 months should be viewed individually as if they were subject to the 1991 Act, none of them would give rise to any licence period, because each would attract a right to release "unconditionally" at its half-way point under sections 33(1)(a) of the 1991 Act: see para 60 above.)

69. In these circumstances, the author of para 14 made clear by the bracketed words that, where there were two or more sentences and each was of less than 12 months, sections 33 to 51 of the 1991 Act were to continue to govern the situation. Such sentences might amount in total to more than 12 months, but they would still

remain subject to the 1991 Act. In particular, two such sentences totalling more than 12 months could and would (under section 51(2) of the 1991 Act) continue to be treated as a single term of more than 12 months, so that there would under section 37(1) continue to be a licence period (after release at the half-way point under section 33(1)(b)) up to the three-quarters point of that term.

70. The words in brackets in para 14 of Schedule 2 to the 2005 Order were, on the other hand, clearly drafted so as *not* to deal with the situation of one or more sentences of 12 months or more being passed concurrently or consecutively with one or more sentences of less than 12 months. (It is common ground that the phrase "another such sentence" means and can only mean "another sentence of less than twelve months".) Sections 263 and 264(2) and (3) had been brought into force by Schedule 1 to the same Order. Their language expressly contemplates and covers the situation of sentences passed of a length either side of 12 months: see para 66 above. Yet, on the Secretary of State's and Court of Appeal's approach, they cannot apply to such a situation. That cannot have been meant; and this, in my opinion, also provides a key to understanding why the bracketed words in para 14 are limited to cases where the only sentence(s) in the arena had a term of less than 12 months. Leaving aside the difficulty of identifying an applicable definition of "custodial period" in this situation for the sentences under 12 months, it made sense to bring the provisions of sections 244 to 268 including sections 263(3) and 264(2) and (3) into force, which Schedule 1 did as from 4 April 2005, and it makes sense for these provisions to cover the situation of sentences of a length either side of 12 months. The licence period applicable in that situation would under section 264(3)(a) last until the end of the aggregate length of all the terms of imprisonment imposed. Eligibility for HDC would fall to be determined under section 246, which ties it back to the CRD specified in section 264(2) (see sections 246(1) and (6) and 244(3)(d)).

71. In the compressed wording of para 14, the author was attempting to achieve and reflect this result. However, he must have overlooked the fact that, without section 181, the definition in section 264(6)(a)(iii) of "custodial period" in relation to any sentence of less than 12 months is inoperable, and that, if he limited the application of para 14 to cases where no sentence of 12 months or more was in question, then section 33(1)(a) would not, on its face, be available to supply the definition and fill the gap in the situation where there were sentences of a length either side of 12 months. However, the continued application of section 33(1)(a) to all cases where the only sentence or sentences in existence are of less than 12 months (giving a custodial period of one-half in respect of such sentences) leaves no doubt about the "custodial period" which the author would and must have intended would apply under sections 263(3) and 264(2) and (3), if, as I consider, he must have intended these to apply to mixed sentences of a length either side of 12 months. (The appropriateness of a custodial period of one-half is merely reinforced by the fact that this is also the custodial period in relation to terms of 12

months or more under the 2003 Act: section 264(6)(a)(ii).) Apart from the objection that, under the literal language of para 14, section 33(1)(a) does not apply in relation to the situation of mixed sentences either side of 12 months, I would see no difficulty about deriving a "custodial period" of one-half for the purposes of section 264(2) and (3) from sections 33(1)(a). The definition in section 264(6) is not expressed in exhaustive terms, and, even if it were, the inoperability of section 264(6)(iii), in circumstances in which section 181 has never been brought into force, would justify recourse to the 1991 Act to fill the consequent gap.

72. The author of para 14 may have failed literally to give effect to these intentions; he may well, as the Court of Appeal (in view of other presently irrelevant drafting errors in Schedule 2) suggested in *R (Buddington) v Secretary of State for the Home Department* [2006] EWCA Civ 280; [2006] 2 Cr App R (S) 109, para. 18, have been suffering from "Homeric exhaustion"; but each literal construction that has been suggested has wholly implausible and unacceptable consequences. On the other hand, a purposive construction makes it possible, for the purposes of section 264(2), (3) and (6)(a)(iii), to apply the definition of "custodial sentence" in section 33(1)(a) (which under para 14 applies on any view to all cases of one or more sentences all of less than 12 months) to the situation where there are sentences of a length either side of 12 months. This avoids the anomalies identified earlier in this judgment and makes sense of the transitional provisions.

73. In summary, either the definition of custodial period, when required under section 264(2) and (3) in relation to a term of less than 12 months, can, in circumstances where section 181 has not come into force, be supplied under section 264(6)(a)(iii) simply by reading into that subsection in this limited context a reference to a custodial period of one-half of the term (as would have applied under section 33(1) of the 1991 Act). Or para 14 can be understood as if the bracketed passage went on to provide "but, where such a sentence is imposed to run concurrently or consecutively with a sentence of 12 months or more, sections 244 to 268 take effect as if section 33(1) continued to apply so as to define the custodial period of the sentence of less than 12 months as one-half of such sentence".

74. In my opinion, this is a permissible as well as the correct approach to the understanding of para 14, read in the overall context of the scheme and provisions of the 2003 Act and 2005 Order. In *Inco Europe Ltd. v First Choice Distribution* [2000] 1 WLR 586, 592C-D, Lord Nicholls, giving the only full speech in the House of Lords, noted that it had "long been established that the role of the courts in construing legislation is not confined to resolving ambiguities in statutory language" but that "The court must be able to correct obvious drafting errors. In suitable cases, in discharging its interpretative function the court will add words, or

omit words or substitute words". He added (p.592E-G) that the latter power was confined to "plain cases of drafting mistakes", where the court could be "abundantly sure of three matters: (1) the intended purpose of the statute or provision in question; (2) that by inadvertence the draftsman and Parliament failed to give effect to that purpose in the provision in question; and (3) the substance of the provision Parliament would have made, although not necessarily the precise words Parliament would have used, had the error in the Bill been noticed". Any alteration in the literal wording "must not be too big, or too much at variance with the language used" (p.592H).

75. In *Attorney-General's Reference (No. 5 of 2002)* [2004] UKHL 40, [2005] 1 AC 167, the House, in view of the absurdity that would otherwise result, refused to give its literal interpretation to a statutory provision which, literally read, precluded the defence from asking questions to establish that there had been interception (consequently illegal) on part of a public telecommunications system, but allowed the prosecution to call evidence to the effect that the interceptions had taken place wholly within a police private telecommunications system (and were therefore legal). The linguistic difficulty was "decisively outweighed by a purposive interpretation of the statute" (para 31, per Lord Steyn). In my opinion, the reasoning and approach taken in both these cases is applicable to the present. It is the more readily applicable in my view, when this case concerns delegated legislation made by executive action as the Court of Appeal noted in *Round and Dunn*, and subject only to the limited opportunity for any Parliamentary scrutiny involved in the negative resolution procedure described by Lord Hope in *R (Stellato) v Secretary of State for the Home Department* [2007] UKHL 5; [2007] 2 AC 70, paras 12-13.

76. Some attention was directed in argument and in the courts below to further provisions of Schedule 2, especially paras 19 and 25 dealing with the application of provisions of the 2003 Act in relation to offences committed before 4 April 2005. To my mind these cannot be decisive in either direction. I would only comment that, as at present advised, I would find it difficult to agree with the Secretary of State's and Court of Appeal's interpretation of their effect as regards sections 263 and 264. The omission from para 19 of any reference to sections 263 and 264 and the reference in para 25 to those sections seem to me more easily understood as indicating an intention to apply the aggregation provisions of those sections from 4 April 2005 in all circumstances (save only where all sentences in question are for less than 12 months and are therefore within para 14). It was understandable to mention section 244 in para 19 (and so to make clear that, where all sentences in question were for offences committed before 4 April 2005, the relevant provisions of the 1991 Act were to apply). But, where offences committed either side of 4 April 2005 are in question, the language of section 264(2) seems to me quite capable of operating, and to have been intended by para 19 to operate, to require the Secretary of State to release the offender on licence after the period

specified. Nothing in para 25 suggests that it was to be confined in scope to cases where one of the sentences was an extended sentence. There seems no reason why para 25 should not be relevant generally (for example, to preclude a long-term prisoner serving a sentence of 4 years or more for an offence committed before 4 April 2005 in conjunction with another prison sentence for an offence committed after that date from claiming under section 264(6)(a)(ii) the benefit of a custodial period of one-half in respect of the former sentence, instead of the period of two-thirds which would follow from section 33(2) of the 1991 Act, the application of which is preserved in relation to the former offence by para 19).

77. For the reasons given in paras 49 to 75, I would in any event allow this appeal, allow the application for judicial review and declare that the appellant's release dates were correctly calculated by the Secretary of State's first notification slip of 24 May 2007.

LORD JUDGE

78. In his Judicial Studies Board Lecture, *The Drafting of Criminal Legislation: Need it be so Impenetrable?*, given on 13th March 2008, Professor John Spencer QC explained that the collection of statistics in preparation for his lecture was "not easy, because there has been so much criminal justice legislation over the last 10 years that accurate figures are now hard to give. However, by my reckoning we have had since 1997 no less than 55 Acts of Parliament altering the rules of criminal justice for England and Wales". The problem he said is not the mere number of statutes, but their increasing bulk. Many of them are "enormous". Indeed they are. And that is not the end of the difficulties. Ill considered commencement and transitional provisions, which have to negotiate their way around and through legislation which has been enacted but which for one reason or another has not or will not be brought into force, add to the burdens. And there are hidden traps, the most obvious of which is legislation which repeals the earlier repeal of yet earlier legislation.

79. In the course of his judgment in the Administrative Court in this present case, Mitting J underlined the statutory obligation imposed on the sentencing court to explain the effect of the sentence to the offender in ordinary language. He recorded that

> "These proceedings show that, in relation to perfectly ordinary consecutive sentences imposed since the coming into force of much of the Criminal Justice Act 2003, that task is impossible…It is simply unacceptable in a society governed by the rule of law for it to

be well nigh impossible to discern from statutory provisions what a sentence means in practice. That is the effect here…".

80. I entirely agree with these observations. The explanation for the problem is simple. For too many years now the administration of criminal justice has been engulfed by a relentless tidal wave of legislation. The tide is always in flow: it has never ebbed.

81. On 23rd May 2007 a perfectly simple case was listed at Stafford Crown Court before His Honour Judge Eades. After making due allowance for the mitigation the judge concluded that Rebecca Noone's criminality merited a sentence of 27 months' imprisonment. Whether he imposed a sentence of 27 months for one offence of theft, with lesser concurrent sentences for the remaining offences, or a sentence of 22 months for theft, with consecutive sentences of four months and one month totalling a further 5 months' imprisonment (as he did), and whatever the order in which he would eventually pass the sentence, his final assessment required the sentence to reflect the "totality principle", recently given the accolade of express reference in statute in section 120(3)(b) of the Coroners and Justice Act 2009.

82. Generations of sentencing judges have been brought up to understand that the relevant legislation always reflected the obvious sense that when sentences are imposed on the same occasion, consecutively to other sentences, and in whatever order they are imposed, for the purposes of ascertaining the prisoner's release date, the sentence should be treated as a whole. Thus, section 38(4) of the Criminal Justice Act 1961, section 104(2) of the Criminal Justice Act 1967, and section 51(2) of the Criminal Justice Act 1991 describe the overall effect of such sentences as a "single term". In the Criminal Justice Act 2003, in relation to consecutive sentences, the phrase "single term" has been replaced with a reference to the "aggregate" length of the custodial period, which can only mean what it appears to say, that is, that all the terms of the sentence will be added up together to form a single whole.

83. This, surely, is the opposite side of the same coin as the totality principle to which the sentencing decision itself is subject.

84. Judge Eades, like every sentencing judge, would have proceeded on the basis that both common sense and justice compelled the conclusion that, altogether ignoring for present purposes the further complications which can arise in relation to licence periods, whether he used concurrent or consecutive sentences for the purpose of constructing his 27 months total sentence, and in which ever order the

sentences were pronounced, the time actually to be served in custody by the appellant should be the same.

85. Yet the decision to which the prison authorities felt driven after they examined the policy laid down by the Secretary of State about the administration of the Home Detention Curfew Scheme was that their first conclusion about her date of release, as notified to her, was over-generous, and that, notwithstanding any lack of merit in or misconduct by her, her eligibility for release on Home Detention Curfew should be deferred by just over 3 months. In other words the appellant would serve 3 months or so longer in custody because the judge had imposed consecutive rather than concurrent sentences. All this was said to be required by the interaction of the Criminal Justice Act 1991, as amended by the Crime and Disorder Act 1998, with the further provisions of the Criminal Justice Act 2003 and the Criminal Justice Act 2003 (Commencement No. 8 and Transitional and Saving Provisions) Order 2005, a provision which has already achieved a disturbing notoriety for inaccuracy (*R v Buddington v Secretary of State for the Home Department* [2006] 2 Cr App R(S) 109). The statutory framework has been dissected by Mitting J, and the Court of Appeal, and by counsel before this court in long detailed written and oral arguments. Reflecting on the submissions, I have been unable to find even the slightest indication that it was the legislative intention that the totality principle should be disapplied, or that the fact that this appellant's sentence was subject to more than one statutory regime, or even that the introduction of the Home Detention Curfew Scheme by the 1998 Act, was or could ever have been intended to produce the adventitious result for which the Secretary of State contended.

86. I have studied the judgments of Lord Phillips and Lord Mance. Their judgments tell the lamentable story of how elementary principles of justice have come, in this case, to be buried in the legislative morass. They have achieved a construction of the relevant legislation which produces both justice and common sense. I should have been inclined to reject the Secretary of State's contention on the grounds of absurdity – absurd because it contravened elementary principles of justice in the sentencing process - but Lord Phillips and Lord Mance have provided more respectable solutions, either or both of which I gratefully adopt.

87. Nevertheless the element of absurdity remains. It is outrageous that so much intellectual effort, as well as public time and resources, have had to be expended in order to discover a route through the legislative morass to what should be, both for the prisoner herself, and for those responsible for her custody, the prison authorities, the simplest and most certain of questions – the prisoner's release date.