Neutral Citation No: [2020] NICA 63 ***Judgment: approved by the Court for handing down (subject to editorial corrections)****	***Ref:*** **SCO11372** ***ICOS No:*** **15/68725/A01** ***Delivered:*** **11/12/2020**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

-v-

THOMAS VALLIDAY

Before: Morgan LCJ, McCloskey LJ and Scoffield J

Tim Moloney QC and Damien Halleron BL (instructed by Madden & Finucane, Solicitors) for the Appellant
Laura Ievers BL (instructed by the Public Prosecution Service) for the Respondent

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SCOFFIELD J (delivering the judgment of the court)

Introduction

[1] This is an appeal by the defendant, Thomas Valliday, against a sentence imposed by His Honour Judge Grant in the Crown Court, sitting at Downpatrick, on 7 March 2016. Leave to appeal was granted by order of a single judge, McAlinden J, on 21 October 2020.

[2] Mr Moloney QC appeared for the appellant, with Mr Halleron. Ms Ievers appeared for the Crown. We are grateful to counsel on each side for their helpful written submissions, which allowed the appeal to be determined without extensive oral argument on 27 November 2020. At that hearing we indicated that the appeal would be allowed and that we would give our reasons briefly by way of written judgment at a later date. Those reasons are set out in this judgment.

Factual Background

[3] The facts are that on 1 May 2015, the appellant was taken from HMP Maghaberry, where he was serving a life sentence, to the Ulster Hospital in order to

undergo surgery to his hand. Whilst at the hospital he escaped from the custody of the escorting prison guards. Three days later, he was seen by police officers standing beside the perimeter wall of Musgrave PSNI station in Belfast. He was taken into police custody and at that time handed over a number of diazepam tablets which were in his possession.

[4] On 7 March 2016, the appellant was arraigned and pleaded guilty to one count of escaping from lawful custody after conviction, contrary to section 26 of the Prison Act (Northern Ireland) 1953; and one count of possession of Class C drugs, contrary to section 5(2) of the Misuse of Drugs Act 1971.

[5] The life sentence which the appellant was serving at the time of the offences was imposed on him by Hart J, on 25 March 2010, for the murder of Francis McGreevy. Sentencing him for the murder and related offences, Hart J had imposed a minimum term of imprisonment of 17 years.

[6] Upon the appellant's plea of guilty in the current proceedings, His Honour Judge Grant imposed a determinate custodial sentence of 12 months (comprised of 6 months' imprisonment and a 6 months licence period) in respect of each offence. The learned judge ordered that these sentences should be concurrent but, significantly in the context of this appeal, that they should be consecutive to custodial period of the life sentence the appellant was then serving.

[7] We agree with the intention behind the judge's direction that the sentences should run consecutively to the period of imprisonment being served by the appellant pursuant to the life sentence. Otherwise, as the learned judge pointed out, the appellant would receive no effective, additional penalty for the more recent offending.

The issue in this appeal

[8] The issue in this appeal concerns precisely when the consecutive sentences imposed by the Crown Court can properly take effect as a matter of law. This issue came into focus in February of this year, when the appellant sought clarification from the Northern Ireland Prison Service as to when he would commence serving the consecutive sentence imposed by the Crown Court in March 2016.

[9] In the course of an email exchange dating from the time of sentence, which is before the Court, the Prison Service was informed by Court Service that the sentences imposed by His Honour Judge Grant were not to take effect simply upon the expiry of the appellant's tariff but, rather, after his release had been directed by the Parole Commissioners. It is the direction to that effect – which, notwithstanding the somewhat unconventional way in which this was brought to the appellant's attention, we take to be a direction of the sentencing judge – which is under challenge in this appeal. There is no appeal against any other aspect of the sentencing exercise.

[10] The appeal is mounted on one single ground, expressed in the following terms:

> "*The learned judge erred in directing that the Applicant's consecutive sentence should commence from the date that the Parole Commissioners direct his release on Life Licence under the terms of the Life Sentences (Northern Ireland) Order 2001*."

As will be apparent from the discussion below, we consider that the resolution of this issue involves a balance between giving practical effect to the sentence imposed whilst also not frustrating the relevant statutory provisions in the 2001 Order.

Discussion

[11] The power to direct the time at which a sentence imposed by the Crown Court shall take effect – in contrast to the usual position, which is that it shall take effect from the beginning of the day on which it is imposed – is contained in section 49(1) of the Judicature (Northern Ireland) Act 1978, which provides as follows:

> "*A sentence imposed, or other order made, by the Crown Court when dealing with an offender shall take effect from the beginning of the day on which it is imposed or made, unless the court otherwise directs.*"

[12] Although, on its face, this power is unconstrained, the discretion it provides must be exercised in accordance with principle and proper sentencing practice.

[13] The appellant contends, in summary, that the approach adopted by the sentencing judge is wrong in principle; and that it impermissibly cuts across the statutory scheme for release on licence of life prisoners who have served their tariff, set out in the Life Sentences (Northern Ireland) Order 2001 ('the 2001 Order'). The Crown does not resist the appeal on either of these grounds.

[14] Although there does not appear to be any statutory prohibition in the sentencing provisions in this jurisdiction against a direction such as that given by the trial judge, we have reached the view that the direction given in this case was wrong in principle as a matter of sentencing practice, for the reasons set out below.

The availability of a custodial sentence imposed consecutively to the minimum term of a life sentence

[15] We are satisfied that there is no longer any issue in principle with a sentence of imprisonment being directed to commence consecutively to the custodial element of a life sentence. It was previously thought, on the basis of *R v* Foy (Practice Note) [1962] 1 WLR 609, that such a sentence was invalid because "*life imprisonment means*

imprisonment for life", so that a sentence ordered to run consecutively to a life sentence "*cannot operate until the sentenced man dies*", which was nonsensical. However, that approach was revisited by the Court of Appeal (Criminal Division) in England and Wales in the cases of *R v Hills* [2008] EWCA Crim 1871; [2012] 1 WLR 2112, a case relating to indeterminate sentence prisoners (see paragraphs [9]-[10]); and *R v Taylor (Ezra)* [2011] EWCA Crim 2237; [2012] 1 WLR 2113, a life sentence case, at paragraphs [8]-[17] and [25].

[16] The availability of a sentence imposed consecutively to the minimum term of an existing indeterminate or life sentence allows the court to provide punishment for a serious offence committed during the course of imprisonment. There is no reason why the court should not impose such a sentence in light of its discretion under section 49(1) of the Judicature Act. The sentencing regimes created by the 2001 Order and, in the case of indeterminate sentences, by the Criminal Justice (Northern Ireland) Order 2008 provide for clear dates upon which minimum terms will come to an end. As the Court of Appeal in England and Wales said in *Hills* and *Taylor*, the old authorities which pre-dated the introduction of clear, judicially-determined minimum terms are no longer relevant in this context.

[17] In a case such as this, therefore, it was properly open to the sentencing judge to impose a sentence of imprisonment which was consecutive to the appellant's life sentence tariff in order to deal with later re-offending. Earlier authorities indicating that this is impermissible should no longer be regarded as good law.

[18] What then of the situation where a sentencing judge is considering the imposition of a determinate custodial sentence consecutive to the minimum period of a life or indeterminate sentence not for later re-offending (as in this case) but, rather, at the same time as the life sentence or indeterminate sentence is being imposed? Where the court might otherwise impose a consecutive sentence for offending related to that which is giving rise to the life or indeterminate sentence, the better course remains (as Hart J did when sentencing this appellant: see *R v Valliday* [2010] NICC 14 at paragraph [13]-[15]) to take this offending into account when fixing the minimum term, rather than imposing a separate consecutive sentence.

The coming into effect of a sentence imposed consecutively to a minimum term

[19] As set out above, it was open to the sentencing judge in this case, as a matter of principle, to make the appellant's determinate custodial sentences consecutive to the tariff period of his life sentence. We do consider, however, that it is wrong in principle to direct that such a sentence should only take effect once the life prisoner has been considered to be eligible for release by the Parole Commissioners, that is to say at the time when the Commissioners have determined that it is no longer necessary for the protection of the public from serious harm that the prisoner should be confined.

[20] The course adopted by the sentencing judge in this case seems to us to militate against the requirements of good offender management. It would allow, indeed require, the further terms of imprisonment being imposed to commence at some unascertained date in the future, which could not be predicted with reasonable certainty, much less precision at the time of sentencing. The introduction of judicially-determined minimum tariffs was designed to promote these values as regards that element of life or indeterminate sentences imposed in order to satisfy the requirements of retribution and deterrence. The scheme of such sentences is that the fixed period of detention is served first and, thereafter, the offender is detained only insofar as is required for public protection, at which point he or she is entitled to release, albeit release on licence: see, in this regard, the discussion of 'the DNA' of a life sentence contained in the judgment of the Divisional Court in *Re McGuinness's Application* [2019] NIQB 10.

[21] The Court is aware that a considerable amount of work is undertaken with a life prisoner who is nearing the end of their tariff period – including by participation in a variety of assessments, programmes and pre-release schemes – in order to assess their suitability for release on licence and, if appropriate, prepare them for such release. A planned and orderly approach to these arrangements is likely to be disrupted by a 'floating' consecutive sentence which only becomes effective once the prisoner has been determined to be eligible for release. It also appears to us counter-intuitive that a sentence should be ordered to take effect only at the very point the prisoner has been assessed as no longer posing any risk and would otherwise have a right to release.

[22] On the other hand, if – contrary to the approach adopted by the sentencing judge in this case – any further term of imprisonment were to commence immediately after the appellant's tariff expiry, that would serve the purpose of ensuring that some additional penalty was imposed upon the appellant for his 2015 offending without giving rise to the concerns we have just identified. (The time when he enjoys a right to have his case referred to the Parole Commissioners would be deferred, pursuant to article 6(5)(c) of the 2001 Order, until such time as, but for his life sentence, he would be entitled to be released from custody having served the additional sentence. Crucially, however, this time will be readily predictable in advance.)

[23] Indeed, in many cases, this approach will serve to effectively delay the release of a prisoner who, but for the additional sentence, may have been in a position to be released on licence upon or shortly after the expiry of their tariff. Importantly, however, it also promotes certainty for the offender, the prison authorities and the Parole Commissioners as to the anticipated start and end date of the consecutive determinate custodial sentence.

[24] We do not accept the appellant's submissions that the course adopted by the trial judge would result in the appellant never being eligible for release; or that the Parole Commissioners' procedure under the 2001 Order would necessarily become

completely unworkable. Nonetheless, in light of the conclusion we have reached above, that is not determinative of the appeal.

Conclusion

[25] Accordingly, we allow the appeal.

[26] Pursuant to the power contained in section 10(3) of the Criminal Appeal (Northern Ireland) Act 1980, we quash the sentences imposed by the learned trial judge and replace them with identical sentences, save that we vary the judge's direction pursuant to section 49(1) of the Judicature Act by ordering that the sentences imposed for the 2015 offences, which are to operate currently with each other, shall become operative consecutively upon the expiry of the custodial period (or 'tariff') of the appellant's life sentence.

[27] To cater for any possible doubt regarding the decision and order of this court, there shall also be liberty to apply.