

Guideline Judgments Case Compendium – Update 4: July 2008

SUBJECT	CASE NAME AND REFERENCE
(A) Generic sentencing principles	
Life sentences <ul style="list-style-type: none"> ▪ Discretionary life sentences 	<p><u>R v McNee, Russell and Gunn [2007] EWCA Crim 1529</u> (date of judgment: 3 May 2007)</p> <p><u>R v Kehoe [2008] EWCA Crim 819</u> (date of judgment: 8 April 2008)</p> <p><u>R v Davies [2008] EWCA Crim 1055</u> (date of judgment: 21 April 2008)</p>
Prosecution and defence duty to assist at sentencing	<p><u>R v Tongue and Doyle [2007] EWCA Crim 561</u> (date of judgment: 26 February 2007)</p>
Sentence discounts <ul style="list-style-type: none"> ▪ Assistance to the police/informers 	<p><u>R v P and Blackburn [2007] EWCA Crim 2290</u> (date of judgment: 22 October 2007)</p>
Sentence length <ul style="list-style-type: none"> ▪ Standard of proof 	<p><u>R v Davies [2008] EWCA Crim 1055</u> (date of judgment: 21 April 2008)</p>
(B) Homicide and related offences	
Murder <ul style="list-style-type: none"> ▪ Conspiracy to murder ▪ Minimum term ▪ Soliciting to murder 	<p><u>R v Barot (Dhiren) [2007] EWCA Crim 1119</u> (date of judgment; 16 May 2007)</p> <p><u>R v McNee, Russell and Gunn [2007] EWCA Crim 1529</u> (date of judgment: 3 May 2007)</p> <p><u>R v Davies [2008] EWCA Crim 1055</u> (date of judgment: 21 April 2008)</p> <p><u>R v Saleem, Muhid and Javed [2007] EWCA Crim 2692</u> (date of judgment: 30 October 2007)</p>
(E) Sex offences	
Public nuisance	<p><u>R v Kavanagh [2008] EWCA Crim 855</u> (date of judgment: 22 February 2008)</p>
(F) Drug offences	
Production or cultivation of cannabis	<p><u>R v Xu [2007] EWCA Crim 3129</u> (date of judgment: 21 December 2007)</p>

Guideline Judgments Case Compendium – Update 4: July 2008

(G) Public order offences	
Offensive weapons	<u>R v Povey, McGeary, Pownall and Bleazard [2008] EWCA Crim 1261</u> (date of judgment: 21 May 2008)
(J) Counterfeiting and money laundering	
Counterfeiting and forgery <ul style="list-style-type: none">▪ False passports	<u>R v Mutede [2005] EWCA Crim 3208</u> (date of judgment: 1 December 2005) <u>A-G's Reference Nos 1 & 6 of 2008 [2008] EWCA Crim 677</u> (date of judgment: 4 March 2008)

(A) GENERIC SENTENCING PRINCIPLES

In respect of sentences imposed under the dangerous offender provisions, including those contained in the Criminal Justice and Immigration Act 2008, please refer to the updated 'Dangerous Offenders Guide for Sentencers and Practitioners' published by the Sentencing Guidelines Council in July 2008.

Life sentences

Discretionary life sentences

R v McNee, Russell and Gunn [2007] EWCA Crim 1529 (date of judgment: 3 May 2007)

Previous Court of Appeal decisions indicate that, in general, a discretionary life sentence is to be reserved for cases where the offender is someone in respect of whom there is some relevant feature which cannot be determined at the time when the judge is passing sentence. The usual example is a mental condition which affects the degree of risk which the release of the offender into the community will present.

However, this is not an inevitable rule and there will be exceptions. Furthermore, the authorities do not require, as a matter of uniform practice, medical evidence to establish good grounds for considering that the offender is likely to be a continuing danger for an indeterminate time in the future.

R v Kehoe [2008] EWCA Crim 819 (date of judgment: 8 April 2008)

The Court emphasised that, where an offender meets the criteria of dangerousness, there is no longer any need to protect the public by passing a sentence of life imprisonment, as the public are now properly protected by the imposition of a sentence of imprisonment for public protection. A life sentence should be reserved for those cases where the culpability of the offender is particularly high or the offence itself particularly grave.

Specified period

In relation to the principles in *R v Szczerba* as regards determining the specified period of a life sentence (summarised on page 5 of the compendium), please note the provisions in s.19 Criminal Justice and Immigration Act 2008 when in force.

See also R v Davies in 'Minimum term of mandatory life sentence' update for section (B) below.

Offences taken into consideration (TICS)

In February 2007 the Sentencing Advisory Panel published a consultation paper on the impact that offences taken into consideration should have on sentence. The Panel's advice will be submitted to the Council alongside its advice following the current review of the seriousness guideline.

Prosecution and defence duty to assist at sentencing

R v Tongue and Doyle [2007] EWCA Crim 561 (date of judgment: 26 February 2007)

The Court noted that, once relevant guidelines have been issued by the Sentencing Guidelines Council, it should be the exception rather than the rule for advocates to cite previous cases. The guidelines of the Council are generally more pertinent.

Sentence discounts

Assistance to the police/informers

R v P and Blackburn [2007] EWCA Crim 2290 (date of judgment: 22 October 2007)

Legislation: Serious Organised Crime and Police Act 2005, ss.73-75

The Court considered sections 73-75 of the Serious Organised Crime and Police Act 2005 (SOCPA), which create a statutory framework in relation to the provision of 'Queen's evidence':

- Section 73 governs the arrangements for a reduction in sentence for an offender who has provided assistance pursuant to a written agreement with investigating authorities:
 - in determining what sentence to impose, the court may take into account the extent and nature of the assistance given or offered;
 - if the court imposes a reduced sentence, it must state in open court that it has done so and indicate what the sentence would have been but for the assistance given or offered. This requirement does not apply if the court thinks it would not be in the public interest to disclose that the sentence has been discounted but, in these circumstances, the court must give written notice of the matters specified to both the prosecutor and defendant.
- Section 74 introduces a new process which allows the Crown Court to review a sentence already imposed where:
 - the offender has reneged on a written agreement which resulted in a reduction in accordance with section 73; or

Guideline Judgments Case Compendium – Update 4: July 2008

- the offender did not previously offer to provide assistance but, subsequent to sentencing, has agreed to do so.
- Where the review arises from the offender's failure or refusal to provide assistance in accordance with a written agreement, the sentencing judge will already have in mind the sentence which would have been passed 'but for the assistance given or offered'. Save in exceptional circumstances, that sentence should not be subject to any reduction but, equally, it should not be increased by way of punishment for an offender who has backed away from an agreement.
- Where the review relates to an offender's offer to provide assistance post-sentence, it will be relevant to consider why the offer has been delayed and whether the delay may have diminished the value of the assistance. However, any reduction should reflect the extent and nature of the assistance given or offered; unless the delay has diminished the value of the assistance, the offender should not be penalised by a lesser reduction. If the delay has reduced the value of the assistance, the reduction should be adjusted by a proportionate extent.
- Section 74 is applicable regardless of whether the original sentence was imposed before or after the implementation of SOCPA.
- The review is not an appeal against sentence; it is a fresh process which takes place in new circumstances. Accordingly, the process is not inhibited by the fact that the Court of Appeal has already heard and decided an appeal against the original sentence.
- Section 75 contains publicity provisions in relation to reviews under section 74. Unless absolutely necessary, the normal principle that sentences must not be imposed or altered after private hearings should so far as is possible be applied to reviews,
- SOCPA does not abolish the existing process of allowing a discount for the provision of assistance to investigating authorities; R v X and R v R (see pages 9 and 10 of the compendium) continue to apply when an offender has provided assistance that does not fall within the new arrangements. However, any discount may be reduced because the value of providing assistance in this form is likely to be less than under the statutory scheme.

Extent of reduction

There is no provision in SOCPA regarding the appropriate level of discount for an offender who has entered into an agreement under the legislation. While each case must be decided on its own facts, the following general principles, established in a series of decided cases, apply:

- The first factor in any sentencing decision is the criminality of the offender, appropriate weight being given to any relevant aggravating or mitigating factors.
- Next, the quality and quantity of material provided by the offender should be considered. Particular value should be attached to cases where the offender provides evidence in the form of a witness statement or is prepared to give evidence at trial, and does so, with added force where the information produces convictions for, or prevents, the most serious offences (including terrorism and murder), or which leads to disruption of major criminal gangs.

Guideline Judgments Case Compendium – Update 4: July 2008

- The nature and extent of personal risks to and potential consequences faced by the offender and his or her family should also be addressed. In most cases, the greater the nature of the criminality revealed by the offender, the greater the consequent risks.
- The discount for a guilty plea in accordance with the Sentencing Guidelines Council guideline '*Reduction in Sentence for a Guilty Plea*' (revised July 2007) is separate from and additional to the appropriate reduction for assistance provided by the offender. The discount for the assistance provided by the offender should be assessed first, and the notional sentence so achieved should be further discounted for the guilty plea.
- In this type of sentencing decision, a mathematical approach is liable to produce an inappropriate answer; the totality principle is fundamental.
- The SOCPA procedure will almost inevitably mean that the offender will admit offences which would never otherwise have been attributed to him or her. In order for the process to work as intended, sentencing for offences which fall within this category should be approached with these realities in mind and, so far as section 73 agreements are concerned, should normally result in concurrent sentences.
- Where an offender who is already serving a sentence enters into an agreement to provide information and discloses his or her previous criminal activities, he or she will come before the court to be sentenced for the new crimes as well as for a review of the original sentence. In this situation, the totality principle is critical.
- It is difficult to conceive of any circumstances in which an offender who has admitted serious crimes should escape punishment altogether. The process under sections 73 and 74 does not provide immunity from punishment and, subject to appropriate discounts, an effective sentence remains a basic characteristic of the process. It is only in the most exceptional case that the appropriate level of reduction would exceed three quarters of the total sentence which would otherwise be passed. The normal level will continue, as before, to be a reduction of somewhere between one half and two thirds of that sentence.

Sentence length

Standard of proof

R v Davies [2008] EWCA Crim 1055 (date of judgment: 21 April 2008)

The Court stated that, when deciding whether aggravating features exist to increase the appropriate starting point for the minimum term of a mandatory life sentence, the judge should apply the same standard of proof as that applied by a jury in reaching its verdict. The distinction between the factors that call for a 30 year starting point and those that call for a 15 year starting point are no less significant than that which has to be considered by a jury when distinguishing between alternative offences, and it would be anomalous if the same standard of proof did not apply in each case.

Sentences/Ancillary orders

Anti-Social Behaviour Orders (ASBOs)

Please note that in May 2008 the Sentencing Guidelines Council published a consultation guideline on sentencing for breach of an ASBO. The guideline contains a summary of the principles relevant to the making of an ASBO.

(B) HOMICIDE AND RELATED OFFENCES

Murder

Legislation: s.269 and schedule 21, Criminal Justice Act 2003

Conspiracy to murder

R v Barot (Dhiren) [2007] EWCA Crim 1119 (date of judgment; 16 May 2007)

Appropriateness of discretionary life sentence

- A terrorist who is in the grip of idealistic extremism to the extent that, over a prolonged period, he or she has been plotting to commit murder of innocent citizens is likely to pose a serious risk for an indefinite period if not confined. If he or she commits an offence that permits the court to impose an indeterminate sentence, this is likely to be the appropriate course, although each case must be determined on its facts.

Approach to determination of minimum term

- The element of public protection is achieved when an indeterminate sentence is imposed. Accordingly, this factor should not influence the length of the minimum term to be served.
- Punishment is the other important element of the determination of the sentence.
- In approaching the sentence for an inchoate offence, it is appropriate to start by considering the sentence that would have been appropriate had the objective of the offender been achieved.
- The effect of schedule 21 of the Criminal Justice Act 2003 has been to increase significantly the minimum terms imposed for the most serious murders. It is logical that the sentences for attempted murder or conspiracy to murder should reflect these minimum terms.
- However, it is not possible to adopt an arithmetical approach to the terms specified in schedule 21 when dealing with terrorist attempts to commit mass murder because, when mass murder is committed, a whole life term will be imposed.

Guidelines:

The Court reviewed the guidance in R v Martin [1999] 1 Cr App R (S) 477 (*please see the topic 'Explosives offences' in section G of the Compendium*) and established that:

- A life sentence with a minimum term of 40 years should, save in quite exceptional circumstances, represent the maximum sentence for a terrorist who sets out to achieve mass murder but is not successful in causing any physical harm. Such a sentence should be reserved for the terrorist who

Guideline Judgments Case Compendium – Update 4: July 2008

has been convicted after trial of a serious attempt to commit mass murder by a viable method.

- The length of the minimum term for conspiracy to murder will depend on the facts of the particular conspiracy and the offender's involvement in it.
- A leader should receive a more severe sentence than a follower.
- Where the court is satisfied that the conspiracy was likely to lead to an attempt and the attempt was likely to succeed, it may be right to draw little difference between a conspiracy and an attempt. However, where the court is unable to be certain that the conspiracy would have been put into practice, or would have led to a successful attempt to murder, the sentence should be significantly lower than for an attempt.
- Guidance on aggravating and mitigating factors is provided in the Sentencing Guidelines Council guideline '*Overarching Principles: Offence Seriousness*'.
- The Council's guideline '*Reduction in Sentence for a Guilty Plea*' should be followed; guilty pleas can be of particular value to the administration of criminal justice where terrorist offences are involved.

R v McNee, Russell and Gunn [2007] EWCA Crim 1529 (date of judgment: 3 May 2007)

The Court held that, when assessing the sentence for conspiracy to murder, the judge is not obliged to have regard to the sentencing structure for murder provided by schedule 21 of the Criminal Justice Act 2003. However, the Court endorsed the sentencing judge's decision to do so as 'entirely logical and an inevitable consequence of the new regime for sentencing in cases of murder'. It observed that the features which bear on the sentencing decision in murder cases also applied to the current case, where the objective of the conspiracy was fulfilled and the culpability of the offenders was extremely high.

The Court also considered the circumstances in which a discretionary life sentence may be imposed: *please see the topic 'Discretionary Life Sentences' in the section on 'Generic Sentencing Principles' above.*

Minimum term of mandatory life sentence

R v Davies [2008] EWCA Crim 1055 (date of judgment: 21 April 2008)

When deciding whether aggravating features exist to increase the appropriate starting point for the minimum term of a mandatory life sentence, the judge should apply the same standard of proof as that applied by a jury in reaching its verdict.

See also 'Specified period' update for section (A) above.

Guideline Judgments Case Compendium – Update 4: July 2008

Soliciting to murder

R v Saleem, Muhid and Javed [2007] EWCA Crim 2692 (date of judgment: 30 October 2007)

The Court considered the approach to sentencing for this offence where the conduct can lead others to commit acts of terrorism. When assessing offence seriousness, material factors will include:

- the period of time covered by the offending;
- the sophistication, skill and industry devoted to it; and
- the likelihood that the offending would lead others to commit acts of terrorism, or has done so.

The Court noted that a sentence of seven years' imprisonment was upheld in R v El-Faisal [2004] EWCA Crim 465, 'which involved a persistent and protracted course of conduct aimed at indoctrinating young Muslims into committing terrorist murder'. The current case was at the lower end of the spectrum, involving a one-off demonstration mounted at short notice without sophisticated planning. A term of four years' imprisonment was substituted (original sentence was six years).

Corporate manslaughter

Please note that the Corporate Manslaughter Act 2007 came into force on 6 April 2008, restricting the application of the offence of manslaughter by gross negligence under the common law to individuals. The Sentencing Advisory Panel published a consultation paper on sentencing for corporate manslaughter in November 2007.

(C) NON-FATAL OFFENCES AGAINST THE PERSON

Assault

Wounding / causing grievous bodily harm with intent

Replace existing text under these headings with:

Please refer to the definitive guidelines 'Assaults and Other Offences against the Person' and 'Assaults on Children and Cruelty to a Child' published by the Sentencing Guidelines Council on 20 February 2008 and effective from 3 March 2008.

(D) DRIVING OFFENCES RESULTING IN DEATH

Causing death by dangerous driving and careless driving when under the influence of drink or drugs

Replace existing text under heading with:

Please refer to the definitive guideline ‘Causing Death by Driving’ published by the Sentencing Guidelines Council on 15 July 2008 and effective from 1 August 2008, relating to sentencing for these offences and the two new offences created in the Road Safety Act 2006 (causing death by careless or inconsiderate driving and causing death by driving: unlicensed, disqualified or uninsured driver).

(E) SEXUAL OFFENCES

Public nuisance

R v Kavanagh [2008] EWCA Crim 855 (date of judgment: 22 February 2008)

The Court considered sentence for an offence of public nuisance under the common law, consisting of the making of hundreds of sexually explicit telephone calls to a number of victims. It was emphasised that, where an offence was of a sexual nature, a court should now consider the authorities in the context of the Sentencing Guidelines Council guideline '*Sexual Offences Act 2003*'. Where an offence is similar to those within the guidelines, an attempt should be made to see how best to relate that offence to those within the guidelines. In the present case the Court considered the guidelines for sexual assaults and voyeurism to be of assistance when deciding sentence.

(F) DRUG OFFENCES

Production or cultivation of cannabis

Legislation: ss. 4 and 6, Misuse of Drugs Act 1971

Maximum penalty: 14 years imprisonment

R v Xu [2007] EWCA Crim 3129 (date of judgment: 21 December 2007)

The Court considered appropriate sentencing levels in cases of commercial cultivation and production of cannabis on a large scale. Starting points for several levels of involvement were identified, with deterrent sentences for offenders with greater involvement to reflect the fact that they stand to make a substantial profit from the offending.

- *Worker/ 'gardener'*
At the lowest level, where the offender has tended plants and carried out other tasks but has had minimal involvement with the setting up of the operation, the starting point should be three years before taking into account any guilty plea or personal mitigation.
- *Manager*
At the next level of seriousness, the offender will have played a greater part in the operation, arranging for plants to be brought in and for the crop to be distributed, as well as possibly helping to run more than one operation and making payments on instruction. The starting point will be between 3 and 7 years depending on the level of involvement and the value of the cannabis produced.
- *Organiser*
Where the offender has played a part in setting up and controlling an individual operation, for example by recruiting workers and obtaining premises and equipment, the starting point should be 6 - 7 years depending upon the quantity of cannabis involved. A more severe sentence may be appropriate for an offender who has controlled a larger number or network of operations.

(G) PUBLIC ORDER OFFENCES

Possession of offensive weapons

R v Povey, McGeary, Pownall and Bleazard [2008] EWCA Crim 1262 (date of judgment: 21 May 2008)

The Court of Appeal made observations of a general nature in relation to offences of carrying knives and offensive weapons given the current level of prevalence on a national scale.

- The Court affirmed the seriousness of carrying any weapon given that it represents a threat to public safety and public order;
- Offences of this kind have escalated and are reaching epidemic proportions. In the public interest this crime must be confronted and stopped. It is important for public confidence that the man or woman caught in possession of a knife or offensive weapon should normally be brought before the courts and prosecuted, any conviction recorded, and the offender sentenced.
- Sentencing courts must have at the forefront of their thinking that the sentences for this type of offence should focus on the reduction of crime, including its reduction by deterrence, and the protection of the public.
- This is a serious offence and it should be treated with the seriousness it deserves. When considering seriousness, courts should bear in mind the harm which the weapon might foreseeably have caused.
- Conditions now are much more grave than they were at the time of the guidance given by this court in *Poulton and Celaide* (see page 67 of the compendium). This guidance should be applied with the current grave situation and the sentencing considerations identified above clearly in mind.
- **For the time being** relevant guidance from the Sentencing Guidelines Council to magistrates should normally be applied at the most severe end of the appropriate range of sentences (see Magistrates' Court Sentencing Guidelines, published 12 May 2008, page 33).

(H) THEFT ACT OFFENCES/FRAUD

Fraud

Please note that in August 2007, the Sentencing Advisory Panel published a consultation paper on sentencing for various types of fraud.

Theft

Please note that in March 2008 the Sentencing Guidelines Council published consultation guidelines on sentencing for a number of forms of theft, including theft in breach of trust, theft from the person, theft in a dwelling, theft from a shop, and burglary in a building other than a dwelling.

Making off without payment

Legislation: s. 3(1), Theft Act 1968

Maximum penalty: 2 years imprisonment

Please note that following advice from the Panel a new guideline for this offence has been included in the *Magistrates' Court Sentencing Guidelines* published by the Sentencing Guidelines Council on 12 May 2008 and effective from 4 August 2008.

Abstracting electricity

Legislation: s.13, Theft Act 1968

Maximum penalty: 5 years imprisonment

Please note that following advice from the Panel a new guideline for this offence has been included in the *Magistrates' Court Sentencing Guidelines* published by the Sentencing Guidelines Council on 12 May 2008 and effective from 4 August 2008.

(J) COUNTERFEITING AND MONEY LAUNDERING

Counterfeiting and forgery

False passports

R v Mutede [2005] EWCA Crim 3208 (date of judgment: 1 December 2005)

The Court emphasised that the guidance in R v Kolawole [2005] 2 Cr App R (S) 14 relates to offences under the Forgery and Counterfeiting Act 1981 involving the use of false passports. The Court held that it is necessary to distinguish between using a false passport to obtain entry into the country and using false immigration letters to obtain work by a person who was permitted to enter the United Kingdom.

A-G's Reference Nos 1 & 6 of 2008 [2008] EWCA Crim 677 (date of judgment: 4 March 2008)

The Court considered the application of R v Kolawole [2005] 2 Cr App R (S) 14 to two very different cases. In the first, the Court emphasised that the fact that an offender will soon be deported from the United Kingdom is not a sufficient ground for departing from the guideline. In the second case, the guideline was found to be of very limited application, as the possession of the false identity document was not part of an attempt to undermine immigration control. The offender had been in 'limbo' in respect of his immigration status and had used the document to obtain employment. The suspension of a sentence of six months imprisonment, and the requirement of unpaid work, were not lenient at all but an entirely appropriate exercise of mercy.

(K) MISCELLANEOUS OFFENCES

Health and safety offences

Please note that the Sentencing Advisory Panel's consultation paper on corporate manslaughter, published in November 2007 (see section B above), also covers sentencing for health and safety offences involving death.