

This article serves as an addendum to my previous piece on the Release of Prisoners (Alteration of Relevant Proportion of Sentence) Order 2019 ('The Order'). This addendum will deal specifically with the issue of 'Offenders of Particular Concern' under s236A of the Criminal Justice Act 2003 ('CJA 2003'). Offenders sentenced under this section are not subject to the provisions of The Order. This article will explain what criteria must be met for an offender to be sentenced under s236A, the purpose of such a sentence and the potential interaction between s236A sentences and sentences under The Order.

Offenders of Particular Concern: What are they?

This section was added by virtue of The Criminal Justice and Courts Act 2015. For an offender to be sentenced as one 'of particular concern', the following conditions have to be met:

1. The offender must be over 18 years of age when **the offence was committed**
2. The offender must have been convicted of an offence listed within schedule 18A CJA 2003
3. The sentencing judge must not have imposed a sentence of life imprisonment or an extended sentence under s226A.

If the conditions are satisfied, the court **must** pass a sentence under s236A.

The offences contained within Schedule 18A include a number of terrorism (and terror-associated) offences. Also contained within schedule 18A are certain child sex offences. A full list can be found here (<http://www.legislation.gov.uk/ukpga/2003/44/schedule/18a>) or Archbold 2020 5A-647.

The sentence for such an offender takes the form of an appropriate custodial term (to be determined by the court) and then a further 12-month license period. The offender will be released at the end of the custodial term or at a point before that if the Parole Board believes that detention is no longer necessary for the protection of the public. This means that an offender will not be released automatically at the 'halfway point' as they would have been if sentenced to a standard prison sentence.

Offences within schedule 18A are often missed by counsel and the court. If a standard prison sentence is passed in error, it can be remedied by way of the 'slip rule' if necessary. Prosecuting counsel, in particular, should be alive to the possibility of a sentence of this kind, as it is their duty to ensure that the court is fully aware of its sentencing powers.

NB: An extended sentence under s226A and a sentence under s236A cannot be passed for the same offender on the same occasion in respect of separate offences.

However, two sentences under s236A can be sentenced consecutively to each other, with the extra license periods also running consecutively to each other.

The Purpose of s236A sentences:

The sentence for offenders of particular concern contains two distinct parts: the custodial sentence and the 12 month extended license period. The purpose of both parts of the sentence is protection of the public, although they serve that purpose in different ways. The custodial element of the sentence ensures that offenders likely remain in custody longer than if they were subject to a standard determinate sentence. Further, the fact that release is discretionary allows for greater monitoring of the offender whilst they are in prison.

The extended period of license also allows for greater monitoring while the offender is in the community. This further monitoring, including license conditions, allows more opportunity for rehabilitation. This allows for the protection of the public in the long-term.

If one goes through the kind of offences that can be found in schedule 18A, they mostly deal with explosives, terrorism and child sex matters. Understandably, offenders of this kind require monitoring in a way which is more intense than usual and should not be released into the community whilst concerns about them still exist.

The interaction between s236A and the new provisions:

Article 5 of The Order states that the provisions do not apply “in relation to a sentence imposed under section 236A of the 2003 Act”. This means that if the offender is sentenced for an offence contained within schedule 18A, which might otherwise qualify under The Order, the release provisions that would apply are those under s236A.

The logic behind this exception appears to be that a sentence under s236A is not a standard determinate prison sentence. This is due to the fact that release from custody is subject to the approval of the parole board, rather than being automatic after a period of time. If The Order were to apply, there would be an obligation to release the offender at the two-thirds point in the custodial sentence, nullifying the effect of s236A.

When it comes to multiple offences sentenced together, the position is different. The extended period served in custody under The Order applies to each individual sentence. Therefore, it is theoretically possible for an offender to be sentenced to a determinate sentence of greater than 7 years for a specified violent or sexual offence and separately for an offence contained with schedule 18A.

If the offences are to be sentenced concurrently, then the overall custodial term, plus the one year extended license period, should be stated at the end of the sentencing hearing (Archbold 2020 5A-648).

If the offences are to be sentenced consecutively, the procedure for how such a sentence should be passed is as follows:

1. The appropriate determinate sentence must be passed first.
2. Then, the appropriate custodial term under s236A must be passed to run consecutively, irrespective of which offence is the more serious offence or committed first in time.
(Archbold 2020 5A-649)

The reason why the sentence is passed in this way is because the release point, as determined by the parole board, cannot be known at the point of sentence. In theory, it is possible that the offender could serve the entirety of the s236A custodial term in custody. Thus, it would not be possible to determine the proper length of the total custodial period if the s236A sentence were passed first.

Conclusion:

Sentencing hearings involving offenders convicted of serious offences are often difficult technical exercises. Practitioners and judges alike must be alive to the possibility that an offender might have to be sentenced to a special custodial sentence under s236A as well as the interaction between different sentencing obligations.

My article covering the effects of The Release of Prisoners (Alteration of Relevant Proportion of Sentence) Order 2019 can be found here (<https://www.stiveschambers.co.uk/the-release-of-prisoners-alteration-of-relevant-proportion-of-sentence-order-2019-an-update/>).



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