



Judging Maturity

Exploring the role of maturity in the sentencing of young adults

Howard League
for **Penal Reform**

T2A
Transition to
Adulthood

Convened by:

**Barrow
Cadbury
Trust**

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The Howard League for Penal Reform is the oldest penal reform charity in the world. Its legal team specialises in working with children and young adults in and on the edge of custody, providing expert legal support and empowering young people through its valuable participation work. It campaigns, lobbies and publishes research and works towards less crime, safer communities and fewer people in prison.



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Introduction

Every young adult (18-25) is in prison because a court has decided to place him or her there. It is an active decision made by a judge. We know a lot about the difficulties that young adults face, from the high levels of self-inflicted deaths in prison to the huge increase in the likelihood of reoffending on release. Yet, in contrast to the focus on sentencing principles for children, there has been very little scrutiny of the sentencing process for young adults and how judges apply rules designed for fully formed adults to young adults. Tens of thousands of young adults appear before the courts for sentencing each year. In its recent report, the Justice Committee raised serious concerns about the sentencing process applied to young adults:

“Neither CPS investigating prosecutors nor sentencers have a sufficiently sophisticated understanding of maturity to weigh up how it may affect young adults’ culpability. In addition they do not routinely have the necessary information on which to make robust assessments about an individual’s maturity and hence take account of this in their reasoned prosecution and sentencing decisions. It is likely therefore that maturity is only considered primarily in cases where there is extreme immaturity.”

(Justice Committee, 2016a, p.33)

The Howard League for Penal Reform, founded in 1886, works to achieve less crime, safer communities and fewer people in prison. In 2002, the Howard League established a legal service for children in or at risk of being sent to prison. Individual expert legal support was aimed to help children avoid being sucked into lives of crime. But it quickly became clear that the children the Howard League was helping needed just as much help, if not more, when they became young adults. They were still as vulnerable, confused and troubled the day after their 18th birthday as the day before, but had significantly less support or understanding within the structures of the adult criminal justice system.

This research explores current themes and trends in the way the courts currently deal with young adults through an analysis of 174 senior court judgments in respect of young adults. In line with the conclusions of the Justice Select Committee, the analysis shows that better information makes for better decision making and that, at present, maturity as a factor affecting the culpability of the individual is considered infrequently and, when it is considered, the depth of understanding is variable and the impact on decision-making inconsistent.

The research considers examples of judicial decision-making tailored to the needs and experiences of young adults and the extent to which the law and guidance may be insufficient in its present form to encourage this approach. The current judicial treatment of maturity in sentencing young adults suggests that there is every reason to be optimistic that, provided with the right information and equipped with a set of sentencing principles for young adults, the courts will be able to make sentencing decisions about young adults that effectively take account of their distinct developmental stage and should lead to better outcomes for everyone.

Executive summary

A substantial and growing evidence base has found that young adults aged 18-25 are a distinct group, largely because they are still maturing. Reaching adulthood is a process, not an event, and the key markers of adulthood, such as independent living, employment and establishing relationships, happen at different times for different young people. Young adults face an increased risk of exposure to the criminal justice system compared to older adults. Contact with the criminal justice system also raises the risk of adverse outcomes for young people and increases their risk of reoffending. Although hundreds of thousands of young adults are sentenced each year, in contrast to the wealth of guidance and case law concerning the sentencing of children, there is no set of principles to guide sentencers through this process or ensure that they take a tailored approach to young adults. The sentencing process presents an opportunity to apply the wealth of expertise concerning the development of young adults to achieve better outcomes.

Senior court judgments and guidance concerning children, which acknowledge the reduced culpability of a person who is not yet fully mature, set a blueprint for an approach that could be consolidated and applied to young adults.

This research explores 174 senior court judgments with a view to capturing current judicial treatment of young adults, with a particular focus on how judges view the concept of maturity.

Key findings from the sample show:

- In almost half of all sentence appeal cases involving young adults neither age nor maturity were considered.
- The inclusion of age and/or lack of maturity in sentencing council guidance has not made a significant difference as to whether or not maturity is considered.
- Where the relevant sentencing guideline included age and/or lack of maturity, and the court considered that factor, it was more likely to result in a reduction in the sentence on appeal.

In addition, the research explored a number of references by the Attorney General in respect of sentences deemed to be unduly lenient and judgments reviewing the positive maturation of young adults who committed the offence of murder as a child. These cases illustrate that the courts are capable of taking a nuanced and thoughtful approach based on the actual development of the individual.

The research suggests that professionals need to be encouraged to bring these factors to the court's attention and sentencers need to be encouraged to consider these factors of their own will. It also indicates that guidelines can make a positive difference and empower sentencers to reduce sentences on account of lack of maturity and/or age. To bring about this change, the Sentencing Council should work towards developing formal sentencing principles for young adults, similar to the principles that are in place for children.

Young adults and sentencing: some context

DEFINING YOUNG ADULTS

Young adulthood as a distinct phase of development between childhood and adulthood is not a recent concept. The Roman poet Ovid has Pythagoras teach of a stage between childhood and adulthood when “everything is in flower, the fertile earth gay with brightly coloured blossoms, but as yet there is no sturdiness in the leaves” (Innes, 1995, p. 340). Recent evidence from neuroscience and psychology has further strengthened the case for reform in the way this group is dealt with by the law (T2A, 2015a).

There is no legal definition of what it means to be a young adult comparable to the legal definition of a child, and variation as to what precise age group falls within the term. A child is defined as a person under the age of 18 (Children Act 1989, section 105). There are some legislative provisions that apply to young adults aged 18-25, such as provisions of the Powers of Criminal Courts (Sentencing) Act 2000. The Children Act 1989 also makes provision for young people to be defined as care leavers until at least the age of 21 and beyond, provided they commence a programme of education and training before the age of 25.

The Justice Committee has recognised a growing consensus towards referring to 18-25 year olds as ‘young adults’ (Justice Committee, 2016a, p.5). For the purpose of this report, the term ‘young adult’ is used to refer to people aged 18-25 unless otherwise stated.

THE CASE FOR YOUNG ADULTS TO BE TREATED DIFFERENTLY

The growing body of evidence drawing on criminological, neurological and psychological research has led the Justice Committee to conclude that young adults’ characteristics and needs make them distinct from older adults in terms of both their needs and their outcomes (Justice Committee, 2016a, p.7).

For the purposes of informing sentencing practice, 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 underpins criminal behaviour (Blakemore et al

2006, T2A, 2012). In terms of brain physiology, the development of traits such as maturity and susceptibility to peer pressure appear to continue until at least the mid-twenties (The Royal College of Psychiatrists, 2015, paragraphs 1.1–1.3).

There is also evidence that one of the prevailing characteristics of this group is the differing rates of development within the group: maturation occurs at different rates between individuals (The Royal College of Psychiatrists, 2015, paragraph 6.2).

In its concluding report the Justice Committee accepted this evidence and strongly advocated a distinct approach for young adults:

“Research from a range of disciplines strongly supports the view that young adults are a distinct group with needs that are different both from children under 18 and adults older than 25, underpinned by the developmental maturation process that takes place in this age group. In the context of the criminal justice system this is important as young people who commit crime typically stop doing so by their mid-20s. Those who decide no longer to commit crime can have their efforts to achieve this frustrated both by their previous involvement in the criminal justice system due to the consequences of having criminal records, and limitations in achieving financial independence due to lack of access to affordable accommodation or well-paid employment as wages and benefits are typically lower for this age group.”

(Justice Committee, 2016a, paragraph 14, p.9)

*“In our view there is a strong case for a distinct approach to the treatment of young adults in the criminal justice system. Young adults are still developing neurologically up to the age of 25 and have a high prevalence of atypical brain development. These both impact on criminal behaviour and have implications for the appropriate treatment of young adults by the criminal justice system as they are more challenging to manage, harder to engage, and tend to have poorer outcomes. For young adults with neuro-disabilities maturity may be significantly hindered or delayed. **Dealing effectively with young adults while the brain is still developing is crucial for them in making successful transitions to a crime-free adulthood. They typically commit a high volume of crimes and have high rates of re-offending***

and breach, yet they are the most likely age group to stop offending as they 'grow out of crime'. Flawed interventions that do not recognise young adults' maturity can slow desistance and extend the period of involvement in the system.

(Justice Committee, 2016a, p.13)

The Government responded in January 2017 to the Justice Select Committee Inquiry on young adults. The focus of the response is on early intervention to prevent young adults entering the criminal justice system and the development of targeted and high quality community sentences. It is argued that developmental status does not need to be recognised in legislation because of the increasing role maturity plays in policy and practice (Ministry of Justice, 2017a, p.7). The Government reached the view that legislative change was not required on the basis that 'age and/or lack of maturity' is listed as a mitigating factor in the sentencing guidelines (Ministry of Justice, 2017a, p.17).

LEVELS OF YOUNG ADULT CONTACT WITH THE CRIMINAL JUSTICE SYSTEM

A disproportionate number of young adults come into contact with the criminal justice system. According to the Justice Committee, citing evidence from T2A, *"adults under the age of 25 represent ten per cent of the general population but account for 30 to 40 per cent of cases, including policing time, those supervised by probation, and prison entrants."*

(Justice Committee, 2016a, p.6).

Despite a sharp decrease in the number of young adults in prison in recent years, a significant number of young adults remain in prison (Justice Committee, 2016a, p.6). According to the Ministry of Justice, as of 31 March 2017, the total prison population was 85,513. 14,032 of these were 18-24 year olds in prison and, of these, 12,316 were sentenced (Ministry of Justice, 2017).

The negative effects of custody for young adults and the community are demonstrated by the high number of self-inflicted deaths by young adults in custody (Lord Harris, 2015) and extremely high reoffending rates. Between 2006 and 2016 there were 164 deaths of 18-24 year olds in custody; 136 of which were self-inflicted (Ministry of Justice 2017c).

Incarceration is the form of punishment most likely to result in reoffending: **75 per cent of young adults are reconvicted within two years of release** from prison (Justice Committee, 2016a, p.6). This is a striking figure when compared to the overall 12 month reoffending rates for the age group for all disposals of 29 per cent for 18-20 year olds and 26 per cent for 21-24 year olds (Ministry of Justice, 2016, p.10). Given the potential impact on life chances, there can be no doubt that sentencing is a critically important act. **By comparison, the reoffending rate over 12 months for adults leaving custody is 25%** (Ministry of Justice, 2016, p.16).

Current sentencing frameworks

The current legal framework for sentencing applies equally to all adults, including young adults. A summary of the legal framework is set out at Appendix 1.

A PRECEDENT FOR SENTENCING PRINCIPLES THAT FACTOR IN MATURITY: PRINCIPLES FOR CHILDREN

Although current sentencing principles do not formally recognise young adults as a distinct group, there is some precedent for overarching principles for specific age groups. Since 2009, the Sentencing Council has issued definitive guidance on the principles that should apply to children under the age of 18 (Sentencing Guidelines Council, 2009). Since the guideline was introduced in 2009 the number of children in custody has fallen by 70 per cent (Ministry of Justice, 2017d). A number of key Court of Appeal judgments concerning children have referred to the guidance as a sound basis for reducing sentences imposed on children. For example, in *R v. RL TR* [2011] EWCA Crim 1862 and *R v. R, S, N* [2010] EWCA Crim 2902, the Court of Appeal considered that insufficient weight had been given to the consideration of youth in accordance with the guidelines.

The second edition of the Sentencing Council guidance for children was published in 2017. It contains some powerful guidance as to the role of maturation. The guidance cautions against the criminalisation of young people (paragraph 1.4). It requires sentencers to consider how lack of maturity can impact on sentencing (Sentencing Council, 2017, paragraph 1.5):

“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. 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).”

The guidance encourages children *“to be given the opportunity to learn from their mistakes without undue penalisation or stigma, especially as a court sanction might have a significant effect on the prospects and opportunities of the child or young person and hinder their re-integration into society.”* (Sentencing Council, 2017, paragraph 1.6).

It also notes that offending by a child or young person is

“often a phase which passes fairly rapidly and so the sentence should not result in the alienation of the child or young person from society if that can be avoided.” (Sentencing Council, 2017, paragraph 1.7).

It is evident from the developing knowledge concerning young adults that these principles do not simply cease to be applicable on a child’s eighteenth birthday. Much of this guidance is clearly applicable to young adults.

There is also precedent for extending a welfare based approach into adulthood. In *R(Smith) v Secretary of State for the Home Department* [2005] UKHL 51; [2006] 1 AC 159, the House of Lords considered the progress in prison of those who have committed murder as children. The judgment affirmed the need for the punishment term to be kept under review, even into adulthood. Baroness Hale outlined that *“an important aim, some would think the most important aim, of any sentence imposed should be to promote the process of maturation, the development of a sense of responsibility, and the growth of a healthy adult personality and identity.”* (Smith, paragraph 25).

THE CURRENT SENTENCING TREATMENT OF THOSE AGED 18 TO 24

Notwithstanding the progress made in respect of understanding the development of maturity in young adults, the sentencing framework for young adults is the same as that for adults, in that beyond the age of 18 the same guidelines and principles apply irrespective of age (Ashworth, 2005). As a consequence, young adults have to rely on the extent to which they can persuade a sentencer that the fact of their age and/or immaturity is a mitigating factor.

Chronological age has long been accepted as a mitigating factor in sentencing, both in terms of being very young and also very old.

More recently, the concept of lack of maturity has been introduced into formal sentencing guidance as a mitigating factor. Far less formulaic than chronological age, maturity is a “core, developmental concept which addresses the processes through which a young person achieves the status of adulthood” (T2A, 2013, p.2). According to T2A, these developmental processes include the interactions between physical, intellectual,

neurological, emotional and social development. The most obvious way for the maturity of a person facing sentence to be assessed is by the person preparing a pre-sentence report for the court. Section 156 of the Criminal Justice Act 2003 gives courts the power (and indeed the obligation) to order a pre-sentence report prior to sentencing an offender to a custodial or community sentence.

T2A commissioned the University of Birmingham to produce a guide for probation practitioners on how to factor maturity into assessments (T2A, 2013). A new probation instruction issued in January 2016 now requires pre-sentence reports to include consideration of lack of maturity of young adults and cites T2A's 'Taking account of maturity' practice guide:

"PSRs completed on 18-24 year old offenders must include consideration of maturity. Guidance for PSR writers is available, Taking account of Maturity which can inform a maturity assessment. Where the offender has previously been known to the youth offending team, information should be obtained on previous response to supervision and also any relevant information on the offender which could include details of any previous assessments completed. The ASSET would provide background information that could inform suitability for sentencing options and a risk assessment."
(National Offender Management Service, 2016, paragraph 8.1)

The inclusion of lack of maturity as a mitigating factor in certain of the Sentencing Council's new guidelines does not require a court to assess maturity at the point of sentence. Maturity may only be considered if raised in mitigation on behalf of the young person.

The Justice Committee reported that the Magistrates Association Chair, Mr Malcolm Richardson, had conducted a straw poll with some colleagues and found that lack of maturity had not regularly been raised with them in court (Justice Committee, 2016a, p.32). The Justice Committee also reported that Mr Richardson "acknowledged that magistrates had difficulty defining maturity, even with the intervention of advocates, noting that although there was now greater awareness by magistrates of mental health needs, there was limited training of magistrates operating in the adult court on maturity, communication difficulties, or acquired brain

injury." (Justice Committee, 2016a, p.32)

Practitioners have indicated that the sentencing process would be improved by a statutory requirement to consider the lack of maturity of young adults (Justice Committee, 2016b, Q297). However, in oral evidence Dr Nathan Hughes of the University of Birmingham highlighted the potential shortcomings of lack of maturity as mitigation in existing guidelines:

"The concern is that it does not just become something that means less of a sentence than they would have got otherwise, if that sentence is not appropriate to the maturity of the young adult. It is not about seeing it as mitigation where you might take, say, a 25% reduction in the tariff but then still deliver the same adult-focused approach."

(Justice Committee, 2015a, Q28)

In its final report, the Justice Committee considered the impact of the inclusion of lack of maturity as a mitigating factor in new adult guidelines:

"The Sentencing Council assisted us in understanding the impact of the inclusion of age and/or lack of maturity in its guidelines by analysing crown court data on the operation of sentencing guidelines in 2014. The Council compared the prevalence of the mitigating factor "age and/or lack of maturity affecting responsibility" in sentencing decisions made using the Sentencing Council's guidelines and "age" for offences sentenced using its predecessors' guidelines which have not yet been re-issued. The analysis indicates that these factors have been used differently. Across all sentencing decisions for all ages, "age" was taken into account in 25% of cases and "age and/or lack of maturity" in nine percent of cases, but the proportion varied by offence type. The Council's likely explanation for this was that the latter factor was being interpreted as "age and lack of maturity". The Council also analysed how these factors were applied by age range. "Age and/or lack of maturity" was taken into account in 28% of cases of 18 to 21 year olds and six percent of 22 to 29 year olds, whereas "age" was applied in 59% of cases of 18 to 21 year olds and six percent of 22 to 29 year olds."

(Justice Committee, 2016a, p.32)

The Justice Committee concluded, in relation to the sentencing of young adults, that:

“We note that the inclusion of maturity as part of a mitigating factor may have lessened the likelihood of age being taken into account in the sentencing of young adults. The Sentencing Council should conduct further research on the impact of this factor in sentencing decisions for 18 to 25 year olds. We would encourage the Director of Public Prosecutions to evaluate the impact of the inclusion of age and maturity in the Code for Crown Prosecutors to satisfy herself that its use reflects properly the maturity of young adult suspects, which may be hidden.”

(Justice Committee, 2016a, p.59)

The Justice Committee also concluded that:

“Both age and maturity should be taken into significantly greater account within the criminal justice system. The rationale of the system for young adults should presume that up to the age of 25 young adults are typically still maturing”.

(Justice Committee, 2016a, p.58).

Calls for young adults to be treated differently in the sentencing process

The divide between children and adults in the sentencing process, presently drawn at the age of 18, does not accord with the realities of young adults' development. T2A, the Criminal Justice Alliance and the Howard League have all called for a separate sentencing regime for young adults (The Howard League for Penal Reform, 2015, Criminal Justice Alliance, 2013, T2A, 2015b). T2A has questioned whether the current system is able to adequately reflect young adults' culpability given that it requires them to face adult sentencing guidelines, whilst they continue to battle with many of the issues arising from the lack of maturity and development which are also faced by under-18s (T2A, 2009).

Lord Harris, in his landmark review of deaths in custody of those aged between 18 and 24, recommended that there be a legal recognition of the concept of maturity in sentencing:

*“There must be a legal recognition of the concept of ‘maturity’. **As well as chronological age, maturity should be a primary consideration** in making decisions relating to diversion, sentencing and, where a custodial sentence must be given, how and where a young adult (18-24) should be accommodated.”*

(Lord Harris, 2015, p.106)

The Justice Committee (2016) did not explicitly call for a separate sentencing regime for young adults but raises concerns in relation to the ability of judges to assess lack of maturity in light of the information available to them:

“We welcome the inclusion of considerations of maturity in the Crown Prosecutors’ Code and Sentencing Council guidelines. However, it is not clear what impact these efforts to reflect the maturational development of young adults have had in practice. Neither CPS investigating prosecutors nor sentencers have a sufficiently sophisticated understanding of maturity to weigh up how it may affect young adults’ culpability. In addition they do not routinely have the necessary information on which to make robust assessments about an individual’s maturity and hence take account of this in their reasoned prosecution and sentencing decisions. It is likely therefore that maturity is only considered primarily in cases where there is extreme immaturity.”

(Justice Committee, 2016a, p.33)

The joint T2A and Criminal Justice Alliance paper “Sentencing Young Adults: Getting it right” drew upon issues of maturity amongst young adults to propose a comprehensive overhaul of the sentencing system which would include training on and considerations of lack of maturity when sentencing (Criminal Justice Alliance, 2011).

Treating young adults differently: other examples

The notion that young adults should be treated differently is not unprecedented. There are a number of instances where young adults are recognised for practical and legal purposes as distinct from fully formed adults, both at home and abroad. A practical example of this is in the car rental market. A key consideration for car rental companies is the likelihood that a customer will cause damage to the rental vehicle, **it is widely accepted that young people under the age of 25 are more likely to engage in high risk activities (Romer, 2010)**. Consequently, car insurance can be more expensive for young adults and many companies will not rent cars to customers under a certain age (usually the lower limit is 21-23 years of age) or will often levy a 'young driver surcharge' on customers under 25. Similarly, there are more stringent requirements on the driving of public buses for people aged under 24 than for those 25 and over (Gov UK, 2016d).

The particular needs of some young adults are recognised by the Children (Leaving Care) Act 2000 which identified a new group of care leavers aged 18–21 known as “former relevant children”. Baroness Hale described the aim of these provisions as providing certain “older children the same sort of continuing support and guidance which children can normally expect from their own families as they move from childhood to adulthood” (*R (on the application of M) v London Borough of Hammersmith and Fulham* [2008] UKHL 14, paragraph 21).

A number of jurisdictions acknowledge the fact that young adults are still developing and as a result should not necessarily be sentenced in the same way as fully matured adults. A number of jurisdictions have specialist young adult courts and there are plans to pilot such a scheme in England and Wales (T2A, 2015b).

In the German system for example, all young adults aged 18-20 can be sentenced under either juvenile law or the adult law. Juvenile law should be applied if “a global examination of the offender’s personality and of his social environment indicates the young adult in his moral and psychological development was like a juvenile” (T2A, 2015b, p.41). Where young adults are dealt with in the adult system, lack of maturity is still seen as a mitigating factor. Nearly two-thirds of young adults are sentenced as juveniles and on the whole it

is more serious cases that are dealt with in the juvenile jurisdiction and minor, particularly traffic, offences that are dealt with in the adult system (T2A, 2015b, p.63).

This approach, which has been used in Germany since 1953, has been endorsed by the Council of Europe’s Committee of Ministers, which recommended that in view of “the extended transition to adulthood... young adults under the age of 21 to be treated in a way comparable to juveniles and be subject to the same interventions.” (T2A, 2015b, p.7).

Similarly, in 2015 the Netherlands raised its juvenile justice provisions to 23, (T2A, 2015b, p.57), while in Austria young people can be kept in juvenile custodial facilities until aged 27 (T2A, 2015b, p.62). In the United States, some young adult courts have been established modelled on the processes of drug courts or juvenile and family courts which feature intensive services and frequent contact to monitor participant progress. In some cases programmes end with a form of graduation ceremony (T2A, 2016).

In Japan, anyone under the age of 20 is treated as a juvenile and subject to a markedly different regime from adults, governed by the law applicable to children (Ryan, 2005).

Research findings

A methodological overview of the research can be found at Appendix 2.

THE SAMPLE

The final sample consisted of 174 published court judgments made up of:

- 118 sentence appeals;
- 33 Attorney General references; and
- 23 HMP minimum term reviews.

The majority of cases (152/174) occurred during the 2015/16 financial year, including all of the sentence appeals and half of the HMP reviews.

Sentence appeals – These are cases where the defendant has appealed against the sentence imposed in the Crown Court. The appeal will usually only be granted if the sentence is found to be either wrong in principle or manifestly excessive.

Attorney General references – These are cases referred to the Court of Appeal by the Attorney General where a sentence imposed in the Crown Court appears to be unduly lenient.

Minimum term reviews – These are cases where the High Court reviews the progress of a person who has been sentenced for the crime of murder committed as a child. In England and Wales any person who is convicted of murder receives a mandatory life sentence. Where the defendant was a child at the time the murder was committed, it is distinguished from an adult mandatory life sentence and referred to as “detention during Her Majesty’s pleasure” (Section 90 Powers of Criminal Court Sentencing Act 2000).

The sentence of detention at Her Majesty’s pleasure incorporates a continuing duty of review. As such, HMP detainees are entitled to a review with the possibility of a reduction in their minimum term in light of the progress made by the young person.

The sample provided a range of case-types where maturity is of central importance. These included judicial scrutiny of the appropriate sentence in the sentence appeals and the Attorney General’s references and progress to towards a positive, crime-free life in the HMP detainee cases. However, the role of maturity in these two processes is different, even seemingly

contradictory within the criminal justice system.

In the context of sentencing, the immaturity of the young adult, either by virtue of their chronological age or their apparent immaturity in comparison to what is expected for a person of that age, is taken to reflect a young person’s culpability. This is to say that an immature young adult who lashes out without thinking when confronted with an upsetting truth, or an immature young adult inexperienced in the world of sexual relations who commits a sexual offence, may be seen by the sentencing judge to be less culpable than a fully-fledged adult who can draw on the full range of developmental experiences in the same situation. Thus evidence of immaturity in the sentencing context may be of significant benefit in reducing the sentence. An exception to this is where a serious crime has been committed and the court is required to consider dangerousness (s 229 CJA 2003). In the course of this exercise it is at least possible that the immaturity of the young adult will be seen as a factor that makes the person more impulsive, less predictable and therefore more dangerous.

Maturity is also considered by the courts, the Secretary of State for Justice and the Parole Board, when assessing the progress that a young adult has made towards rehabilitation. In this context young people will always have been deemed to be either dangerous at point of sentence (if they were sentenced to a public protection sentence or a discretionary life sentence) or immature by virtue of their age (in the case of children convicted of murder, as in the Smith case cited above). Therefore, their positive maturation is seen as an important factor towards their progress. Therefore in this context, far from displays of immaturity being a mitigating factor indicative of a lesser culpability it becomes a negative factor in assessing progress. Immaturity, usually based on the assessment of professionals in prison or probation services, in this context is seen as indicative of the failure to progress and mature towards a pro-social and healthy safe adult identity. The starkest example of this can be found in the High Court jurisdiction to review the progress of children sentenced to HMP detention following a conviction for murder imposed on a child. In these cases the court has the unique function of reviewing the young person’s progress in custody including the extent to which they

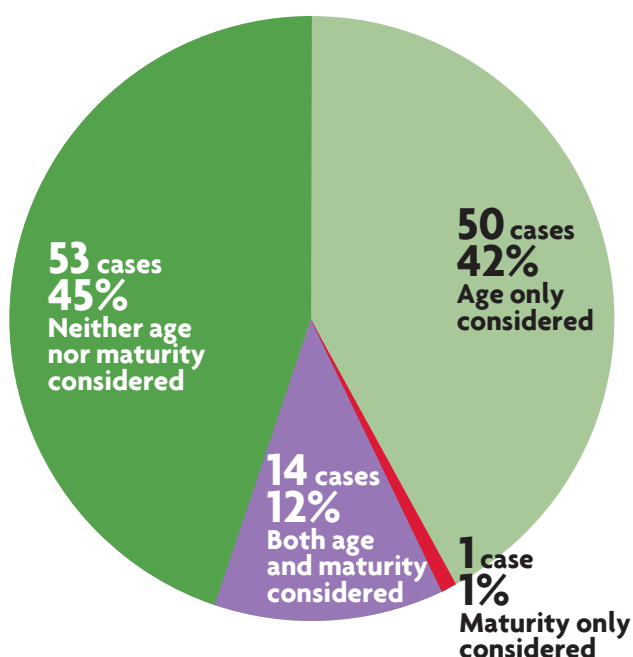
have matured, in recognition of the fact that children change and develop in a shorter period of time than adults, with a view to reducing the minimum term to be served as a punishment in recognition of the young person’s progress. The judicial treatment of maturity in these cases demonstrates that judges are both capable of and experienced in assessing a young person’s maturity in the context of their life as a whole rather than just recognising immaturity as a factor towards reduced culpability.

SENTENCE APPEAL CASES

The sample included 118 appeals. These concerned young adults aged 18 to 25 years of age at either conviction or the time of their offence. The judgments were handed down between 1 April 2015 and 23 March 2016. Of the 118 appeals, sentences were reduced in 80 instances (68 per cent).

Age was considered in 64 of the 118 cases either at first instance or at appeal. Maturity was considered in just 15. Of the 80 cases where a reduction in sentence was made, age was cited as part of the reasoning for the reduction in 22 cases. Just two of those cases referred to lack of maturity as a reason for reducing sentence.

Number of cases where lack of maturity, age, both or neither were considered out of 118 appeals.



In almost half of all sentence appeal cases in the sample neither age nor maturity was considered. In light of the evidence that maturity is highly pertinent to decisions that underpin criminal activity, it is surprising that age and/or maturity was not considered in such a high proportion of cases.

In the sample, age was far more likely to be considered than maturity. Age (but not maturity) was considered in 50 of the cases at some stage. Of those 50, sentences were reduced in 32 instances. Age was cited as part of the reason for reducing the sentence in just 13 of those 32 cases. This indicates that even where age was considered, it only made a difference to the sentence in less than half of the cases.

Several judgments endorse the notion that significant weight should be attached to age and previous good character. For example, one case referred to the young adult’s “considerable personal mitigation of the appellant’s young age and previous good character” (R v White (Siana) [2016] EWCA (Crim) 320, paragraph 11). Another concluded that the “sentences imposed here were somewhat out of scale with sentences imposed in other cases, particularly given the ages of the appellants and their previous good character” (R v Sibley (Jack Alan) and Reid (Warren) [2015] EWCA (Crim) 2258, paragraph 18).

This indicates that lack of maturity as a sentencing factor drives a coach and horses through the bedrock of traditional sentencing practice, which has tended to be based on incontrovertible factors such as age and lack of previous convictions.

However, in the 16 cases where maturity was considered, the sentence was reduced in 13 cases (81 per cent). This suggests that when judges consider maturity, it can be more significant in their decision making than age. This finding is borne out by several examples of judicial comment on maturity in cases in the sample.

For example, R v Oghene [2016] EWCA Crim 262 outlines that a person technically becoming an adult at 18 years old does not mean they dramatically change overnight:

“You were just 18 at the time of the commission of this offence. Under 18 a very different sentencing regime might apply but, as I have said to your counsel, I do not

regard the age of the 18th birthday as being a cliff-edge. One has to grade one's approach to sentence." (Irwin LJ, quoting judge at first instance, paragraph 14)

Another example of a nuanced approach being adopted in relation to the sentencing of young adults who have celebrated their 18th birthday, but have not yet attained maturity befitting treatment by the criminal justice system as full adults is *R v C (SP) [2015] EWCA Crim 1866*. In this case the young adult (aged 22) whose 11 year sentence was appealed had caused very serious injuries to his infant son when he felt that his son hated him, because the baby had failed to settle for a short period in his care. Despite the seriousness of the offence and sensitive nature of the case, where the identities of both the offender and the victim remained confidential, the judge factored the Appellant's lack of maturity into the judgment, noting "he was comparatively young and immature". The judgment cites the age of the appellant no fewer than five times in reaching the decision to reduce the sentence by two years. In that case counsel argued that the judge at first instance had not attributed enough weight to these factors. The judgment provides a stark example as to how the court is able to provide a detailed examination of the particular circumstances of a developing young adult and arrive at different conclusions from that which one might expect in the case of a fully formed, mature adult.

A further example of an assessment of the particular maturity of the young adult affecting the sentence can be seen in *R v Jones [2016] EWCA Crim 51*:

"R v De Silva [2014] EWCA Crim 2616 at [10], makes clear, whilst age at the time of the offence may be a significant factor in mitigating culpability and the sentence, it all depends on the circumstances of the particular case. In De Silva, the fact that young offenders are more likely to be immature than adults in the sense that they may be impulsive, unthinking and more likely to respond to situations with excessive force, was emphasised; but that necessarily depends on the maturity of the particular young offenders. Some young people mature more quickly than others. In the case before us, it is clear that the murders of Carriere and Manful were not impulsively carried out on the spur of the moment. They involved a planned ambush of the two men and their execution on the streets in circumstances so overt that it is almost

impossible not to conclude that they were designed to put a marker down to any other outsider who was minded to trade drugs on this particular patch. These young men knew precisely what they were doing." (Hickinbottom LJ, paragraph 22)

The court in this case clearly recognised that young adults are typically less mature, and acknowledged the issues that this can cause (inherent lack of maturity), before concluding that in this case the particular maturity of the offender and nature of the offence meant that they could not rely on a lack of maturity as a mitigating factor to reduce culpability.

As the Justice Committee has noted it is unclear whether the inclusion of 'age and/or maturity' in the newer sentencing council guidelines has resulted in reduced sentences for young adults. The sample included cases where both the old and new guidelines applied.

New sentencing guidelines, which include "age and/or maturity" as a specific mitigating factor, applied in 95 cases in the sample. Age and/or maturity was raised in 50 of these cases (53 per cent). In the 23 cases where the old guidelines which factor in 'age' or the offence does not carry a guideline, age and/or maturity was raised more often - in 15 cases (64%).

In line with observations of the Justice Committee, this sample suggests that the new guideline does not result in an increase in consideration of age and/or maturity. However, of the 95 sentence appeal cases where the relevant sentencing guideline included lack of maturity as a mitigating factor, while only approximately half of the cases considered maturity, 33 of these cases were successful on appeal with 18 of these cases citing age and/or lack of maturity as a reason for the reduction in sentence.

While a greater proportion of the cases under the old guidelines considered age and/or maturity, of the 14 out of 23 cases that were successful on appeal, only four cases cited age as part of the reasoning for the reduction.

Therefore, while the inclusion of maturity in the guideline did not seem to significantly increase consideration of age and/or maturity generally, when it was considered it was more likely to have a positive effect.

However, analysis of the judgments suggests that it is possible that the combining of the two factors has, in some instances, caused the courts to take a tougher approach to reducing sentences on account of age and/or lack of maturity. For example, in *R v Sarwar* [2015] EWCA Crim 1886 counsel argued that the appellants were “isolated, socially inexperienced and emotionally immature”, but the judgment concludes that although the sentence will weigh hard on the young men being sentenced, there was not in fact a particular element of immaturity significant enough to warrant a reduction in sentence:

“Insofar as reliance is placed on age and naivety, we of course recognise that these are young men upon whom a lengthy sentence will bear hard but we are not persuaded that there was any particular naivety or immaturity which should attract further weight.”
(Treacy LJ, paragraph 55)

The sample also revealed an instance where maturity had been used against a young adult defendant. In *R v Muktar (Ibrahim)* [2016] EWCA (Crim) 279 the original judge had treated the defendant’s relative maturity as an aggravating factor:

“In sentencing the learned judge recognised his youth... He also found the applicant was quite mature ... He then halved the sentence of 9 months to reflect the age of the applicant at the time of the offence and slightly increased the term to reflect his view of the applicant’s relative maturity hence he arrived at 5 months’ detention.”

In *R v Khan* [2015] EWCA Crim 1816, the court recognised the lack of maturity of the defendant as a mitigating factor and found that the court below had correctly applied youth justice principles, even though the defendant had reached his majority at the point of conviction. Adeel Khan had been convicted of attempted murder following a premeditated attack on a 15 year old boy who had been involved in a relationship with Adeel’s sister a year prior to the attack. Adeel struck the victim in the head with a hammer a number of times, fracturing his skull in three places before running away.

The court rejected Khan’s appeal but in his judgment Justice Burnett clearly sets out that young people’s lack

of maturity can allow for mitigation in circumstances where an adult would not be similarly treated. Particular attention is paid to the defendant’s vulnerability and the ability to resist pressure from family and peers:

“We do not accept that an adult committing a revenge attack of this sort could suggest that such motivation provided any mitigation whatsoever. The position may be less clear-cut with a child or young person, just as it is when sentencing judges are dealing with young or vulnerable offenders who have genuinely been put under tangible and substantial pressure into committing any crime by identified family members or older friends... The age of the victim was an aggravating factor and, as the judge recognised, the age of the appellant a mitigating factor. In arriving at a sentence of 15 years’ detention it is apparent that the judge allowed a significant discount to reflect the appellant’s youth.”
(Burnett LJ, paragraph 23)

Although the judgment uses the word ‘adult’ as being totally distinct from young person or child (in the case the appellant was 17 at the time of the commission of the offence), the judgment demonstrates how the courts may be willing to apply factors usually applied to children to young adults aged 18-25 years old. Overall, the sample shows that lack of maturity is increasingly considered, but is still not considered in a significant number of cases involving young adults. The inclusion of maturity as a sentencing factor does not appear to necessarily increase the chance of lack of maturity being considered. However, when it is considered, the courts appear to give it more weight. Even so, factors other than lack of maturity are far more likely to influence sentence.

ATTORNEY GENERAL REFERENCE CASES

The sample of Attorney General reference cases comprised of 33 cases concerning 43 young adults aged between 18 and 25 years old at the time of conviction, although the majority were 19-21 years of age. The judgments were handed down between 24 June 2014 and 5 February 2016.

In just three of the 33 cases, the first instance sentence was not interfered with. In the remaining 30 cases, the sentence was increased by between one year and seven years and four months. The first instance sentences for

29 of the 33 cases were informed by sentencing guidelines that include “maturity” as a mitigating factor. However, it is unclear whether the guidelines were actually relied on in reaching decision on sentence at first instance. Age was raised in 20 of the 33 judgments, whilst maturity was mentioned in just eight of the 33 cases. Eight of the 33 cases mentioned neither age nor maturity.

Of the cases that did not mention age or maturity, sentence was increased in seven of the eight cases. Of the cases that mentioned age but not maturity, sentence was increased in 16 of 17 cases. Of the cases that mentioned age and maturity, sentence was increased in six of seven cases. The only case in the sample that mentioned maturity but not age resulted in an increase in sentence.

Textual analysis of the sample shows that considerations of age and lack of maturity sometimes had a significant impact on the sentences passed by the Court at first instance. For example, in *R v Brown* [2016] EWCA Crim 80, a case involving the rape of a 12 year old by a 19 year old with various learning difficulties and vulnerabilities, the Crown Court had imposed a community penalty. This was increased by the Court of Appeal to 42 months’ detention, despite acknowledging that the correct starting point for the offence was 10 years with a range of 8-13 years custody. The Court of Appeal increased the sentence but noted:

“There were indications made at some length in the report about the difficult and troubled childhood which the offender had had. It seems that he has had, and has, significant learning difficulties and had been diagnosed when younger as suffering from ADHD. The indications are that he is a person of significant immaturity by reference to his age.”

(Davis LJ, paragraph 13)

In *R v Hatt* [2015] EWCA Crim 2240 the defendant was aged 20 at the time of the offence, had extremely low cognitive ability (IQ 65) and was extremely vulnerable and immature. She had been convicted of sexual activity with a child following an incident whereby she invited herself into the bedroom of the 11 year old boy that she was babysitting, removed items of his and her own clothing and engaged in sexual intercourse with him before stopping once the victim asked her to do so,

because he felt what was happening was wrong. She received a two year suspended sentence, together with a two year supervision requirement and a three year sexual harm prevention order preventing unsupervised contact with boys under 16.

In finding that the sentence given at first instance was not unduly lenient, despite being a suspended sentence and the applicable guideline indicting a significant custodial term, the court gave detailed consideration to the lack of maturity of the defendant:

“The offender presented to the psychologist as a somewhat vulnerable, childlike and emotionally immature young woman... According to the psychologist, her behaviour on this occasion may well have derived from her lack of social and emotional maturity, rather than from sexual deviancy... It is apparent from the reports that this offender had a level of maturity falling significantly short of her chronological age, and that she had had life experiences which had affected her social and emotional development in a way that left her vulnerable and craving intimacy.... She is still only 21; she is not of a criminal disposition; she has vulnerabilities... We are not prepared to hold that, when the circumstances of immaturity, vulnerability and cognitive deficits of this offender are considered, the judge’s conclusion was so far removed from what was appropriate as to be unduly lenient.”

(Treacy LJ, paragraphs 10, 16, 20 and 22)

In *R v Ahinger* [2014] EWCA Crim 2860 the Court of Appeal justified the Crown Court’s decision to factor in the immaturity of the defendant in determining his culpability and placed particular emphasis on the ability of the Court at first instance to reach a conclusion as to his character:

“As to mitigating factors, the Attorney General accepts that the offender’s young age and lack of maturity, his lack of convictions and his good character, were material. The recorder appears also to have accepted that during the course of this man’s short period of residence in the United Kingdom this was an isolated incident. In our judgment, given the offender’s background and emotional response to what he perceived to be his victimisation by burglars, his immaturity was, as the recorder found, a consideration to be given some weight in mitigation of his culpability,

the factor that placed the offence in category 2 in the first place. Finally, we recognise that, having presided over the trial, the recorder was in a better position than is this court to observe the character and personality of the young man on trial.”

(Pitchford LJ, paragraph 19)

HMP MINIMUM TERM REVIEWS

This group of cases demonstrates a very different approach from the consideration of immaturity in the sentence appeals and Attorney General’s references. In many ways, the court is required to take the opposite approach by scrutinising the extent to which the young person can be rewarded for his or her maturity with a view to reducing the punishment term. Some might see the approach to maturation in these cases as out of step with the current knowledge about young adult brain development and the likely impact on young adults of the adversity that is all too common among this group in prison. Nevertheless, analysis of this group of cases reveals the extent to which judges are able to consider a young adult’s progress and maturation in the round as part of the decision making process.

In *R (Smith) v Secretary of State for the Home Department* the House of Lords explained that the sentence of detention during her majesty’s pleasure *“was expressly differentiated from the sentence which the law required to be passed on those committing murder as adults, in that it required account to be taken of the detainee’s welfare.”* (Bingham LJ, paragraph 10) *The sentence reflects the immaturity of a child who kills but who also has the opportunity to mature and change in the future. The detainee’s term might be reduced if there is “clear evidence of exceptional and unforeseen progress such as may reasonably be judged to call for reconsideration of the detainee’s minimum term.”* (Bingham LJ, paragraph 17).

Following *Smith*, a system of periodic reviews was introduced. The purpose of the review is to determine if the existing minimum term is still appropriate in light of the detainee’s progress in custody. The current policy of the Secretary of State for Justice is that detainees become eligible for a review once they have reached the halfway point of the original minimum term. Once the halfway point is reached, the detainees will be

contacted by the Ministry of Justice and invited to apply for a review. A dossier of reports, including information from the prisoner, the victim’s family and the professionals connected with the case, will be sent to the High Court for review.

The primary test applied by the Court is whether the detainee has shown exceptional and unforeseen progress.

The full criteria set by the Ministry for Justice is set out at Appendix 3.

The judge will usually consider the application for a reduction on the papers without convening an oral hearing. The judgment will recommend either a reduction in minimum term or no reduction. The Secretary of State will always follow the recommendation of the judge.

A sample of 23 reviews concerning 23 young people (aged 18-25 at the time of review) were analysed. The judgments were dated between 22 June 2011 and 8 June 2016.

It was rare for the court to reduce the minimum term in light of exceptional and unforeseen progress. Only eight cases in the sample of the 23 resulted in a reduction in the minimum term.

Ten of the 23 judgments explicitly considered maturity in the judgment. The consideration of maturity typically took the form of a run through of the various programmes undertaken by the detainee, behaviour in prison, responsibilities taken on, professional reports from staff responsible for the young person and any psychological reports.

All eight reviews where the minimum term was reduced included a consideration of maturity. In one review the minimum term was reduced by two years, in six reviews it was reduced by one year and in one review it was reduced by one year and 39 days.

In *R v J* [2014] EWHC 3254 (Admin) the decision to reduce the minimum term by one year was heavily based on the applicant’s maturation:

“She was a wild and immature 15-year-old, in a violent relationship with a drug dealer, who had turned her into a regular cocaine user. She is now a young adult who

shows every sign of being mature, highly motivated, and responsible, not only for her own future but able to take responsibility for others. She has also expressed a clear understanding of the impact of her actions on her victims, both direct and indirect, in ways which evidence a developing degree of empathy.”

(Wilkie LJ, paragraph 10)

“The Court of Appeal, looking at the case as a whole, concluded that the most powerful argument in Ms. J’s favour was her very young age and level of maturity at the time of the offence... She did not have the level of maturity which she has since been achieving in the secure training centre.”

(Wilkie LJ, paragraph 28)

In assessing maturity, it appears that the **courts tend to give particular weight to the completion of relevant courses aimed at reducing risk and acquiring skills, remaining adjudication free and the detainee having accepted their offence and expressed remorse.** This was particularly the case where there was previously a lack of remorse, denial or minimisation of certain facts, a feature which is not uncommon when young people are convicted of very serious offences. The judges also commented on evidence that the detainee had taken responsibility, often through work in the prison and involvement in listening/mentoring, and referred to the invariably favourable professional reports.

An example of an assessment of maturity can be seen in the judgment of Justice Baker in R v B [2016] EWHC 1293 (QB), where the minimum term was reduced by one year:

“There is evidence that B has now fully accepted his responsibility for the part which he played in this offence, and is genuinely remorseful.

I consider that this reflects an increasing level of maturity on the part of B, gained from his successful engagement with the offence based cognitive behavioural programmes which he has completed whilst he has been in custody. Moreover his level of risk has correspondingly reduced.

B has built and maintained successful relationships both with fellow offenders and with the prison staff; the former being attested to by the mature way in which he has handled his responsibilities as scorer for the prison volleyball team; the latter, as described in the most

recent Tariff Assessment Reports.

Moreover, all of these positive aspects of B’s maturing character have been sustained over a lengthy period of time, and now in more than one prison.”

(Baker LJ, paragraphs 28-31)

A further example can be seen in the judgment of Justice Wilkie in YOR/27/2015 (R v F), in which the minimum term was reduced by one year:

“He has matured both physically and emotionally... His prison case notes demonstrate mature and sensible behaviour, a willingness to improve and the ability to apply consequential thinking which was absent at the time of the index offence.”

(Wilkie LJ, paragraph 14)

Five reviews did not consider maturity at all, even though all report writers are asked to comment on it. The minimum term was not reduced in any of these cases. In each instance disciplinary issues were cited as a reason for the decision. Other reasons that minimum term reduction was refused included the maturation process not yet having progressed enough, the young person being unable to form relationships or manage their temper, or the young person being unwilling to admit the index offence or, despite ‘good progress’ the progress not being ‘exceptional’. In some cases, there was recognition of unforeseen or exceptional progress but the Court considered itself bound to only reduce the minimum term if there was evidence of both exceptional and unforeseen progress.

For example, Justice Cranston in R v S [2015] EWHC 654 (QB) a case in which the applicant had been convicted of murder after a group attack on a homeless man lying on the street in Scunthorpe, commented:

“There is no doubt that he has made real progress in prison, compared with the person he was when he entered custody. He is a much changed man in terms of his maturity. His successful completion of courses, including educational courses, is to be applauded. There is also a greater acceptance of what he did, whereas immediately after his incarceration in 2009 he was attempting to minimise his role and to avoid responsibility. I accept that he now displays greater remorse. His offender manager’s report of June 2014 is quite positive. All of this will go a considerable way with

the Parole Board when they come to assess him for release.

In my view, however, Mr S has not surmounted the high threshold of exceptional progress.”

(Cranston LJ, paragraph 21)

Conversely, evidence of immaturity weighed heavily against the detainees at review, as evidenced by Justice Simler’s judgment number R v D [2014] EWHC 975 (Admin). The detainee had been sentenced for a drunken attack whilst aged 16, in which he stabbed a friend 55 times causing death, and was praised for his progress in embracing “educational, employment and other opportunities, particularly those available for addressing offending behaviour”, but the judge noted that, “he remains... immature for his age” and did not reduce the minimum term.

Overall the judgments in the sample demonstrate that the courts are capable of assessing maturity in young adults. However, in many cases, judges clearly felt constrained by the present state of the law in translating maturation into the degree of progress that they consider necessary to warrant a reduction in the minimum term. However, that may be more to do with the legal test as it has come to be applied by the courts in light of the Secretary of State’s policy rather than an inherent reluctance by the judiciary to recognise maturation and reward progress. That would suggest that judges pay sharp attention to guidance.

There remains room for progress given the absence of consideration of maturity in some cases and the lack of recognition that young adults mature at different ages. For example, in R v S [2015] EWHC 2842:

“He has certainly matured. But it would be a real sign of failure if he had not.”

(Collins LJ, paragraph 5)

Unsurprisingly, judges are more capable of making an assessment of maturity where they are given a greater quantity and quality of information about the detainee whose case they are reviewing. Just having a minimum term assessment report (TAR) from one or two prison staff, and a list of the young person’s disciplinary record and the courses that they have completed may not be enough to form an assessment of the full character and maturity of the individual. It is notable that of the five

cases where a recent (within four years of the hearing) psychologist’s report is discussed in judgment the minimum term was reduced in three out of five cases, compared with the five out of 18 cases where the minimum term was reduced without a psychological report. In addition, reports from a range of professionals can assist the Court greatly. In R v E YOR/1/2013, in addition to formal professional reports, the detainee had also obtained references from six members of staff, which doubtless helped Justice Dobbs to form a more nuanced understanding of the individual and reach her conclusion:

“However, what is particularly important in this case, is the evident and significant development there has been in Mr E’s maturity. He came in an immature teenager with little insight into the appropriateness and risks of violent behaviour and little empathy for the victim. He has developed into a mature young man with real insight into himself and others. He has shown genuine remorse and fully accepted responsibility for causing the fatal injuries to the deceased. He has acknowledged the impact of his actions on others, and in particular the family of the deceased. He does not blame others.” (Dobbs LJ, paragraph 24)

Conclusion

FINAL REFLECTIONS AND NEXT STEPS TOWARDS A BETTER APPROACH FOR SENTENCING YOUNG ADULTS

Analysis of the 174 senior court judgments provides compelling evidence that courts already recognise the distinct position of young adults in the sentencing process. In the words of Lord Justice Irwin in *R v Oghene*, the 18th birthday is not a “cliff-edge”.

Yet, while it is permissible and appropriate within the current legal framework to grade the approach to sentence accordingly, it is not a legal requirement. This research shows that in the absence of such a requirement, judges do not adjust the sentences of young adults to take age into account: in almost half of all sentence appeal cases in the sample neither age nor maturity was considered.

However, when lack of maturity was considered by the court, it appeared to carry greater weight than consideration of chronological age. This suggests that courts are well equipped to factor this into sentencing decisions provided the issue is raised and there is relevant evidence before the court. The ability of courts to consider the reality of young adults’ lives and their stage of development and maturation is also borne out by the analysis of minimum term review cases where the high court examines the progress young adults have made since their incarceration as children. It is particularly relevant that in these cases the court often benefitted from a comprehensive psychological assessment as well as information from those with daily contact from the young person.

While this research demonstrates the possibility of good practice in the courts, in line with recent thinking and progress in other disciplines, at present there is no guarantee that young adults being sentenced will benefit from it. Even where lack of maturity and the capacity to change is factored into the sentencing process, the absence of any guidance presents difficulties in achieving consistency in practice.

There are two simple ways that the progress identified in the analysis of the decisions in this research can be built upon. First, lawyers and other professionals involved with young adults can amend their practice.

The court needs to be made aware of the issues of

maturity and be provided with evidence to enable it to be factored into decision-making. There are already tools in place to support this, such as the T2A Maturity Practice guide for probation. Comprehensive guidance for all professionals involved in the process, along with practical guidance for young adults could help to consolidate good practice.

Second, this analysis of cases suggests **there is a strong case for the Sentencing Council to consider formal sentencing principles for young adults**, similar to the principles it has developed, and recently enhanced, for children. This would be a natural progression from the children’s guidance that recognises emotional and developmental age as of at least equal importance to chronological age (if not greater). It would also convert the best practice that is already being carried out in courts into standard practice.

While senior court judgments are influential, sentencing decisions do not always reach the attention of magistrates’ courts where the vast majority of young adults are sentenced. Senior court judgments generally deal with the more serious end of the spectrum where detention is almost always an issue. Sentencing principles for young adults would guide the courts in respect of how custodial sentences can be avoided altogether to achieve better outcomes for young adults and for communities.

Appendix 1: Current sentencing frameworks

Sentencing is underpinned by statute, legal principles, case law and guidance. Judges exercise discretion within this framework, although some commentators consider that statute has become increasingly prescriptive in recent years, reducing the scope for judicial discretion (Ashworth, 2005).

PURPOSES OF SENTENCING

When sentencing, the judiciary must have regard to the purposes of sentencing. These purposes, which apply to everyone except children under the age of 18, are now enshrined in legislation. Section 142 of the Criminal Justice Act 2003 states:

“Any court dealing with an offender in respect of his offence must have regard to the following purposes of sentencing:

- (a) the punishment of offenders,*
- (b) the reduction of crime (including its reduction by deterrence),*
- (c) the reform and rehabilitation of offenders,*
- (d) the protection of the public, and*
- (e) the making of reparation by offenders to persons affected by their offences.”*

A proposed separate set of sentencing principles for children, yet to come into force, is contained in section 142A of the Act. However, the primary purpose of the youth justice system is to “prevent offending” as set out in section 37 of the Crime and Disorder Act 1998. Section 33 of the Children and Young Persons Act 1933 also requires that any court dealing with a child must “have regard to” the welfare of the child.

SENTENCES FIXED OR RESTRICTED BY LAW

The maximum penalty available for each offence is usually set out in the legislation that criminalises the action. For example, under section 18 of the Offences against the Person Act 1861, the maximum sentence for Grievous Bodily Harm with intent is life, whilst for Assault Occasioning Bodily Harm, it is five years under section 47 Offences against the Person Act 1861.

While some offences carry a wide range of sentences,

others set out rigid sentences once a person has been convicted. For instance, murder carries a mandatory sentence of life imprisonment. Other offences, such as possession of a firearm and certain drug trafficking and burglary offences, specify a minimum sentence (Crown Prosecution Service, 2016).

Some offences provide different sentencing options for children and adults. For example, while anyone convicted for possession of a firearm can expect to receive a mandatory minimum term, the sentence for those over 18 is five years imprisonment, compared to three years for children (section 287(5) Criminal Justice Act 2003). Further section 13 of the Sexual Offences Act 2003 provides a special framework to enable children convicted under sections nine to 12, which outline a number of serious sexual offences, to be charged under section 13 and treated in a more lenient way by capping the maximum sentence available to five years.

It is striking that with the exception of the most serious cases, when statute requires a separate sentencing regime for children, it results in a reduction in the length of time the child can spend in prison. Conversely the only distinctions between adults and young adults aged 18–20 result in the use of different terminology rather than restrictions on how long the young person can spend in prison. For example, where a young adult aged 18–20 is sentenced to a determinate term of detention, the sentence will technically be referred to as detention in a young offender institution (DYOI). Similarly, a young adult aged 18–20 who is given the equivalent of an adult discretionary life sentence is technically sentenced to custody for life. This is because section 89 Power of Criminal Courts Sentencing Act 2000 prohibits anyone under the age of 21 from being imprisoned, although this does not prevent them from being placed in custody. Although there is a long legislative history of use of the term “detention” to denote an emphasis in the sentence on treatment as opposed to punishment, none of these provisions translate into less time in custody for young adults. The Justice Committee has stated that the *“sentence was originally conceived to offer extra protection and support to young adults because of their developing maturity. This has been rendered meaningless by the effective lack of differential treatment in the custodial estate.”* (Justice Committee, 2016a, p.48).

GUIDANCE AND CASE LAW

Within the parameters prescribed by statute, there is a margin of judicial discretion which is guided by sentencing guidelines and case law (Ashworth, 2005, pp.34-38).

Sentencing guidelines are now issued by the Sentencing Council. Under section 125 Coroners and Justice Act 2009, a court must have regard to “any sentencing guidelines which are relevant to the offender’s case” in deciding upon sentencing, unless it would be contrary to the interests of justice to do so.

The Sentencing Council produces definitive guidelines, usually for clusters of offences, which enable the sentencing judge to place the offence into a “category” of seriousness based upon factors indicating greater or lesser seriousness. The category of seriousness determines the range of the sentence. Thereafter, aggravating and mitigating factors are applied.

RELEVANT AGE FOR THE PURPOSE OF DETERMINING A SENTENCE

The relevant age for the purposes of sentencing is important, especially in light of the different treatment a child can currently expect compared to someone sentenced as an adult. In the case of *R v Ghafoor* [2003] 1 Cr.App.R.(S.) 84, Lord Justice Dyson, agreed with counsel that *“the philosophy of restricting sentencing powers in relation to young persons reflects both (a) society’s acceptance that young offenders are less responsible for their actions and therefore less culpable than adults, and (b) the recognition that, in consequence, sentencing them should place greater emphasis on rehabilitation and less on retribution and deterrence than in the case of adults.”* (Dyson LJ, paragraph 31).

The relevant age for determining a sentence is the age on the date of conviction (*R v Obasi* [2014] EWCA Crim 58, paragraph six) except for those who commit the offence of murder as a child (section 90 PCCSA 2000). In cases where a person commits the offence of murder when he or she is under 18 years of age, a mandatory life sentence follows. The sentence is called 'detention at Her Majesty's Pleasure' and it has a specific welfare aspect to it, characterised by the opportunity for the

punishment term to be reviewed in light of progress. The Sentencing Council (2016) has recommended that where a person committed an offence as a child but was convicted as an adult, “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 indication is that the sentencing principles that apply to children might be applied in some cases to those who become of age between offence and conviction.

Appendix 2: Methodology overview

This research was inspired by a combination of the Howard League for Penal Reform's front-line legal work with young adults aged 18–20 and its policy work in this area, largely in conjunction with Transition to Adulthood. In light of the growing evidence that young adults require a different approach in the sentencing process, it appeared that analysis of existing judicial approaches to this age group ought to be explored.

THE PARAMETERS OF THE RESEARCH

The research was restricted to secondary data that was collated and assessed. The study used purposive sampling (Avegard, 2008) to ensure that the information would be data rich, based on the knowledge of the existing evidence about young adults and sentencing summarised above. For example, based on the consensus that young adults are widely seen as those aged 18–25, it was determined from the outset that the cases selected would involve this cohort. In accordance with the legal framework for the relevant age for the purpose of sentence, the age of the young adult at the time of the offence and at the date of conviction were separately listed where possible. The decision was taken to limit the analysis to official transcripts and judgments which are only routinely available in cases that are considered by the senior courts, namely the Court of Appeal and the High Court. Although the majority of young adults are sentenced in the Magistrates' Courts, sentencing remarks are not recorded and therefore not available. Further, it was considered that analysis of senior court judgments would provide an authoritative overview of the nature and extent of judicial approaches to young adults. It was determined that analysis of both sentence appeals brought by defendants and Attorney General references in respect of unduly lenient sentences imposed on young adults would be suitable starting points. Both sets of cases involved direct analysis of the appropriate sentence. In order to ensure the data would be relatively recent and comparable, we restricted the sample of sentence appeal cases to judgments handed down in the 12 months up to 31 March 2016 and the Attorney General reference cases to judgments handed down in the 20 months to 5 February 2016.

As the research progressed and it became apparent that judicial treatment of lack of maturity was highly

relevant, a third category of minimum term reviews was added to the sample. These cases all involved people sentenced for the offence of murder committed as a child where the High Court reviewed the young person's progress, invariably through young adulthood, thus providing a data-rich sample of judicial analysis of young adults' development and progress in custody. As minimum term reviews are relatively rare and not directly comparable to the appellate cases, the time period was for a greater period in order to ensure a sufficiently large data sample.

THE RESEARCH PROCESS

The secondary data in the form of transcripts from these three categories of cases was analysed using a 'framework' approach (Ritchie and Spencer, 1994). This approach has been identified as appropriate for analysing qualitative data in applied social policy research (Srivastava and Thomson, 2009). Following a process of immersion in, or familiarisation with, the data, the research team developed a thematic framework reflecting the dominant themes emerging from the judgments as well as developing criteria for key data collection.

An attempt was made to collect key data, such as the date, the name of defendant, the gender of the defendant and the offence. It emerged that it was simply not possible to identify the ethnicity of the young adult or the presence or absence of other protected characteristics in a sufficient number of cases to obtain a valid data-set because this information was often not apparent from the judgment.

In addition, and based on the dominant emerging themes, a decision was made to collate the relevant Sentencing Council guidelines in force at the time of sentencing where possible. This was to enable some analysis of the extent to which the relatively new inclusion of age and/or maturity as a mitigating factor in more recent sentencing guidelines impacted on decision making. The category which the offence was placed into under the guidelines was also collected along with the relevant starting point and range for the primary offence. The sentence which the young adult received (at first instance and if appropriate on appeal) was then listed in order to assess whether mitigating

factors (including lack of maturity) reduced the sentence below the range in the guidelines. Additional factors that were considered included whether it appeared whether age and/or lack of maturity had been argued on behalf of the young adult or whether or not it had been taken into account in any event by the sentencer.

In order to allow for better analysis and structured argument the data was collated and analysed in three separate sets reflecting the three types of cases.

LIMITATIONS AND ETHICAL CONSIDERATIONS

In addition to limiting the sample to cases in the higher courts, the data set also excluded Crown Court sentencing remarks, other than as referred to in appellate decisions. In considering the data the possibility of good practice in the courts below which would not be appealed by defendants satisfied with the approach taken must be recognised. While to some extent this was off-set by analysis of Attorney General references, which tend to deal with cases where the defendant felt fairly treated at first instance, those cases only tend to deal with the most serious offences.

The analysis of senior court judgments invariably meant that the research would be restricted to the published information available. This is particularly relevant in terms of assessing whether particular points were argued on behalf of young adult or the nature of information considered by the Court as judges are not obliged to document such information.

The decision to analyse publicly available judgments also dealt with ethical concerns that could arise when dealing with unpublished transcripts or reports of cases concerning potentially vulnerable individuals (both defendants and victims).

Appendix 3: criteria for a reduction in the minimum term for HMP detainees

The Ministry of Justice sets out the “Criteria for consideration” in a letter to each prisoner who is entitled to apply:

“Any relevant factors will be taken into account but those which are most important are:

- *A significant change in maturity and outlook since the offence was committed.*
- *Risks to the detainee's continued development that cannot be sufficiently mitigated or removed in the custodial environment. In other words, where continued detention would damage a detainee's prospects of developing or maturing properly.*
- *Anything that casts doubt on the appropriateness of the original tariff, for example new evidence about the circumstances of the offence or the detainee's mental state at the time.*

Exceptional progress in prison:

In addition to the criteria above, exceptional progress in prison can be taken into account. This may include an exemplary work and disciplinary record in prison, genuine remorse, and successful engagement in work (including offending behaviour/offence-related courses) that has resulted in substantial reduction in areas of risk. All of these would ideally have been sustained over a lengthy period and in at least two different prisons.

To reach the threshold of exceptional progress there would also need to be some extra element to show that the prisoner had done good works for the benefit of others. Examples would be acting as Listener (helping vulnerable prisoners), helping disabled people use prison facilities, raising money for charities, and helping to deter young people from crime. Again, there would need to be evidence of sustained involvement in at least two prisons over a lengthy period.

Given the likely change in an offender's personality that the above evidence would demonstrate, it is anticipated that in cases of exceptional progress a significant alteration in the prisoner's maturity and outlook since the commission of the offence (the first of the criteria set out above) will also be present.”

The letter also sets out the Criteria for reduction of Tariff in respect of HMP detainees:

“In order for a minimum term imposed in respect of a person detained at Her Majesty's Pleasure to be reduced, evidence of one or more of the following should be present:

- *Exceptional progress in prison, resulting in a significant alteration in the detainee's maturity and outlook since the commission of the offence, and a significant reduction in the level of risk posed to public safety.*
- *Risk to the detainee's continued development that cannot be significantly mitigated or removed in the custodial environment.*
- *Any matter that calls into question the basis of the original decision to set tariff at a particular level (for example, about the circumstances of the offence itself or the detainee's state of mind at the time), together with any other matter which appears relevant.*

In considering the criteria for reduction of minimum term, and in so far as the offender's age is concerned, international and domestic obligations to children under the age of 18 should be taken into account in deciding where the balance between the public interest in punishment and the public interest in the offender's welfare lies. That balance would have been at the heart of the decision on the proper length of the initial tariff. Evidence of risks to the offender's continued development that cannot be sufficiently mitigated or removed in the custodial environment should also be examined. The tariff should be reduced if the offender's welfare may be seriously prejudiced by his or her continued imprisonment, and that the public interest in the offender's welfare outweighs the public interest in a further period of imprisonment lasting at least until the expiry of the provisionally set tariff. In these circumstances release on or after tariff expiry will be dependent on the question of risk, decided in the same way as at present.

The views of the victim's family may be sought but can only be relevant in so far as they inform an assessment of the seriousness of the offence. These factors will normally have been taken into account at the time of sentence.

Explanation of Exceptional Progress in Prison:

Specific factors indicative of exceptional progress may include a prisoner having demonstrated:

- 1) *an exemplary work and disciplinary record in prison;*
- 2) *genuine remorse and accepted an appropriate level of responsibility for the part played in the offence;*
- 3) *the ability to build and maintain successful relationships with fellow prisoners and prison staff; and*
- 4) *successful engagement in work (including offending behaviour/offence-related courses) with a resulting substantial reduction in areas of risk.*

All of these should ideally have been sustained over a lengthy period and in more than one prison. It is not to be assumed that the presence of one or all of these factors will be conclusive of exceptional progress having been made in any individual case. Whether the necessary progress has been made will be a matter to be determined taking into account the specific factors present in each case.

To reach the threshold of exceptional progress there would also need to be some extra element to show that the detainee had assumed responsibility and shown himself to be trustworthy when given such responsibility. Such characteristics may well be demonstrated by the detainee having done good works for the benefit of others. Examples would be acting as a Listener (helping vulnerable prisoners), helping disabled people use prison facilities, raising money for charities, and helping to deter young people from crime. Again, ideally, there would need to be evidence of sustained involvement in more than one prison over a lengthy period.”

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