



Neutral Citation Number: [2020] EWCA Crim 1540

Case No: 202001697 A4

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM BIRMINGHAM CROWN COURT
HHJ FARRER
T20180636

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20 November 2020

Before:

LORD JUSTICE DINGEMANS

MR JUSTICE JEREMY BAKER

and

HIS HONOUR JUDGE SLOAN QC (THE RECORDER OF NEWCASTLE)

Between:

CONNOR SCOTHERN
- and -
REGINA

Appellant

Respondent

Mr Gerard Hillman and Miss Sarah Day (instructed by **Charles Strachan Solicitors**) for the
Appellant
Mr Barnaby Jameson QC (instructed by the **Crown Prosecution Service**) for the
Respondent

Hearing date: 12 November 2020

Approved Judgment

Mr Justice Jeremy Baker:

1. On 9 June 2020 Connor Scothern appeared at Birmingham Crown Court and, following his conviction after a re-trial for an offence of Membership of a Proscribed Organisation, contrary to section 11 of the Terrorism Act 2000, was sentenced to 18 months' detention in a Young Offenders' Institution.
2. There were four co-accused, three of whom were also convicted of the offence after a re-trial whilst the remaining co-accused, Daniel Ward, had pleaded guilty to the offence. The co-accused were sentenced as follows:
 - i. Mark Jones, 6 ½ years' imprisonment under section 236A of the Criminal Justice Act 2003 comprised of a custodial term of 5 ½ years and an extended licence period of 1 year;
 - ii. Garry Jack, 5 ½ years' imprisonment under section 236A of the Criminal Justice Act 2003 comprised of a custodial term of 4 ½ years and an extended licence period of 1 year;
 - iii. Alice Cutter, 4 years' imprisonment under section 236A of the Criminal Justice Act 2003 comprised of a custodial term of 3 years and an extended licence of 1 year;
3. Connor Scothern now appeals against sentence with the permission of the single judge.

Circumstances of the offence

4. The offence arose from the activities of the accused in connection with an organisation known as National Action which was a UK based neo-Nazi organisation founded in 2013.
5. It was a revolutionary movement opposed to democracy and engaged in open incitement to racism and political violence. Its aims included the creation of an all-white state in Britain, ethnically cleansed of all religious and racial minorities. Its propaganda involved the proposition that Hitler was correct in his view of Aryan supremacy and was justified in murdering millions of Jews and other people in Europe because they were racially inferior. The organisation adopted the swastika and its logo was based upon that of the paramilitary arm of the Nazi party. The organisation's Twitter account posted praise for the killer of the murdered MP, Jo Cox.
6. As a result of its ideology and behaviour, National Action was proscribed as a terrorist organisation on 16th December 2016, with the Home Secretary stating that it was,

“a racist, anti-Semitic, and homophobic organisation which stirs up hatred, glorifies violence, and promotes a vile ideology”.
7. Prior to proscription, the appellant and the four co-accused were members of the organisation; the appellant having joined the organisation in June 2016. Following

proscription, between 17th December 2016 and 5th September 2017, the appellant and his co-accused defied the ban and continued as members.

8. The appellant, who was born on 5 February 2001, was aged 15 and 16 when a member of the organisation. The prosecution case was that he was one of the most active members post-proscription and regularly attended meetings.
9. Post-proscription the appellant attended six meetings of the organisation, including a meeting in Birmingham in January 2017 where future plans were discussed. In February 2017 he attended a leadership meeting. He was thereafter included as a member of a chat group, formed in the wake of the meeting, which was for “the big boys of the region”. It was clear that he had the ear of Alex Deakin, the Midlands leader of organisation, and although the judge accepted that the appellant had not held any leadership or organising position, his status within the group was clear from references made about him by other members at a time when he was suspected of being an infiltrator. One commented that “giving teenagers big responsibility and leadership is negligent”, whilst another stated that they should not be given “the keys to the castle”. Alex Deakin defended him against those accusations.
10. In June 2017, the appellant submitted photographs to the website of an alias of the organisation known as NS131.
11. In July 2017 he was included in a plan to recruit new members of the organisation by becoming involved in the National Front, and he attended one of that group’s demonstrations in Grantham in August for that purpose. He ordered 1,000 stickers which featured an image of Hitler and proclaimed National Socialism to be the final solution. These he put up in public and distributed to others.
12. In September 2017 he was involved in hanging a neo-Nazi banner from the side of a car park in his home city of Nottingham and placed its image on-line. His high level of commitment to the organisation was widely observed and praised with one local leader commenting that he had “driven himself into poverty buying stickers and travelling to socials.”
13. The appellant was arrested on 5 September 2018 and interviewed by the police during which he stated that he no longer subscribed to the far-right extremist ideology and had not done so since January of that year.

Sentencing remarks

14. In his careful sentencing remarks, HHJ Farrer QC, determined that under the relevant sentencing guidelines, whilst Mark Jones was a prominent member of the organisation, the remaining accused including the appellant were active but not prominent members of the organisation. Therefore, whilst the appropriate starting point for Mark Jones was 7 years’ custody, the appropriate starting point for the appellant and the other co-accused was 5 years’ custody with a category range of between 3 – 7 years.
15. At the date of the sentencing hearing Garry Jack was 24 years of age, with one relevant previous conviction. He had been involved in the organisation for a similar period to that of the appellant. He had what were described as mental health

difficulties as a result of which he was considered to be vulnerable. He was intelligent and had asserted that he had abandoned his extremist mindset. He had attended 8 meetings of the organisation, sought to recruit others and had been involved in placing racist stickers around Aston University for which he had previously been convicted of a separate offence.

16. Alice Cutter was 23 years of age at the date of the sentencing hearing and had no previous convictions. She too had been a member of the organisation for a similar period to that of the appellant. In that period she attended one demonstration, one meeting and a few other events. She was a trusted confidant of Alex Deakin and advised on recruitment. She had no previous convictions.

17. In relation to the appellant the judge observed that,

“You are now 19 years of age and as such, the definitive terrorist guideline applies in your case. Before consideration of other factors, you would fall into culpability B, with a starting point of five years custody and a category range of between three and seven years. During the indictment period, you were aged between 15 years and 10 months and 16 years and seven months. In these circumstances, paragraph 6 of the Sentencing Children and Young People guideline applies and suggests that the appropriate starting point should be the sentence which is likely to have been imposed on the date at which the offence is committed. In circumstances where you are not a dangerous offender, the maximum sentence that could have been imposed prior to your 18th birthday would have been a two-year detention and training order. By reference to the guideline, I remind myself that it will rarely be appropriate for a more severe sentence to be imposed than the maximum which could have been imposed at the time of the offence. In deciding whether this is one of those rare cases, I must have regard to the purposes of sentencing as set out in section 142 of the Criminal Justice Act 2003. In this respect, you have been convicted of a serious terrorist offence. It was an offence which was easy to commit, and your objective was to undermine the values and security upon which our society is based. The subversive nature of this offence is such that there is an obvious and compelling need for deterrence. As against that, I need to consider the mitigation available to you over and above your age. You were not seduced into joining National Action. Instead, you sought out this group and then engaged enthusiastically with their agenda. I do, however, accept that a lack of maturity and a degree of social isolation may have played a significant role in your unquestioning loyalty to this pernicious organisation. You were certainly surrounded by older people, who you regarded as friends and looked up to. You are of good character and I am prepared to accept that prior to your arrest, your views had begun to change and that you took steps to distance yourself from extreme right-wing ideology. These features, combined with a supportive family, lead probation to assess you as at a low risk of reoffending. I accept that view. By

way of punishment you have now been remanded in custody, in very difficult conditions, for nearly three months. Prior to that, you were subject to a tagged curfew for 14 months and a non-qualifying curfew for a further four months. In my judgment, the gravity of this offence means that appropriate punishment can only be achieved by an immediate sentence of detention. I am, however, persuaded that it would be wrong to impose a sentence of more than two years. Your counsel argues that a starting point of two years should not be adopted because a change in the early release provisions mean that you will have to serve two thirds of such a term before being eligible for parole and as such, will serve a longer sentence in custody than could have arisen at the time of the offence. In effect, he submits that any sentence of over 12 months' detention would amount to a breach of the second sentence of article 7.1 of the European Convention of Human Rights. I reject that submission. The court does not concern itself with the changing effect of the early release provisions. The sentence imposed is the entire sentence and not simply the custodial element of that sentence. A sentence can be served in different ways and whether it is served in custody or in the community is irrelevant to the appropriate length of that sentence. To explain this in the language of article 7, the penalty imposed is the entire sentence, regardless of whether it is enforced in custody or on licence. I, therefore, adopt a starting point of two years. That takes account of your age and immaturity and I treat the other matters I have referred to, including your good character and changed political ideology, as mitigatory.”

Grounds of appeal

18. Mr Hillman who appears before us, together with Ms Day, as he did in the court below, seeks to advance two grounds of appeal:
 - i. That insufficient discount was afforded for the appellant’s significant mitigation, and;
 - ii. That the imposition of 18 months’ detention in a Young Offenders’ Institution was a breach of Article 7.1 of the European Convention on Human Rights and therefore a breach of section 6(1) of the Human Rights Act 1998.
19. In relation to the first ground it is pointed out that the appellant was only 15 and 16 years of age at the time of the offence and that he had no previous convictions. It is asserted that the sentencing judge accepted that the appellant had rejected his extremist ideology prior to his arrest. It is submitted that had it not been for an administrative error, the appellant’s curfew would have been electronically monitored throughout the whole period from the date of his release from police custody on 11 September 2018 until his remand in custody following his conviction on 19 March 2020, rather than only part of the period between 5 January 2019 and 19 March 2020. It is pointed out that that the author of the pre-sentence report considered that the appellant had matured since the offence and therefore posed a low risk of re-conviction. Moreover, that one of the police officers who had worked with the

appellant under the Prevent scheme was of the opinion that the appellant “would be vulnerable to extremist influence in the event of him having to serve a long prison sentence.” Moreover, that any period of custody would be made more difficult in the current situation.

20. In relation to the second ground it is pointed out that as a result of section 247A of the Criminal Justice Act 2003 the appellant will have to serve 2/3 of his 18 months’ period of custody before he may be considered eligible for release by the Parole Board and will then only be released, prior to the end of the full term of 18 months, if he is considered suitable for release. In contrast, if the appellant had been sentenced for the offence, when he was still under 18 years of age, it is submitted that the only custodial sentence which would have been available to the court would have been a detention and training order, the effect of which, had the order been of 18 months duration, would have been to require the appellant to serve 9 months in youth detention and thereafter be released under supervision for the balance of the term of the order.
21. It is submitted that by reason of the principles set out in *Ghafoor* [2002] EWCA Crim 1857, as reflected in the Sentencing Council’s Definitive Guideline on Sentencing Children and Young People, to the effect that where an offender is under 18 years of age at the time of the commission of the offence but over 18 at the date of the sentence, the court should take as its starting point the sentence likely to have been imposed on the date at which the offence was committed, the sentence which ought to have been imposed upon the appellant should not have exceeded 9 months in a Young Offenders’ Institution.
22. In these circumstances it is submitted that the sentence imposed upon the appellant was not only wrong in principle but was also unlawful as comprising a breach of Article 7.1 of the European Convention on Human Rights, which requires that,

“...Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed”,

and therefore contrary to the provisions of the Human Rights Act 1998.
23. Mr Jameson QC on behalf of the respondent submits that not only was the sentence imposed upon the appellant justified on the basis of the circumstances relating to the offence and those of the appellant but that there was nothing unlawful about the sentence.
24. It is submitted that as the judge imposed a period of custody upon the appellant which did not exceed the maximum to which he was liable at the time of the commission of the offence, namely a Detention and Training order of 2 years’ duration, this accorded with the principles set out in *Ghafoor* and the Sentencing Guidelines on Sentencing Children and Young People.
25. Moreover, that the effect of Article 7.1 in relation to section 247A of the Criminal Justice Act 2003 has been recently considered by the Divisional Court in *Khan* [2020] EWHC 2084 (Admin) and that the court determined that the term “penalty” in Article 7.1 referred to the sentence imposed by the court and that unless there were changes to the sentence itself which effected a heavier penalty upon the offender, then the term did not encompass the sentence ameliorated by whatever provisions are then in force for early release.

26. In these circumstances it, is submitted that as section 247A only affects the provisions for early release, the sentence imposed upon the appellant was neither wrong in principle, nor manifestly excessive.
27. Before turning to consider these matters, we would like to acknowledge our gratitude to Mr Hillman, Ms Day and Mr Jameson QC for the quality of their submissions, both orally and in writing, which have enabled us to focus upon the points of significance in this case.

Discussion

28. As the Sentencing Council's Definitive Guideline in respect of Terrorism Offences applies to all offenders aged 18 and older who are sentenced on or after 27 April 2018, regardless of the date of the offence, the guideline applied to all of the accused in this case, including the appellant. Moreover, there is no challenge, nor in our judgment could there be on the evidence presented at the re-trial, as to the judge's determination in accordance with the guideline of the appropriate level of culpability of each of the accused, including the appellant.
29. Therefore, as the judge correctly observed, the appropriate starting point in the case of the appellant was one of 5 years' custody with a category range of between 3 – 7 years. However, as a result of the appellant's age at the time of the offence, namely 15 and 16, the judge appreciated that it was also necessary to have regard to the Sentencing Council's Definitive Guideline on Sentencing Children and Young People, which provides for the situation where, as here, an offender has passed a relevant watershed between the date of the commission of the offence and the date of the conviction/sentence and which reflects the principle set out in *Ghafoor*, as follows,

“6.2 In such situation the court should take, as its starting point the sentence likely to have been imposed on the date at which the offence was committed. This includes young people who attain the age of 18 between the commission and the finding of guilt of the offence but when this occurs the purpose of sentencing adult offenders has to be taken into account, which is:

- The punishment of offenders
- The reduction in crime (including reduction by deterrence)
- The reform and rehabilitation of offenders
- The protection of the public, and
- The making of reparation by offenders to persons affected by their offences

6.3 When any significant age threshold is passed it will rarely be appropriate that a more severe sentence than the maximum that the court could have imposed at the time the offence was

committed should be imposed. However, a sentence at or close to that maximum may be appropriate.”

30. In our judgment, had it not been for the issues which arise from the second ground of appeal, there could be no criticism of the judge’s decision to reflect the extent of the appellant’s culpability and harm in respect of the offence in a period of 2 years’ detention, prior to any reduction to take into account the mitigation available to the appellant in this case.
31. Thereafter, some reduction was of course necessary to take into account the appellant’s lack of previous convictions, together with the judge’s view that the appellant’s extremist views had begun to change prior to his arrest and the fact that he had taken some steps to distance himself from them. Albeit that bearing in mind his conviction, we are sceptical of the appellant’s assertion in the pre-sentence report that he had begun to lose interest in the organisation prior to its proscription and, in this regard, we note that the police officer responsible for the Prevent programme stated that the appellant had declined assistance in August 2017.
32. We have seen the documentation relating to the availability of electronic monitoring where an accused is resident at more than one address and it is unfortunate that this was not appreciated at the commencement of the period of the appellant’s release on bail. As a result, a period of 4 months elapsed before the appellant was made the subject of electronic monitoring, which would otherwise have provided an additional 2 month period to be deducted from the sentence under section 240A of the Criminal Justice Act 2003 (“the 2003 Act”).
33. We are also of course cognisant of the increased difficulties faced by all offenders, including the appellant, who serve custodial sentences in the current situation, as reflected by the observations of the LCJ in *Manning* [2020] EWCA Crim 592, together with the assessment by the author of the pre-sentence report that the appellant posed a low risk of reoffending and the opinion of the police officer responsible for the Prevent programme as to the risks associated with a long period of incarceration.
34. However, it is clear from the sentencing remarks that the judge had taken all of these factors into account and in our judgment, his reduction from the 2 year starting point to one of 18 months’ custody, appropriately reflected these various factors of mitigation. Moreover, we are also of the view that, as explained by the judge and in accordance with the Sentencing Council’s Guideline on the Imposition of Community and Custodial Sentences, the nature and extent of the offending in this case was such that appropriate punishment could only be achieved by a sentence of immediate custody.
35. If matters rested there, then as we have indicated there could be no criticism of the sentence imposed upon the appellant. However, as we shall endeavour to explain, that is not our ultimate conclusion in this case and it is now necessary to consider in a little more detail the effect of section 247A of the 2003 Act.
36. Section 247A of the 2003 Act, was inserted by way of amendment by section 1(2) of the Terrorist Offenders (Restriction of Early Release) Act 2020, as from 26 February

2020, and provides for restricted eligibility for release on licence of terrorist prisoners as follows:

“(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.

(2) An offence is within this subsection (whether it was committed before or after this section comes into force) if—

(a) it is specified in Part 1 of Schedule 19ZA (offences under counter-terrorism legislation),

(b) it is specified in Part 2 of that Schedule and was determined by the court to have had a terrorist connection under section 30 or (in the case of a person sentenced in Scotland but now subject to the provisions of this Chapter) section 31 of the Counter-Terrorism Act 2008 (sentences for certain offences with a terrorist connection), or

(c) it is a service offence as respects which the corresponding civil offence is an offence specified in Part 2 of that Schedule and was determined by the service court to have had a terrorist connection under section 32 of that Act (sentences for certain offences with a terrorist connection: armed forces).

(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.

(4) It is the duty of the Secretary of State to release a terrorist prisoner on licence as soon as—

(a) the prisoner has served the requisite custodial period, and

(b) the Board has directed the release of the prisoner under this section.

(5) The Board must not give a direction under subsection (4) unless—

(a) the Secretary of State has referred the terrorist prisoner's case to the Board, and

(b) the Board is satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined.

(6) Subsection (7) applies where the terrorist prisoner is serving a sentence imposed under section 226A, 226B, 227, 228 or 236A.

(7) It is the duty of the Secretary of State to release the terrorist prisoner on licence under this section as soon as the prisoner has served the appropriate custodial term (see sections 255B and 255C for provision about the re-release of a person who has been recalled under section 254).

(8) For the purposes of this section—

“the appropriate custodial term”, in relation to a sentence imposed under section 226A, 226B, 227, 228 or 236A, means the term determined as such by the court under that provision;

“the requisite custodial period” means—

(a) in relation to a person serving one sentence imposed under section 226A, 226B, 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, and

(c) in relation to a person serving two or more concurrent or consecutive sentences, the period determined under sections 263(2) and 264(2);

“service offence”, “corresponding civil offence” and “service court” have the same meanings as in the Counter-Terrorism Act 2008 (see section 95 of that Act).

(9) For the purposes of this section, a reference of a terrorist prisoner's case to the Board disposed of before the day on which this section comes into force is to be treated as if it was made (and disposed of) under subsection (3) if—

(a) it was made under section 244A(2)(b) and disposed of at a time when the prisoner had served the requisite custodial sentence (within the meaning of this section, not section 244A), or

(b) it was made under section 246A(4).

(10) Nothing in this section affects the duty of the Secretary of State to release a person whose release has been directed by the Board before this section comes into force.

(11) This section is subject to paragraphs 5, 17 and 19 of Schedule 20B (transitional cases).”

37. In general terms the effect of this provision is that where an individual is a “terrorist prisoner” and has not been released on licence, then instead of being automatically released at the half way point of the custodial term, as provided for by section 244(1) of the 2003 Act, the individual will have to serve 2/3rds of the custodial term and then only be released if he is considered suitable for release by the Parole Board or, if not released earlier, when the individual has reached the end of the custodial term. It is of note that these provisions apply to a terrorist prisoner regardless of the date when the individual was sentenced and therefore have retrospective effect.
38. It is common ground between the parties that section 247A applies to the appellant, as not only is the offence of which he was convicted an offence listed in Part 1 of Schedule 19ZA of the 2003 Act, but the sentence of 18 months Detention in a Young Offenders’ Institution is a fixed-term sentence.
39. There was at one point a dispute between the parties as to whether, had the appellant still been under 18 years of age at the time of his conviction and therefore sentenced to a Detention and Training Order, (a sentence under section 91 of the Powers of the Criminal Courts (Sentencing) Act 2000 being unavailable as the offence of which the appellant was convicted carried a maximum penalty of 10 years’ custody), section 247A would have applied to him.
40. On behalf of the respondent it was originally submitted that section 247A(8)(b) is couched in very wide terms and includes an individual who has been convicted of an offence within section 247A(2) and is sentenced to a Detention and Training Order. On the other hand, it was submitted on behalf of the appellant that it is clear from section 247A(1)(a) that the section only applies to those individuals who are serving a fixed-term sentence and that a Detention and Training Order is not such a sentence.
41. In support of the latter submission it is pointed out that section 237(1) of the 2003 Act provides a definition of what comprises a “fixed-term sentence”, which does not include someone who is subject to a Detention and Training Order,

“Section 237 Meaning of “fixed-term prisoner” etc

(1) In this Chapter “fixed-term prisoner” means—

(a) a person serving a sentence of imprisonment for a determinate term, or

(b) a person serving a determinate sentence of detention under section 91 or 96 of the Sentencing Act or under section 226A, 226B, 227, 228 or 236A of this Act.

and “fixed-term sentence” means a sentence falling within paragraph (a) or (b).”

42. Moreover, that section 101(12A) of the Powers of the Criminal Courts (Sentencing) Act 2000 contrasts a fixed-term prisoner with an individual who is subject to a Detention and Training Order.

“Section 101(12A) Section 243 of the Criminal Justice Act 2003 (persons extradited to the United Kingdom) applies in relation to a person sentenced to a detention and training order as it applies in relation to a fixed-term prisoner, with the reference in subsection (2A) of that section to section 240ZA being read as a reference to subsection (8) above.”

43. In our judgment, and as the respondent now concedes, section 247A does not apply to an individual who is subject to a Detention and Training Order, as the latter is not a fixed-term sentence under section 237(1) of the 2003 Act.

44. Indeed, in our judgment and for the same reason, neither has the early release regime provided for by section 244 of the 2003 Act applied at any stage to an individual subject to a Detention and Training Order.

45. Some resonance for the conclusion that section 247A does not apply to an individual who is subject to a Detention and Training Order can be gleaned from the Explanatory Note to the Terrorist Offenders (Restriction of Early Release) Act 2020, which whilst including within the ambit of the provisions,

“terrorist offenders aged under 18 who have been, or in the future will be, sentenced under section 91 of the Powers of the Criminal Courts Sentencing Act 2000 (which is a fixed term sentence and applies to offences where an adult over 21 could receive a sentence of 14 years or more...”,

makes no mention of other offenders within England and Wales who are under 18 years of age.

46. Moreover, it appears to us that the exclusion of individuals sentenced to a Detention and Training Order from the provisions of section 247A accords with the specific statutory regime under which such orders are imposed namely sections 101 to 107 of the Powers of Criminal Courts (Sentencing) Act 2000, which provides at section 101(3) that,

“101(3)A detention and training order is an order that the offender in respect of whom it is made shall be subject, for the term specified in the order, to a period of detention and training followed by a period of supervision.”

And at section 102(2) that,

“Subject to subsections (3) to (5) below, the period of detention and training under a detention and training order shall be one-half of the term of the order.”

Whilst section 102(3) to (5) provide for early release by the Secretary of State.

47. It is apparent therefore that Detention and Training Orders, being sentences imposed on offenders under 18 years of age, are different in nature from other custodial sentences and are subject to their own early release provisions, rather than the early release provisions of either section 244 or section 247A of the 2003 Act
48. The effect of this is that although when a Detention and Training Order is imposed it is specified to be for one of the terms set out in section 101(1), namely 4, 6, 8, 10, 12, 18 or 24 months, it is clear that the maximum custodial element, described as the period of detention and training, is one half of the specified term, with the remaining period being one where the offender is subject to supervision pursuant to section 103(1), albeit subject to breach proceedings under section 104.
49. In these circumstances, absent successful breach proceedings, the maximum period which an offender subject to a Detention and Training Order will spend in youth detention will be 12 months if the order was specified to be one of 2 years' duration, or where the specified term is one of 18 months' duration, then the maximum period which the offender will spend in youth detention will be 9 months.
50. In the light of these matters it seems to us to be necessary to look at the situation which this court was dealing with in *Ghafoor* in more detail, because of course in that case, like the judge in the present case, the court reflected the principle that the starting point for an offender who crosses a relevant age threshold between the date of the commission of the offence and the date of conviction is the sentence likely to have been imposed on the date when the offence was committed, by substituting a period of 18 months' detention in a Young Offenders' Institution in respect of an offender whom the court considered would have been made the subject of a Detention and Training Order of 18 months' duration had he been convicted and sentenced when he was under 18 years of age.
51. In this regard, it is important to appreciate that at the time when *Ghafoor* was decided, and in the case of short-term prisoners, i.e. those serving a term of less than 4 years, sections 33(1) and 43 of the Criminal Justice Act 1991 provided for their automatic release after the offender had served one half of their sentence. Therefore the effect of the substitution of an 18 month period of detention in a Young Offenders' Institution upon the over 18 year old offender in *Ghafoor*, meant that he would be released automatically after serving one half of that period, just as he would had he been convicted and sentenced as an under 18 year old who had been made the subject of a Detention and Training Order of 18 months' duration.
52. By way of contrast in the present case, as a result of the application of section 247A of the 2003 Act, not only has the appellant not been released after serving one half of the period of 18 months' detention in a Young Offenders' Institution, (as previously would have been the situation either under sections 33(1) and 43 of the Criminal Justice Act 1991 or more recently under section 244(1) of the 2003 Act), but as we understand it the appellant's application for parole has been considered and refused by the Parole Board such that he is likely to remain in detention for the full 18 months' term.
53. If the appellant had been over 18 when he committed the offence then this issue would not have arisen, as not only would the principle in *Ghafoor* not have applied, but it is clear from *Khan* [2020] EWCA Crim 2084 that the effect of section 247A would not have rendered any period in custody beyond the half-way point unlawful for the reasons explained in that case, namely that in the context of Article 7 ECHR,

“...the changes wrought by the 2020 Act were changes in the arrangements for early release; they were not changes to the sentence imposed by the sentencing judge. In the absence of fundamental change of the sort described in *Del Rio Prada*, a redefinition of the penalty itself, the principle is clear; an amendment by the legislature to the arrangements for early release raise no issue under Article 7. A change to those arrangements does not amount to the imposition of a heavier penalty than that applicable at the time the offence was committed....”

54. However, as we have reached the conclusion that section 247A does not apply to those aged under 18 who are made the subject of a Detention and Training Order, we consider that in order to give proper effect to the principle in *Ghafoor* and the Sentencing Guideline on Sentencing Children and Young People, it is necessary to have regard to the period which the appellant would have been detained whilst undergoing detention and training before being released on supervision, which in the present case would have been a period of 9 months, based upon the judge’s determination of an order of 18 months’ duration.

55. At this juncture, the respondent submits that the language used in *Ghafoor* and for that matter the Sentencing Guideline on Sentencing Children and Young People affords some elasticity and that neither dictate that the sentence imposed on the adult who has committed an offence whilst under 18 should be an identical mirror image of the equivalent sentence which would have been imposed upon him if he had still been aged under 18. Moreover, it is pointed out that the judge took as his starting point a period of 2 years, but could, it is submitted, have taken a higher starting point given the gravity of the case.

56. Although we accept that the language used both in *Ghafoor* and in the sentencing guideline appropriately allows for some degree of flexibility of approach depending upon the particular circumstances faced by the sentencing court, as Dyson LJ (as he then was) observed at [31] and [32],

“31. The approach to be adopted where a defendant crosses a relevant age threshold between the date of the commission of the offence and the date of conviction should now be clear. The starting point is the sentence that the defendant would have been likely to receive if he had been sentenced at the date of the commission of the offence.....”

32. So the sentence that would have been passed at the date of the commission of the offence is a “powerful factor”. It is the starting point, and other factors may have to be considered. But in our judgment, there have to be good reasons for departing from the starting point. An examination of the authorities to which we have been referred shows that, although the court has looked at other factors to see whether there should be a departure from the starting point, it is not obvious that there has in fact been a departure in any of them. This serves to demonstrate how powerful a factor the starting point is. That is because justice requires there to be good reason to pass a sentence higher than

would have been passed at the date of the commission of the offence.”

57. In our judgment, applying this principle, which understandably focuses upon the period of custody or detention, to the circumstances of the present case, as it is apparent that the appellant is not going to be subject to early release under section 247A, we consider that the appropriate term of detention in a Young Offenders’ Institution is one of 9 months.

Conclusion

58. As we have already observed, had it not been for the issues which arise from the application of section 247A of the 2003 Act, there could have been no criticism of the sentence imposed upon the appellant. Moreover, as we consider that there has been more focus by the parties upon these issues before us, than took place in the lower court, we can understand the approach that was taken by the judge in this case. However, for the reasons we have endeavoured to explain, we are of the view that in the particular circumstances of this case and in order to have proper regard to the principle in *Ghafoor* as reflected in the Sentencing Guideline for Sentencing Children and Young People, the sentence imposed by the lower court should be quashed and a sentence of 9 months’ detention in a Young Offenders’ Institution substituted; to that extent the appeal is allowed. We would only add that as in *Ghafoor*, we too have not found it necessary to consider the impact of Article 7 ECHR, as the appellant would be placed in no more advantageous position than that in which he finds himself as a result of the application of the principle in that case and the relevant sentencing guidelines.