

MAY 2022

A Sentence is for Life, not just the Minimum Term – Part 1

The background

Over the course of two days (4th and 5th May 2022) the Court of Appeal, sitting as a court of five, has been hearing multiple appeals in respect of some of Britain's most notorious murderers of recent times. The case will cast a legal spotlight upon the issue of when whole-life orders (i.e. where the offender will never be released) should be imposed upon offenders convicted of murder – the same issue having recently found itself under the political spotlight.

Two of the more recognisable names on the list are Wayne Couzens, the Metropolitan Police officer given a whole-life order for the kidnap, rape and murder of Sarah Everard; and Emma Tustin, the mother of Arthur Labinjo-Hughes, sentenced to life imprisonment with a minimum term of 29 years for her involvement in his murder.

Both appeals have their roots in the perceived gravity of the offending. In short, it was argued on behalf of Wayne Couzens that his case was not so exceptionally high in its level of seriousness as to warrant a whole-life order, i.e. that he should never be released; conversely, it was argued on behalf of the Government against Emma Tustin that her case was so exceptionally high in its level of seriousness as to warrant a whole-life order, rather than life imprisonment with a minimum term of 29 years.

The question for the Court of Appeal therefore ultimately boils down to this: *when should life mean life?*

So, does life mean life at the moment?

It is worth stressing that murder, in whatever factual scenario, is a serious crime with serious consequences. Upon conviction, the court is obliged to pass a sentence of life imprisonment, accompanied by a 'minimum term'.

Unfortunately, this is often misinterpreted by those reporting, and then repeated by the general public/those in political positions, who conflate the sentence (life imprisonment) with the minimum term attached to it.

The minimum term is exactly as it sounds, it is the minimum term that an offender will have to spend in prison. What may confuse people is that it is the time the offender must serve before being *considered* for release, not *actually* released. To dispel a further myth, the minimum term is unaffected by early release provisions. If someone is given a minimum term of 15 years, they will serve every day of those 15 years.

Even after serving their minimum term, offenders are not simply released. They merely gain the possibility of being released, subject to the Parole Board considering the continuing risk they pose. If the Parole Board consider them to be a continuing risk, then the offender remains in prison until such a time (if it ever comes) that they do not pose a risk to the general public. It will be obvious that, with a previous conviction for murder on one's record, trying to convince a panel that you pose no risk is a difficult task, to put it mildly.

Should the offender succeed, however, they will be released and they will remain on licence for the rest of their life, liable to be returned to prison for any future indiscretion.

What is different about whole-life orders then?

Legally, not very much. It is a sentence of life imprisonment, but without a minimum term, meaning the offender will never be released from prison. The difference therefore is the removal of any possibility of release.

This is a power which, at least in the view of this writer, is quite understandably exercised sparingly. It represents a proverbial line in the sand, the point at which we as a society consider a murder to have been committed in such abhorrent circumstances that the offender should never leave prison.

Where the line is to be drawn is largely in the hands of the judiciary. A court may only pass a whole-life order if it is satisfied of two criteria: (a) the seriousness of the offence (or the combination of the offence and one or more offences associated with it) is exceptionally high, AND (b) the offender was 21 or over at the time of the offence.

The same provision goes on to list scenarios that would 'normally' meet the criteria of being ones of 'exceptionally high' seriousness, such as murders for the purpose of advancing a political cause (note the recent murder of David Amess MP) and murder of a child involving abduction or sexual/sadistic motivation. It can be seen that the list of scenarios is not intended to be an exhaustive one, nor does it compel the sentencing judge to impose a whole-life order should the case before them fall into one of those descriptions. It represents no more than examples of cases where a whole-life order would normally be suitable. Whether the threshold for seriousness is crossed is ultimately the judge's decision.

What does the Government say about that?

There are presently two proposed amendments to the availability of whole-life orders, both are in the latter stages of passage through the Houses of Parliament¹.

¹ Schedule 21 in the Police, Crime, Sentencing and Courts Bill

The first seeks to make whole-life orders available for 18-year-olds (the current provisions require offenders to be 21 or over).

The second seeks to add the 'murder of a child involving substantial pre-meditation or planning' to the list of scenarios where the starting point would normally be a whole-life order.

The latter provision would seem to be aimed directly at cases such as Emma Tustin and the facts of her case.

Great. Isn't this a Government finally being tough on crime?

Not exactly.

It is a great political soundbite, aligning oneself and one's party with a proposal that would – at face value – seek to keep a convicted child murderer in prison for the remainder of her days is unlikely to alienate any voters. However, when you drill down in to the detail, there is very little effect from a legal perspective.

The first point to note is that simply adding it to the list does not mean that a sentencing judge has to impose a whole-life order for such cases.

The second point to note is that the judge in Emma Tustin's case could have passed a whole-life order, even without the proposed amendment, had they considered it to have been one of 'exceptionally high' seriousness. The point is illustrated by the Wayne Couzens case. A murder committed by a police officer, using his job title to facilitate the offence, is not on the list, but this did not prevent the court from imposing a whole life order, on the basis that the seriousness of the offence was 'exceptionally high'.

Oh. So what is the Court of Appeal likely to do?

We will find out when it releases its judgment, expected to be sometime next month. Historically they have remained cautious about the imposition of whole-life terms – that they should be reserved for only the most heinous murders. Whether their

stance will have mellowed remains to be seen. It must also be noted that the proposed amendments will not have been passed by the time of the case being heard, such that they will not be considered as part of this judgment.

One thing we can say with certainty, however, is this: five of the country's finest legal minds will not share the general public's misunderstanding of sentencing practice, nor will they be swayed by political soundbites. You may think, having read this article, that once those two features fall away, there is very little to be said on the issue.

Ryan Murray
5 May 2022

THE CRIMINAL TEAM:

Jason Beal (Head of Chambers)

Piers Norsworthy (Head of Crime)

Jo Martin QC

Rupert Taylor

Edward Bailey

Judith Constable

Emily Cook

Sally Daulton

Althea Brooks

Holly Rust

Sophie Johns

Ryan Murray

Charlie Barrass-Evans

Door Tenants:

Adam Feest QC

Paul Williams

Julia Cox



Devon Chambers

8 The Crescent

Plymouth

PL1 3AB

01752 661659

www.devonchambers.co.uk

clerks@devonchambers.co.uk