



Crossing the age threshold into adulthood during COVID-19

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The Basics

- The key date is the date of conviction when deciding whether youth sentencing powers or adult sentencing powers apply
- The culpability should be assessed as at the age of the commission of the offence
- The date of sentence is not the relevant factor
- Whether you're a youth or an adult at the time of conviction can make a significant difference to:
 - When a conviction becomes spent and future DBS checks
 - Sex offenders' register
 - Your release date in the event you end up subject to the new rules preventing release at the halfway point and have attracted a more severe sentence as an adult
- The starting point where crime committed as a youth but convicted as an adult is the sentence you would have received at the time
- The Court of Appeal have been a lot more sympathetic to those who have just turned 18 and young offenders
- 18 is no longer a cliff-edge
- The sentencing guidelines for children and young people can and should be used for young adults aged 18 or over



What should you be looking out for during COVID-19

Offenders RUI and on Police Bail:

- Review your youth cases RUI and on police bail
- Are any approaching 18
- Have in mind the date they turn 18 and whether anything can be done to accelerate the process
- Which cases might this make a huge difference to:
 - Consider sexual offences and the register requirements if an adult by the time of conviction
 - Consider where your client would be eligible for a compulsory referral order rather than likely prison if an adult at conviction



What should you be looking out for during COVID-19

Offenders who have already been charged

- Review your Youth Court and Crown Court cases
- Have the police requisitioned your client with 27 days to go before their 18th birthday with a first appearance the day after their 18th birthday:
 - If they want to plead guilty try and get the first appearance moved forward
- Which other clients are approaching 18 years old with hearings adjourned off into the future:
 - Are any susceptible to resolution before they turn 18
 - Make sure clients have been advised as to the differences between being convicted as a child and an adult
- Which cases might this make a huge difference to?



Spent and Unspent Convictions – The Difference

Sentence	Adult (18+) when convicted: Becomes Spent	Youth (under 18) when convicted: Becomes Spent	Notes
Prison (Over 4 years)	Never	Never	
Prison (More than 30 months and up to 4 years)	Sentence + 7 years	Sentence + 3.5 years	From day on which sentence including licence period ends
Prison (More than 6 months and up to 30 months) or DTO 6+ - 24	Sentence + 4 years	Sentence + 2 years	From day on which sentence including licence period ends
Prison or DTO (up to 6 months)	Sentence + 2 years	Sentence + 18 months	From day on which sentence including licence period ends
Community order / YRO	12 months	6 months	From end of order
Fine	1 year	6 months	From date of conviction
Referral order	N/A	End of the order	
Conditional discharge	At end of order	At end of order	No difference
Caution and Absolute Discharge	Immediately	Immediately	No difference
Conditional Caution	Once conditions are met	Once conditions are met	No difference



Sexual Offenders' Notification Requirements – The Difference

Sentence	Adult (18+) when convicted: Notification Requirements	Youth (under 18) when convicted: Notification Requirements	Notes
Prison (More than 30 months)	Indefinitely	Indefinitely	
Prison (More than 6 months and up to 30 months) or DTO 6+ to 24	10 years	5 years	NB for extended sentences it is the whole term
Prison or DTO (up to 6 months)	7 years	3.5 years	
Community order / YRO	5 years	2.5 years	NB certain offences have additional requirements to qualify
Fine	5 years	2.5 years	As above
Simple Caution	2 years	1 year	As above
Referral order	N/A	2.5 years	As above
Hospital Order (with restrictions)	7 years (Indefinitely)	3.5 years (Indefinitely)	



WHAT DO YOU NEED TO BACK IT UP?



Date of commission of offence not the critical feature

Uxbridge Youth Court, ex parte. H (1998) 162 J.P. 327

Where a defendant turns 18 before his first appearance, the youth court has no jurisdiction to deal with the case



Date of conviction is the important feature

R v Obasi [2014] EWCA Crim 581

- Date of the conviction determines whether you're an adult or child for sentence
- Date of the commission of the offence determines how your culpability should be assessed
- “... with respect to an offender who has crossed a relevant age threshold between the date of the offence and the date of conviction culpability is generally to be judged by reference to the offender's age at the time of committing the offence...” (para 6)



UNDER 18 AT COMMISSION AND OVER 18 AT CONVICTION



Starting Point – What defendant would have received at time of commission

R v Ghafoor (Imran Hussain) [2002] EWCA Crim 1857

- Where an offender commits an offence before he is 18 but is 18 when he is convicted, the starting point for consideration of the appropriate sentence is *the sentence he would have been likely to receive if he had been sentenced at the date of the commission of the offence*.
- This approach can only be departed from with good reason.
- The court considered the statutory maxima for youths (namely 24 months' DTO) but reinforced that it was the *starting point* that would need justification to be departed from and not the maximum (see paragraphs 31 to 33).
- Few months between commission and conviction in this case



Ghafoor cited in Youth Sentencing Guidelines

“6.1 There will be occasions when an increase in the age of a child or young person will result in the maximum sentence on the date of the finding of guilt being greater than that available on the date on which the offence was committed (primarily turning 12, 15 or 18 years old).

6.2 In such situations 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 the finding of guilt of the offence (Ghafoor) but when this occurs the purpose of sentencing adult offenders (section 142 CJA 2003) has to be taken into account, which is:

- the punishment of offenders;*
- the reduction of crime (including its 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.”*



Ghafoor remains good authority

R v Keffa (Kennedy), R v Delpratt (Callam Jay) [2015] EWCA Crim 436

- Applied *Ghafoor* by confirming:

“... There was clear authority that when a defendant passed a qualifying age since the date of the offence, the judge would seldom need to consider a sentence higher than that which could have been passed on the date of offence, R. v Ghafoor (Imran Hussain) [2002] EWCA Crim 1857, [2003] 1 Cr. App. R. (S.) 84 applied....”



Ghafoor remains good authority

***R v Egege* [2017] EWCA Crim 2161**

- Egege was 17 at the time of commission of the offence
- Aged 19 at conviction and 20 at sentence
- Sentence reduced from 30 months to 20 months
- Insufficient regard had to his age at commission
- *Ghafoor* applied



Ghafoor remains good authority

***R v Amin* [[2019] EWCA Crim 1583; [2020] 1 Cr. App. R. (S.) 36**

- Amin was 17 at the time of commission of the offence
- Aged 18 at conviction and sentence
- Judge had failed to consider maximum sentence had he been convicted at time of commission of offence namely 24 months' DTO
- Judge had failed to consider line of *Ghafoor* authority
- Sentence reduced from 4 years' to 24 months' detention
- *Ghafoor* applied (see paragraphs 14 to 20)



Although historic offences are treated differently,
young offenders still fall within Ghafoor

Att.-Gen.'s Reference (O); O [2018] EWCA Crim 2286; [2019] Crim. L.R. 353,

- Defendant committed sexual offences when aged 15
- Convicted aged 19
- Correct approach was to sentence him by reference to the sentence he would have received at the time of the offence, rather than to adopt the approach used in historic cases



What about other age thresholds?

***R v LM* [2002] EWCA Crim 3047; [2003] 2 Cr. App. R.(S.) 26**

- Defendant 14 at time of offence and not persistent offender
- Aged 15 at conviction
- Applying *Ghafoor*, it was inappropriate to impose a DTO where the defendant being convicted after his 15th birthday was not within his control
- Starting point was therefore of the sentence that would have been available at the date of the offence.



OVER 18 AT COMMISSION OF OFFENCE



How the Court should approach young offenders

R v D [2019] 10 WLUK 433

The Court, should:

1. Determine the appropriate, final sentence that an adult would have received
2. Take into account aggravating and mitigating factors
3. Then, apply the further reduction in sentence based on the offender's age, as required by the youth sentencing guidelines



Chronological age or maturity?

R v Peters; Palmer; Campbell [2005] EWCA Crim 605; [2005] 2 Cr. App. R.(S.) 101

- Although eighteenth and twenty-first birthdays represent significant moments in the life of an individual, they are not necessarily indicative of the individual's true level of maturity, insight and understanding; that such characteristics are not postponed or suddenly accelerated by those birthdays;
- The first stage in the process is to select the prescribed statutory starting point; then to allow, where the offender's age, as it affects his culpability and the seriousness of the crime justifies it, a **substantial discount** from the starting point.
- There is no mathematical scale, but one way in which a judge may check that the discount is proportionate would be to consider it in the context of the overall statutory framework, as if Sch.21 envisaged a flexible starting point for offenders between 18 and 21 years old; that has the advantage of linking the mitigation which would normally arise from the offender's relative youth with the statutory provisions which apply to an offender a year or two older, or younger, and would contribute to a desirable level of sentencing consistency.



Turning 18 is not a cliff-edge for sentencing

R v Clark [2018] EWCA Crim 185; [2018] 1 Cr App R(S) 52

- Turning 18 is not a cliff-edge for the purpose of sentencing
- Even where defendants are young adults (up to 25 as this is when the brain, on average, stops developing) youth and maturity are strong mitigating features
- Experience of science is that young people continue to mature, albeit at different rates for some time beyond their 18th birthdays (para 5)
- Youth and immaturity can be “potent factors” (para 39)



Youth Sentencing Guideline even for adults offenders

R v Balogun [2018] EWCA EWCA Crim 2933

- The Sentencing Guideline for children and young people should be considered even where dealing with someone who is 18 or over
- A young adult does not become invested overnight with all of the understanding and self-control of a fully mature adult (paras 37 and 41)



R v Clark being applied in in practice

***R v Daniels* [2019] EWCA Crim 296**

When considering the correct approach to sentencing a 20 year old man for causing death by dangerous driving, in relation to whom there was evidence of particular immaturity, the Court observed:

“32 The absence of a "cliff edge" (as referred to in Clark) is an important factor when sentencing those over 18 years of age but who are not fully mature. The guideline to which we have just referred does not apply in such cases, but the factors quoted from paragraph 1.5 can weigh in considering the appropriate sentence in cases involving young adults who are not fully mature. No doubt science will in time tell us more about the development of the young adult brain and its impact on behaviour. But there will be cases – and this, in our view, is one of them – where there is material available to the sentencing court which speaks about the maturity and developmental reality of the offender in question”



Sentencing Young Adults

<https://howardleague.org/wp-content/uploads/2019/01/Sentencing-Young-Adults.pdf>

- Howard League are arguing for the introduction of a sentencing guideline for young adults
- Research shows the sentencing process, as it stands, does not sufficiently factor in the lessons from neuroscience, psychology and criminology concerning the development of young adult
- The neurological and psychological evidence that development of the frontal lobes of the brain does not cease until around 25 years old is particularly compelling. It is this area of the brain which helps to regulate decision-making and the control of impulses that underpin criminal behaviour
- In terms of brain physiology, susceptibility to peer pressure appears to continue until at least the mid-twenties, and the brain continues to mature in this period



Sentencing Guidelines for Children and Young People

Para 1.5 is of particular significance and assistance:

“It is important to bear in mind any factors that may diminish the culpability of a child or young person. Children and young people are not fully developed and they have not attained full maturity. As such, this can impact on their decision making and risk-taking behaviour. It is important to consider the extent to which the child or young person has been acting impulsively and whether their conduct has been affected by inexperience, emotional volatility or negative influences.

They may not fully appreciate the effect their actions can have on other people and may not be capable of fully understanding the distress and pain they cause to the victims of their crimes. Children and young people are also likely to be susceptible to peer pressure and other external influences and changes taking place during adolescence can lead to experimentation, resulting in criminal behaviour. When considering a child or young person’s age their emotional and developmental age is of at least equal importance to their chronological age (if not greater).”



Sentencing Guidelines for Children and Young People

Para 1.8 states:

“The impact of punishment is likely to be felt more heavily by a child or young person in comparison to an adult as any sentence will seem longer due to their young age.”



Sentencing during COVID-19 – What can be done?

A-G Ref (Manning) [2020] EWCA Crim 592

“The current conditions in prisons represent a factor which can properly be taken into account in deciding whether to suspend a sentence. In accordance with established principles, any court will take into account the likely impact of a custodial sentence upon an offender and, where appropriate, upon others as well. Judges and magistrates can, therefore, and in our judgment should, keep in mind that the impact of a custodial sentence is likely to be heavier during the current emergency than it would otherwise be. Those in custody are, for example, confined to their cells for much longer periods than would otherwise be the case – currently, 23 hours a day. They are unable to receive visits. Both they and their families are likely to be anxious about the risk of the transmission of Covid-19.” (para 41)

“Applying ordinary principles, where a court is satisfied that a custodial sentence must be imposed, the likely impact of that sentence continues to be relevant to the further decisions as to its necessary length and whether it can be suspended. Moreover, sentencers can and should also bear in mind the Reduction in Sentence Guideline. That makes clear that a guilty plea may result in a different type of sentence or enable a Magistrates' Court to retain jurisdiction, rather than committing for sentence.” (para 42)



Interaction between new sentencing release provisions and age thresholds

As of 1st April 2020, defendants sentenced to imprisonment for a period of 7 years or more will be released at the 2/3 point of their sentence if:

- They have been convicted of a violent offence carrying a maximum sentence of life imprisonment
- Makes being aware of crossing age thresholds all the more important
- This includes:
 - Manslaughter
 - Rape
 - Section 18 GBH



Q & A

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Thank you

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