Neutral Citation Number: [2021] EWCA Crim 745

Case No: 202003002 A2

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT WOOLWICH
HIS HONOUR JUDGE MILLER
T20207057

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/05/2021

Before :

PRESIDENT OF THE QUEEN'S BENCH DIVISION
MR JUSTICE SWEENEY
and
MR JUSTICE FOXTON

- -

Attorney General's Reference under Section 36 of the Criminal Justice Act 1988
(R v Aaron Mark McWilliams)

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- -

Tom Little QC on behalf of **Her Majesty's Solicitor General** for **the Attorney General**
Lee Sergent instructed by **GT Stewart Solicitors** for **Aaron Mark McWilliams**
Hearing date : **5th May 2021**

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Approved Judgment

Dame Victoria Sharp P.:

1. The provisions of the Sexual Offences (Amendment) Act 1992 apply in this case. Under those provisions, where a sexual offence has been committed against a person, no matter relating to that person shall during that person's lifetime be included in any publication if it is likely to lead members of the public to identify that person as the victim of that offence. This prohibition applies unless waived or lifted in accordance with section 3 of that Act.

2. This is the third occasion in a matter of months in which the Attorney General has sought leave to refer a sentence to this Court arising from the interrelationship between the court's power under section 82A(3) of the Powers of Criminal Courts (Sentencing) Act 2000 (the PCCSA) to fix the minimum term to be served under a discretionary life sentence, and the custodial period after which prisoners serving determinate sentences are eligible for release as set out in the Criminal Justice Act 2003 (the CJA 2003). Mr Tom Little QC, who appears for the Attorney General on this application, submits to the Court that at present, judges at first instance are not taking a consistent approach to this issue.

3. We feel compelled to observe that these difficulties have largely arisen through a combination of two factors. First, the way in which section 82A(3) addresses the relationship between minimum terms for discretionary life sentences and the date of eligibility for early release under a determinate sentence: by instructing the judge fixing the minimum term to "take into account" the early release provisions as set out in another statute, section 244(1) of the CJA 2003. Second, the piecemeal way in which the early release provisions for determinate sentences in the CJA 2003 have been amended, and the differing legislative techniques adopted to effect those changes.

4. In this application, the Attorney General seeks leave to refer the life sentence imposed on the Offender (McWilliams) for 40 child sex offences, on the ground that the minimum term imposed by His Honour Judge Miller in the Crown Court at Woolwich on 2 November 2020 was unduly lenient. We grant leave.

5. Mr Little QC advances this application on three grounds, albeit he made it clear that it was the first ground which was at the forefront of this application.

6. First, the judge misconstrued or misapplied section 82A of the PCCSA, section 244 of the CJA 2003 and the Release of Prisoners (Alteration of Relevant Proportion of Sentence) Order 2020 No 158 ("the 2020 Order"). The judge should have arrived at the minimum term by taking into account the effect of the 2020 Order, which increased the proportion of a determinate sentence which those convicted of relevant violent and sexual offences had to serve before being eligible for early release from one-half to two-thirds. For that reason, the judge should have reduced the ultimate notional determinate term of 18 years that he had arrived at, after full credit for plea, to a minimum term of 12 years and not 9 years.

7. If that submission is not accepted, then the second ground advanced is that the exceptional gravity of the offending in this case required the judge to exercise his discretion under section 82A of the PCCSA to calculate the minimum term by taking two-thirds of the notional determinate sentence, rather than one-half.

8. Finally, in what was very much a subsidiary submission, it was contended that the notional determinate sentence arrived at by the judge of 27 years before credit for plea was itself unduly lenient.

The Offences

9. It is undeniable that the offending in this case was of the most serious and distressing kind. In order to put the Attorney General's second and third grounds into their proper context, it is necessary to set out the circumstances of that offending.

10. Over a period of some 4 ½ years, between September 2012 and March 2017, McWilliams engaged in a campaign of serious sexual abuse and humiliation of 23 child victims, whose ages ranged from 4 months to 13 years. McWilliams, who was between 20 and 25 years' old at the relevant time, put himself in a position to commit these offences by exploiting positions of trust he obtained in the homes of seven unsuspecting families, as an au pair, nanny or babysitter. McWilliams obtained this employment by forging references, setting up false email accounts or taking other measures to ensure that any requests for references received thoroughly reassuring responses. He then used that employment to secure childcare or baby-sitting work with the friends of his employers.

11. The first offences were committed in September and October 2012, when McWilliams was employed as an au pair by a family we will refer to as "Family 1", helping to look after two boys, aged 13 ("Child 1") and 6 ("Child 2"). During that period, McWilliams put Child 2's penis in his mouth, as well as assaulting him in other ways, and also touched Child 1's bottom and penis. McWilliams also assaulted another child who came to Family 1's house to play, although the police were unable to trace this victim.

12. Between May and August 2013 McWilliams worked for another family ("Family 2"), who had two boys aged 6 and 4 ("Child 3" and "Child 4"). McWilliams put his penis in Child 3's mouth on three occasions, and on two occasions made Child 4 kiss and lick Child 3's penis and otherwise interact with him in a sexual way. On two occasions, McWilliams orally raped Child 3, and on six occasions he performed oral sex on Child 4. During this period of employment, he also looked after a 6-year-old boy ("Child 5") who was a friend of Child 4. McWilliams took video tape of Child 5's bottom, and rubbed Child 5's penis, filming the assault.

13. Between September and October 2013, McWilliams worked as an au pair for a family with three children ("Family 3"), ages 6, 4 and 2 ("Child 6", "Child 7" and "Child 8"). Child 6 was abused on three occasions, including orally, McWilliams filming the offences on his mobile telephone. Child 7 was also assaulted, both orally and otherwise, and McWilliams also touched Child 8's penis. While working for Family 3, McWilliams was caught stealing jewellery, which led to the termination of his employment. He was convicted of the theft and, in November 2013, was made the subject of a 14-month suspended sentence, with an operative period of two years. However, his relentless sexual offending did not come to light.

14. McWilliams managed to procure employment with another family ("Family 4"), who had two boys ages 7 and 6 ("Child 9" and "Child 10"). Between January and February 2014, he orally assaulted Child 9, in the presence of Child 10, and filmed the assault. He also sat Child 9 on his penis while he masturbated. There were similar assaults on

Child 10, in the presence of Child 9, and on one occasion McWilliams ejaculated over Child 10.

15. From May 2014 to March 2015, McWilliams worked as an au pair for a family living abroad ("Family 5") who had three children, ages 6-7, 2 and four months ("Child 11", "Child 12" and "Child 13"). McWilliams performed oral sex on Child 11 on ten occasions and rubbed his penis on Child 11's bottom before ejaculating onto Child 11's face. He also digitally penetrated Child 12's anus and performed oral sex on Child 12 on two occasions. He rubbed his penis around Child 13's face, masturbated himself while straddling Child 13, and then ejaculated on Child 13's face before using his finger to wipe his semen inside Child 13's mouth.

16. Between April and July 2015, McWilliams worked as an au pair for another family ("Family 6") who had two boys ages 9 and 4 ("Child 14" and "Child 15"). On three occasions, McWilliams rubbed Child 14's leg over his clothing while he was filming, and he also filmed Child 14's penis while Child 14 was sleeping. On two occasions, McWilliams anally raped Child 15, and he attempted to do so on two further occasions. He also digitally penetrated Child 15's anus. He performed oral sex on Child 15 on three occasions, masturbated Child 15, and masturbated over him, and on eight occasions he touched Child 15's penis. McWilliams took 7 videos of these assaults. He also exploited the opportunities offered by his employment with Family 6 to sexually assault friends of Child 14 and Child 15. He rubbed the penis and performed oral sex on Child 16, who was aged 9, filming the incident, performed oral sex on another 10-year-old boy ("Child 17") and performed oral sex on three occasions and penetrated the anus of Child 18, the four-year-old brother of Child 17. It will shortly be necessary to say a little more about other offending against Child 18. McWilliams also touched the penis of another friend, who was four years-old ("Child 19"), filming the assault, and performed oral sex on another 11-year-old child ("Child 20") while the child was sleeping.

17. On 16 July 2015, Child 18 spent the day with Family 6 on a play date. On his return home, Child 18 reported to his mother that McWilliams "shook his willy on [his] tummy", and that McWilliams had "pee'd on [his] belly before wiping it off". McWilliams was arrested, and in due course pleaded guilty to a single count of sexual assault on Child 18 involving ejaculation on Child 18's stomach. It is a matter of the greatest regret that the true scale of McWilliams' offending did not come to light at this time. In March 2016 he was sentenced to 32 months' imprisonment (plus 4 months for breach of the suspended sentence imposed in November 2013) on the basis that this was an isolated offence. A sexual harm prevention order was imposed ("the SHPO").

18. Very shortly after his release from that sentence, whilst on licence and in breach of the SHPO, in February 2017 McWilliams deceived another family ("Family 7") into employing him as a nanny. Family 7 had three children: two boys aged 9 and 4 ("Child 21" and "Child 22"), and a four-year-old girl ("Child 23"). On three occasions, McWilliams touched Child 21's penis, and on four occasions he masturbated Child 22. He also sexually assaulted Child 23, including by touching her vagina. Child 23 told her mother that McWilliams had touched her in this way. McWilliams was charged with sexual assault on Child 23, and breach of the SHPO (to which he pleaded guilty). He pleaded not guilty to the assault and was convicted by a jury. By coincidence, the sentencing hearing for those offences came before HHJ Miller, and in August 2017 he sentenced McWilliams to an extended sentence with a custodial term of 7 years.

19. McWilliams' mobile telephone had been seized on his arrest, and analysis revealed a large number of indecent images and videos of him sexually assaulting the children placed in his trust. Confronted with this material, McWilliams made extensive admissions in interview in December 2018, including in relation to sexual assaults or features of such assaults which had not been captured on video. The children's parents were then faced with the unimaginably distressing task of identifying their children in the material recovered from McWilliams' mobile telephone.

20. The impact of these appalling revelations on the families can scarcely be contemplated. A number of the victims have already shown signs of serious psychological harm, and the parents live with the constant dread of further manifestations, and the agonising decision of whether, and if so when, to talk to their children about what happened to them. Their victims' statements describe the devastating impact McWilliams' offending has had on their lives, and their fears for their children's future. A striking theme of the statements is an unwarranted, but understandable, sense of guilt felt by the parents that someone capable of committing such monstrous acts was able to obtain positions of trust in their homes or in relation to their children. However, the parents were the victims of McWilliams' devious behaviour, and the sophisticated efforts he went to in order to present himself as someone very different from his true self.

21. In March 2020, McWilliams pleaded guilty to 38 of the 40 counts and later that same month he indicated an intention to plead guilty to the remaining 2 counts on the Indictment. Sentence was adjourned and was thereafter delayed by the pandemic.

The sentencing hearing

22. The judge conducted the sentencing hearing with conspicuous thoroughness and care. The prosecution opened the facts on 24 August 2020. The judge then adjourned the sentencing hearing to 1 September. At the resumed hearing, Ms Hobson, completed her submissions, and defence counsel made submissions in mitigation. The judge then ordered the production of an updated pre-sentence report (he had commissioned a report when sentencing McWilliams in 2017) for the purpose of assessing dangerousness. Once that report was available, the sentencing hearing resumed on 2 November 2020.

23. In his sentencing remarks, the judge correctly identified the level of culpability as "at the highest", and the very large number of aggravating features. However, the judge's task was complicated by the Offender's convictions in March 2016 and August 2017 to which we have referred. All of the (40) offences for which he was now being sentenced were committed before the sentence imposed in August 2017; and 33 out of the 40 offences had been committed before the sentence imposed in March 2016.

24. The judge had regard to those factors, and to the scale of the offending, in arriving at a notional determinate term after trial of 30 years, which he reduced by 3 years to reflect the available mitigation, namely McWilliams' relative youth at the time of the offending, his diagnosis of Autism Spectrum Disorder, and his co-operation with the police after his second conviction. The notional term of 27 years was then further reduced by one-third to 18 years to reflect the full credit to which McWilliams was entitled for his early guilty pleas. The judge concluded (as he had in August 2017) that McWilliams was dangerous, that he presented a high risk of further sexual offending and that the scale of risk posed to children, together with the severity of the offending, required the judge to impose a life sentence.

25. In fixing the minimum term before McWilliams would become eligible for consideration for release, the judge said:

> "If I had been sentencing to a determinate sentence, taking account of all of the aggravating and mitigating factors in the case after a trial, I would have sentenced you to 27 years' imprisonment. Giving you full credit for your prompt pleas of guilty, I would have reduced that sentence to 18 years. Because you would have served up to half that sentence in custody, I fix the minimum term which you will serve at half of 18 years, that is nine years".

26. At the conclusion of the judge's sentencing remarks, Ms Hobson raised the effect of the 2020 Order, and specifically, whether the minimum term should be calculated as two-thirds rather than one-half of the notional determinate term. The judge said the prosecution should pursue the matter if it wished to do so under the slip rule, which it then did. The slip rule application was heard on 6 November 2020. The judge declined to alter his sentence. He said there was nothing in the 2020 Order which said it was intended to apply to discretionary life sentences; and nothing in the Crown Court Compendium, or in *Archbold Criminal Pleading Evidence and Practice 2020* or in *Banks on Sentence* suggested that it should do so.

27. In that context, it should be noted that the slip rule hearing took place before two decisions of this Court in which *obiter* observations were made about the effect of the 2020 Order: see *R v McCann (Attorney General's Reference No 688 of 2019), R v Sinaga (Attorney General's Reference No 5 of 2020)* [2020] EWCA Crim 1676; [2021] 4 WLR 3 handed down on 11 December 2020, and *R v Safiyyah Shaikh and R v Fatah Abdullah* [2021] EWCA Crim 45 handed down on 21 January 2021. See further [41] to [49] below.

The position before amendments made in 2020 to the early release provisions

28. The legislative history of section 82A of the PCCSA (now section 323 of the Sentencing Act 2020) and the early release provisions in the CJA 2003 is summarised at [22]-[28] and [33] of *Sheikh*. It is not necessary to repeat that summary here. At the time material to this appeal, section 82A provided as follows:

> "(1) This section applies if a court passes a sentence in circumstances where the sentence is not fixed by law.
>
> (2) The court shall… order that the provisions of section 28(5) to (8) of the Crime (Sentences) Act 1997 (referred to in this section as the "early release provisions") shall apply to the offender as soon as he has served the part of his sentence which is specified in the order.
>
> (3) The part of his sentence shall be as such as the court considers appropriate taking into account—

> (a) the seriousness of the offence…
>
> (b) the effect that the following would have had if the court had sentenced the offender to a term of imprisonment— (i) section 240ZA of the Criminal Justice Act 2003 (crediting periods of remand in custody) (ii) … (iii) any direction which the court would have given under section 240A of the Criminal Justice Act 2003 (crediting periods of remand on bail subject to certain types of condition).
>
> (c) the early release provisions as compared with section 244(1) of the Criminal Justice Act 2003".

29. We set out the terms of section 244 of the CJA 2003 below, in a form which shows the alterations made following the 2020 changes to the early release provisions for certain classes of determinate sentences.

30. In *Attorney General's Reference (No 27 of 2013) (R v Burinskas)* [2014] EWCA Crim 334; [2014] 1 WLR 4209 Lord Thomas CJ addressed the relationship between a minimum term set under section 82A of the PCCSA and the early release provisions for determinate sentences. In that case, the Court heard a number of appeals concerned with extended and life sentences. When addressing the approach to be adopted when setting a minimum term under section 82A(3), the Court stated at [34] that "when imposing a discretionary life sentence judges reduce the notional sentence by one half to reach the minimum term". The Court noted that that approach had been endorsed in *R v Szczerba* [2002] EWCA Crim 440; [2002] 2 Cr App R (S) 86, and that *Szczerba* had also held that "there might be cases in which, exceptionally, the reduction might be less than one half". This was a reference to [32]-[35] of *Szczerba*, in particular [35] which stated that "unless there are exceptional circumstances, half the notional determinate sentence should be taken".

31. One of the arguments raised in *Burinskas* was that if the minimum term of the discretionary life sentence was fixed at half of the notional determinate sentence, this might, in some cases mean that prisoners serving a life sentence would be released earlier than prisoners sentenced to an extended sentence for the same offence. The Court's answer to that submission was as follows:

> "[35] A number of advocates drew to our attention what they described as an anomaly caused by the provisions for early release in respect of the new extended sentences. The effect is that a life prisoner may serve less time in prison than an offender serving the custodial term of an extended sentence even though the appropriate custodial term is the same. Offender A, subject to a life sentence, is given a minimum term of five years on the basis that but for the life sentence he would have been sentenced to a ten-year determinate sentence. He serves five years before being considered for parole. He may be released at that stage. Offender B is made the subject of an extended sentence. The appropriate custodial term is ten years. Offender B is not eligible

> for release until he has served two thirds of his sentence. Even if he is released at that point he will have spent longer in prison than the life prisoner who has been released at the first opportunity. Thus, the first opportunity for release occurs sooner for the life prisoner than for the prisoner serving an extended sentence.
>
> [36] We understand the argument, but the position is more complex. A life prisoner is not entitled to release at the end of the minimum term. He must wait until the Parole Board consider that it is safe to release him. In some cases that date is years after the minimum term has expired. The prisoner serving an extended sentence is entitled to be released at the end of the custodial period without any further assessment of risk. Where the custodial term is less than ten years the entitlement arises at the two thirds point.
>
> [37] There is an argument that if the alternative to a life sentence is an extended sentence rather than a determinate sentence then it is the extended sentence, with its longer time to serve, that should form the basis of the calculation of the minimum term in a life sentence. That would reduce the notional determinate sentence by one third rather than one half and would lead to an increase in the minimum term to be served in life cases of one third. There are four difficulties with that approach: (i) an extended sentence is not necessarily an alternative to a life sentence under section 225; (ii) an extended sentence is not an alternative to a life sentence imposed under section 224A; (iii) the sentencing judge must compare the early release provisions at section 244(1) —which are concerned with determinate sentences; (iv) a measure which increases minimum terms in life sentences by one third is, in our judgment, a matter for Parliament."

The 2020 amendments to the early release provisions

32. In 2020, two changes were made to the provisions relating to the early release of prisoners serving determinate sentences.

33. On 26 February 2020, the Terrorist Offenders (Restrictions of Early Release) Act 2000 ("the 2020 Act") came into force. Section 1 of the 2020 Act inserted a new section 247A into the Criminal Justice Act 2003 which provides that the "requisite custodial period" before an offender became eligible for release on licence for many terrorism offences would now be two-thirds of the determinate sentence imposed.

34. On 1 April 2020, the 2020 Order came into force. The 2020 Order was enacted under powers conferred on the Secretary of State by sections 267, 330(3) and 330(4) of the CJA 2003. As required by section 330(5) of the CJA 2003, a draft of the 2020 Order

had been laid before Parliament and approved by a resolution of each House. Article 3 of the 2020 Order provides:

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

35. It is common ground that a determinate sentence imposed for 21 of the offences of which McWilliams was convicted would have attracted the operation of Article 3 of the 2020 Order. If therefore McWilliams had been sentenced to a determinate sentence for those offences, he would not have been eligible for release until he had served two-thirds of that sentence.

36. Following these two amendments to the early release provisions, section 244(1) provides or is to be read in the relevant respects as providing as follows (with the changes underlined):

> "(1) As soon as a fixed-term prisoner, other than a prisoner to whom section 234A, 244A, 246A, 247 or <u>247A</u> applies, has served the requisite custodial period for the purposes of this section, it is the duty of the Secretary of State to release him on licence under this section.
>
> …
>
> (3) For the purposes of this section "the requisite custodial period" means—
>
> (a) in relation to a prisoner serving one sentence [where the 2020 Order applies] <u>two-thirds of his sentence</u>".

37. The new section 247A provides:

> "(1) This section applies to a prisoner (a "terrorist prisoner") who—
>
> (a) is serving a fixed-term sentence imposed (whether before or after this section comes into force) in respect of an offence within subsection (2), and
>
> (b) has not been released on licence.
>
> …
>
> (3) It is the duty of the Secretary of State to refer the case of a terrorist prisoner to the Board—

> (a) as soon as the prisoner has served the requisite custodial period, and
>
> (b) where there has been a previous reference of the prisoner's case to the Board under this subsection and the Board did not direct the prisoner's release, no later than the second anniversary of the disposal of that reference.
>
> (8) For the purposes of this section—
>
> "the requisite custodial period" means—
>
> (a) in relation to a person serving one sentence imposed under section 226A, 2226B, 227, 228 or 236A two-thirds of the appropriate custodial term,
>
> (b) in relation to a person serving one sentence of any other kind, two-thirds of the sentence …"

38. As is apparent, these two amendments took very different forms. The 2020 Order effectively made a specific amendment to the early release provisions set out in section 244 for relevant violent and sexual offences. The amendments effected by the 2020 Act removed the terrorism offences to which that Act applied from the scope of section 244 altogether and made separate provision for them in section 247A.

The authorities addressing the effect of the 2020 Order when fixing the minimum term for a discretionary life sentence

39. We were referred to three authorities in which *obiter* observations have been made about the effect of the 2020 Order.

Khan v Secretary of State for Justice

40. In *Khan v Secretary of State for Justice* [2020] EWHC 2084 (Admin) the applicant unsuccessfully sought a declaration that the 2020 Act and the resultant section 247A of the CJA 2003 were incompatible with articles 5, 7 and 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms. At [31] the Divisional Court stated:

> "Since 1 April 2020, under the 2020 Order, sexual and violent offenders are not entitled to automatic release until the two-thirds point of their sentences. A court will be entitled to take this into account under section 82A(3)(c) when setting the minimum tariff period in respect of a discretionary life sentence".

McCann

41. The Court in *McCann* heard three unconnected cases in which the defendants had been sentenced (before the 2020 Order came into effect) to discretionary life terms for a large number of (predominantly sexual) offences. McCann was sentenced to a discretionary life sentence with a minimum term calculated by reference to two-thirds of the notional determinate sentence, because the judge would have imposed an extended sentence if he had decided that a life sentence was not appropriate.

42. One of the issues before the Court was whether the seriousness of the offending in the cases before it constituted "exceptional circumstances" which justified fixing the minimum term under section 82A of the PCCSA at two-thirds, rather than one-half of the notional determinate term.

43. The Court addressed at [54]-[60] the circumstances in which the sentencing judge was entitled to fix the minimum term at a greater proportion of the notional determinate term than one-half and reviewed various authorities in which the minimum term had been fixed by reference to a higher proportion: see *Szczerba, R v Jarvis* [2006] EWCA Crim 1985 and *R v Rossi* [2014] EWCA Crim 201; [2015] 1 Cr App R (S) 15. At [58]-[59] the Court referred to suggestions that relying on the defendant's offending history or the seriousness of the offending, when deciding whether to fix the minimum term at a greater proportion of the notional determinate term than one-half, involved "double-counting" because these matters would already have been taken into account when arriving at the notional determinate sentence: see *Criminal Law Review* 2015, 4, 294 and *Archbold Criminal Pleading Evidence and Practice 2020*, para. 5A-717. The Court took the view this conflicted with the decisions in *Jarvis* and *Rossi* and concluded at [60]:

> "When 'taking into account' the early release provisions for determinate sentences judges, in the great majority of cases, have adopted the one-half approach; but this does not mean that, when justified, the court cannot reflect the culpability of the offender both in the length of the notional determinate sentence and in the way the minimum term is calculated, for instance in order to capture the exceptional seriousness of the offence or offences. This does not involve 'double counting' but instead provides a staged approach that enables the court to impose appropriate punishment. A defendant's grave antecedents or the extent and seriousness of the offence or offences for which he or she is to be sentenced may be relevant, first, to the length of the determinate term and, secondly, to whether there are persuasive circumstances that justify a departure from the usual one-half approach. As was said by this court in *R v Martin* [2016] EWCA Crim 474 the judge should explain the justification for departing from the usual approach of fixing the minimum term at one-half (see [16])."

44. At [92], the Court noted that "in the collective experience of this court the cases of McCann and Sinaga … come within the most serious cases involving a campaign of

rape to have been tried in England and Wales". On the basis of that finding, at [95], the Court held:

> "These two cases are paradigms of the circumstances which justify a departure from the usual position of fixing the requisite custodial period at a half of the determinate term. We agree with Edis J in McCann's case that a custodial period of two-thirds is necessary, but we express this step as being required for both offenders to ensure that the proper requirements of punishment are met for these unique crimes rather than by reference to the release provisions for an extended sentence".

45. The Court also noted three matters of context, the first of which concerned the 2020 Order which had come into force in the period between sentencing and the hearing of the appeal in that case. At [62], the Court said:

> "With effect from 1 April 2020, in relation to a defendant serving a fixed-term sentence of seven years or more for a relevant violent or sexual offence (an offence listed in Part 1 or 2 of schedule 15 to the 2003 Act for which a sentence of life imprisonment may be imposed) which was imposed on or after that date, the requisite custodial period is two thirds (not a half) (see [the 2020 Order]). These sentences for McCann and Sinaga, for offences which overwhelmingly came within Part 1 or Part 2 were imposed before that date".

46. The Court then referred, at [63], to [31] of *Khan* (which we have set out above). At [66], the Court concluded:

> "The position, therefore, is that the significant changes to the release provisions which have either been recently implemented or are awaiting implementation will have a considerable impact on the position of individuals convicted of a wide range of serious offences."

Shaikh

47. Finally, we turn to *Shaikh*. In that case, two unconnected defendants had been sentenced to discretionary life terms for terrorism offences to which the 2020 Act applied. The sentencing judge in each case fixed the minimum term for the discretionary life sentences he imposed at one-half of the notional determinate term, rejecting the argument that, following the coming into force of the 2020 Act, the appropriate proportion was two-thirds. The Solicitor General sought leave to refer the sentences as unduly lenient.

48. The Court was invited to construe the requirement in section 82A(3)(c) of the PCCSA to "take account" of "the early release provisions as compared with section 244(1)" as

extending not simply to the "requisite custodial period" provided for in section 244 itself, but also that contained in section 247A. It was argued that this was appropriate because of the express carve-out from section 244 of sentences which were subject to section 247A. The Court was unable to accept that conclusion, stating at [50]:

> "In our view, it would be a bold reading of section 82A(3)(c) to interpret it as extending it not simply to the early release provisions provided for in section 244(1), but to other early release provisions appearing elsewhere merely because they have been expressly carved out from section 244(1)."

49. The Court contrasted the legislative mechanism by which the amendments in the 2020 Act had been given effect with that adopted in relation to the 2020 Order, stating at [52]:

> "We acknowledge that this conclusion entails that the legislative structure of the 2020 Act (creating a new early release regime in section 247A and then removing that subject to that regime from the operation of section 244(1)) has a different effect so far as the setting of minimum terms is concerned to that adopted by the 2020 Order (which amended the definition of "relevant custodial period" in section 244(1) itself). However, different forms of statutory language do have different consequences."

The Attorney General's submissions

50. Mr Little QC submits that the effect of the 2020 Order, in conjunction with section 82A(3) of the PCCSA, is clear. For relevant violent and sexual offences, the early release provided for by section 244(1) of the Criminal Justice Act 2003 which the judge was required to take into account, was the two-thirds requirement the 2020 Order had brought into effect. This construction, he contends, is supported by what was said in *Khan*, *McCann* and *Shaikh* and further, by the commentary of Dr Lyndon Harris on the decision in *Shaikh* in Crim LR, 2021,5,409.

The Offender's submissions

51. Mr Sergent for the Offender submits that Parliament cannot have intended that the minimum term for discretionary life sentences for offences which were subject to the 2020 Act should be calculated taking one-half of the notional determinate term (the effect of *Shaikh*) whereas minimum terms for relevant violent and sexual offences should be calculated as two-thirds of the notional determinate term. Whilst he accepts that the effect of the 2020 Order is that a sentencing judge fixing a minimum term for a relevant violent or sexual offence is required to "take into account" the two-thirds provision introduced by that order, he submits that the authorities have established that taking one-half of the notional determinate term is "the norm" (*Szczerba*, [58]). Further, he argues that only legislation addressing the fixing of minimum terms directly can alter that norm. Thus, he says it is only permissible for a sentencing judge to fix a minimum

term by reference to more than one-half of the notional determinate term when there are "exceptional circumstances".

Conclusion

52. As the Court noted in *Burinskas* at [37], any measure "which increases minimum terms in life sentences by one third is … a matter for Parliament". Further, Parliament's intention to effect such a significant change must be manifest with sufficient clarity (*Shaikh*, [51]). Mr Little QC is right to accept as he did in his submissions, that it would have been possible to communicate this change in a clearer and more coherent way than achieved by the 2020 Order. Nonetheless we conclude that the 2020 Order does sufficiently manifest such an intention. As Dr Harris noted in his commentary on *Shaikh* (Crim LR 2021, 5, 409, 413), "a conclusion to the contrary would be difficult to sustain". Moreover, such a conclusion receives strong support from the passages in *Khan*, *McCann* and *Shaikh* which we have set out above.

53. As for the first of Mr Sergent's contrary arguments, the primary means by which the courts ascertain the intention and effect of legislation is through the legislative text, read in context. As the editors of *Bennion on Statutory Interpretation* (7th) note at Section 11.1:

> "The legislative intention is the meaning attributed to the legislature in respect of the words used. So the interpreter's objective, when interpreting an enactment, is to determine the true meaning of the words used by the legislature".

54. The difference in the approach to be adopted when calculating minimum terms for discretionary life sentences for offences which are subject to the 2020 Act on the one hand, and those which are subject to the 2020 Order on the other, is the inevitable result of the different language used in the relevant legislation, from which Parliament's intention is principally to be derived. That in itself is a sufficient answer to Mr Sergent's first argument. However, his attempt to rely on a presumption of consistency of legislative policy faces a further difficulty. The 2020 Order is delegated legislation; the 2020 Act is primary legislation. Moreover, Parliament has frequently provided for different sentencing regimes for different types of serious offending (for example the minimum terms which are imposed for some serious offences, but not for others).

55. As for Mr Sergent's second argument, it is important to note why *Szczerba* and *McCann* described taking one-half of the notional determinate sentence as the normal approach. When the sentences in those cases were passed, the only "early release provisions in section 244(1))" which could be "taken into account" provided for the release of prisoners serving determinate sentences at the half-way point. The position has now changed. Section 244 now provides for a different early release provision for relevant violent and sexual offences, and judges fixing minimum terms for such offences are obliged to take that provision "into account". For such offences, two-thirds is now the "normal" proportion. We do not accept, therefore, that though sentencing judges are required to take account of the new early release provisions, there has been no change in the approach to fixing a minimum term, save where there are exceptional circumstances.

56. In view of our conclusion on the principal ground argued before us, it is not necessary to address the argument on exceptionality; and indeed we need say little more on the discrete ground relied on of undue lenience, which Mr Little QC raised but did not press in oral submissions. As to that, as Mr Little QC properly acknowledged, there were two material factors which the judge was correct to have in mind when determining the appropriate notional determinate term. First, by the time of sentence, McWilliams had already served the equivalent, or near enough, of an 8-year sentence for the convictions in March 2016 and August 2017. Secondly, relevant mitigation (the three-year reduction made by the judge in that connection was not challenged in this reference). Having regard to those two factors, the sentence in this case was equivalent to one of nearly 35 years after allowance for mitigation and before credit was given for the Offender's plea. Exceptionally serious as this offending was, such a sentence could not in our view be characterised as unduly lenient.

Conclusion

57. In all the circumstances, we have concluded that by taking half, rather than two-thirds of the notional determinate term of 18 years, the judge arrived at a sentence which was unduly lenient. Accordingly, the life sentence imposed on the Offender will remain in place, but with a minimum term of 12 years to be served, in substitution for the minimum term of 9 years originally specified by the judge.