

## **S.236A CJA 2003 – Offenders of Particular Concern**

### ▪ **Fruen & DS [2016] EWCA Crim 561**

The court considered the new form of custodial sentence under s.236A CJA 2003, described in the legislation as a “Special custodial sentence for certain offenders of particular concern.” The purpose of the new legislation was to ensure that such persons were subject to licence for a period after release even though they had not been found to be “dangerous” by the sentencing judge.

The section came into force on 13<sup>th</sup> April 2015, and applies to anyone sentenced on or after that date, irrespective of whether the offence was committed before or after that date.

S.236A applies to someone (sub-section (1)):

- (a) convicted of an offence listed in Schedule 18A to the CJA 2003; and
- (b) who was aged 18 or over when the offence was committed; and
- (c) the court does not impose a sentence of life imprisonment or an extended sentence under s.226A.

If the above conditions in sub-section (1) apply, the date of sentence was on or after 13<sup>th</sup> April 2015, and the court imposes a standard determinate sentence of imprisonment (or detention in a YOI) for the offence, then sub-section (2) requires the court to impose a sentence of imprisonment equal to the aggregate of:-

- (a) the appropriate custodial term; and
- (b) a further period of 1 year for which the offender is to be subject to a licence.

The aggregate of the custodial term and further period of 1 year must not exceed the maximum term permitted for the offence (sub-section (4)).

Schedule 18A contains four types of offence [*see Archbold 5-536*]:-

- i) Certain terrorism offences;
- ii) Sexual offences under Sections 5 or 6 of the Sexual Offences Act 2003;
- iii) Accessories and inchoate offences;
- iv) Abolished offences, defined as an offence that:-
  - a. Was abolished before the coming into force of Section 236A; and
  - b. If committed on the day on which the offender was convicted of the offence, would have constituted an offence specified in the preceding paragraphs of this Schedule.

Therefore historic sexual offences charged under the Sexual Offences Act 1956 which are the equivalent of an offence pursuant to Section 5 or 6 of the SOA 2003 by involving penetration of the victim will be caught by these provisions if the other above criteria are met. The most common offences under the 1956 Act to be caught by these provisions are rape (s.1), sexual intercourse with a girl under 13 (s.5),

buggery (s.12), indecent assault on a female (s.14), and indecent assault on a male (s.15), although there may well be others.

Where an historical offence does not plead the fact of penetration in the particulars of the indictment, there must either have been an admission of penetration by the defendant or a finding by the judge that penetration had taken place in order for the offence to be the equivalent of Section 5 or 6 SOA 2003.

The court also considered s.244A which governed the release on licence of prisoners serving a sentence under s.236A. Unlike prisoners serving a standard determinate term, s.236A prisoners are not automatically released at the halfway stage. They cannot be released until the Parole Board is satisfied that it is not necessary for the protection of the public that the offender should be detained. If the Parole Board does not direct a s.236A prisoner's release during the period of the appropriate custodial term, the prisoner must be released at the end of that term (and would still then be subject to the further 1 year licence period).

Section 236A does not prevent a court from passing a non-custodial sentence such as a community order for a Schedule 18A offence in exceptional cases. However, whilst there appeared to be no barrier to a s.236A sentence being suspended, the practical complications of suspending such a sentence made it wholly undesirable and courts should therefore not suspend a sentence of imprisonment under s.236A.

There was in principle no reason why a court should not be permitted to impose consecutive s.236A sentences if considered appropriate. A sentence under s.236A was a single indivisible sentence comprising a custodial term and an extension period, and all of it must be imposed concurrently or consecutively. It was not possible for one element of the sentence (the custodial term) to run consecutively whilst the other element (licence period) runs concurrently. This principle is the same as for extended sentences under s.226A, and the language of the two legislative provisions is almost identical. As a result the court concluded that where consecutive s.236A sentences are imposed, consecutive further periods of licence must follow. Judges would need to give careful consideration to the structuring of their sentences which might impact on the length of the total further licence period, although lengthy further periods of licence would probably not arise in many cases, as appropriate cases are likely to engage the extended licence provisions under s.226A rather than s.236A.

The following 'checklist' was set out by the Court at paragraph 27:-

- a) Is the offence listed in schedule 18A?
- b) If the offence is a repealed historic sexual offence, did it involve rape or penetration of a child under 13?
- c) Was the offender aged 18 or over when the offence was committed?
- d) Section 236A cannot apply if the court imposes life or an extended sentence for the offence or an associated offence.
- e) A sentence is to be expressed as a single term comprising the custodial element and a further one year period of licence.

- f) Each offence qualifying for section 236A must be sentenced in the terms set out at e) above.
- g) Are the section 236A sentences to run concurrently or consecutively to one another? If concurrently, the overall custodial term for those offences plus 1 year further period of licence should be stated at the end of sentencing.
- h) If consecutively, the total custodial term for those offences as well as the total further period of licence should be stated at the end of sentencing.

**Criminal Appeal Office\***  
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