Michaelmas Term
[2016] UKSC 62
On appeal from: [2014] EWCA Crim 1197

JUDGMENT

R *v* Docherty (Appellant)

before

Lord Neuberger, President
Lord Mance
Lord Reed
Lord Carnwath
Lord Hughes

JUDGMENT GIVEN ON

14 December 2016

Heard on 3 and 4 May 2016

Appellant
Kirsty Brimelow QC
Philip Rule
(Instructed by EBR Attridge, Solicitors)

Respondent
John McGuinness QC
Simon Heptonstall
(Instructed by Crown Prosecution Service Appeals and Review Unit)

Intervener (Secretary of State for Justice
David Perry QC
Melanie Cumberland
(Instructed by The Government Legal Department)

LORD HUGHES: (with whom Lord Neuberger, Lord Mance, Lord Reed and Lord Carnwath agree)

Summary

1. The appellant Shaun Docherty fell to be sentenced in the Crown Court for offences of serious violence. He was on any view a high risk of further, and perhaps worse, serious violence. At the time when he was sentenced the statutory scheme for the sentencing of offenders who represent a future public danger was in the course of change. The scheme provided for by the Criminal Justice Act 2003 ("the CJA 2003"), as amended, was being replaced by a different one under the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("LASPO"). The transitional provisions made by the Commencement Order for LASPO preserved the old scheme sentences if the conviction was before the prescribed commencement date. Docherty was convicted before that date and was accordingly sentenced, after it, to an indeterminate sentence of imprisonment for public protection ("IPP") under the scheme of the CJA 2003, although that form of sentence was in the course of being abolished for the future. In his appeal against sentence he contended that the Commencement Order containing the transitional provisions was, to the extent that it preserved IPP for him, unlawful. He submitted that this was so for one or more of three reasons:

> (a) because the new scheme was less severe than the earlier one, and therefore to apply the earlier was unlawful as contrary to an international principle of "lex mitior", which is binding on the English court via article 7 of the European Convention on Human Rights ("ECHR"), as explained by the Strasbourg court in *Scoppola v Italy (No 2)* (2010) 51 EHRR 12 ("*Scoppola*"); or
>
> (b) because the purpose of LASPO was to remove IPP from the armoury of sentencing, and therefore transitional provisions which preserved it to any extent were outside the authority given by that statute; or
>
> (c) because to impose an IPP on him, but not on a person convicted after the LASPO commencement date, amounted to unlawful discrimination against him, contrary to article 14 of the ECHR, read with article 5.

The facts

2. Docherty was born in April 1978. By the time he came to be sentenced in December 2012 on the occasion now under scrutiny he was 34 years of age. He had

been convicted on 16 previous occasions of some 28 offences. There was a clear pattern of aggressive offending, usually fuelled by alcohol, supplemented in some cases by cannabis. His offences included affray, other public order offences, criminal damage and, most significantly, violent offences causing injury to others.

3. In 1997 he was convicted of two violent offences, one of unlawful wounding (section 20 Offences against the Person Act 1861) and the other of causing grievous bodily harm with intent (section 18 of the same Act). They were separate incidents. In the first, he had punched and kicked another man to the head and body. In the second, he had forced his way into the flat of his stepfather in what he later said was a punishment expedition in revenge for suggested misbehaviour by that man towards Docherty's mother. He had broken the other's jaw in two places and inflicted cuts to his head. For these two offences he was sentenced to five years' imprisonment.

4. On 12 July 2012 he started an altercation with two drinking companions, Cook and Lord. He persisted although Lord avoided confrontation. He slapped Cook in the face. When the other two sought to leave, he went and fetched a vegetable paring knife and, on his return, stabbed Cook in the back of the neck, the back and chest, some of the wounds inflicted as Cook tried to crawl away. There were at least six stab wounds in all and the knife was left embedded in his chest. Lord had tried to protect Cook, but Docherty stabbed him also in the face and head. Cook's kidneys were damaged and he was in hospital for four days. Lord sustained a deep penetrating wound to the scalp together with other injuries to the head, arms and hands. Both victims were significantly affected by what had happened to them. These events gave rise to two counts of wounding with intent to do grievous bodily harm, contrary to section 18 Offences against the Person Act 1861. In due course Docherty admitted them and pleaded guilty in the Crown Court.

5. Between release from the five year sentences imposed in 1997 and the commission of these new and more serious offences, he had been either convicted or cautioned for drunken disorder or violence in 2004 (twice), 2005, 2006 (twice), 2007, 2009 and 2010, and then on four different occasions between late May and the beginning of July of 2012. Two of these incidents were relatively minor, involving arriving very drunk at the police station either threatening that he would knock someone out if not taken home or reporting that he had broken a number of windows. The police domestic violence unit had, however, also been called out to three further incidents of drunken aggression on his part.

6. Reports from the probation officer and a consultant forensic psychiatrist confirmed that what lay behind this pattern of behaviour was long-standing alcohol abuse. There was no mental health disability. Docherty was aware of his alcohol problem, and from time to time expressed remorse. His sister had written a letter supportive of him and expressing faith in his underlying goodness of heart. But it

was clear that he was not in control of himself. Moreover, the probation officer's assessment was that he tended to use violence as a means to gain compliance from others and to solve problems. So his was a case of injuries thus far inflicted which were grave and it was largely a matter of chance that they had not been graver, or indeed fatal. He posed the risk of further attacks, with similar or worse consequences; the probation officer described that risk as "very high".

7. The statutory maximum sentence for the offences of which Docherty was convicted is, and has been for well over a century, life imprisonment. The judge passed a sentence of IPP on 20 December 2012. He specified five years and four months as the period which had to pass before the Parole Board could consider release on licence. That was done under the rules for the construction of an IPP sentence which are set out in para 9 below. The sentence meant that Docherty will be eligible for consideration for parole after five years and four months, thus in 2018, but before such release on licence can occur the Parole Board will have to be satisfied that it is no longer necessary for the protection of the public that he be detained. There is no complaint that, if IPP was available, the sentence was either excessive or incorrectly calculated.

The change in the law

8. The CJA 2003 had introduced a new scheme of preventive sentencing for dangerous offenders, there defined as those who are convicted of specified offences and who present a significant risk to the public of serious harm (death or serious personal injury) from further serious offending. That Act was by no means the first to address the sentencing of offenders posing a future risk. An early example was a system of preventive detention for habitual criminals (section 10 of the Prevention of Crime Act 1908), and different provisions were made by statute from time to time thereafter. Immediately before 2003, the solution adopted to the problem was the authorisation of determinate sentences for the dangerous which were longer than "commensurate", ie longer, on grounds of future risk, than would be appropriate simply to the facts of the current offence (section 2(2)(b) Criminal Justice Act 1991). The CJA 2003 removed that power and substituted a new scheme. It consisted, for dangerous adult offenders, of a menu of three possible sentences alongside ordinary determinate or non-custodial sentences: (1) life imprisonment where the offence-creating section provided that as the maximum available, (2) IPP and (3) an extended sentence. There were broadly equivalent sentences for those under 18.

9. IPP was a new form of sentence. The judge was required to specify a minimum period before which there could be no eligibility for parole. In effect he had to identify what the hypothetical determinate sentence for the offence would have been if "commensurate", that is calculated purely by reference to the gravity of the offence and the responsibility of the offender, without consideration of future

risk. Then the judge had to specify half that term as the period before parole was possible (half, because the hypothetical prisoner sentenced to a determinate sentence would, under the CJA 2003, serve half his term in prison and the second half on licence). After the specified minimum period had been served, the IPP prisoner was eligible for release providing that the Parole Board was satisfied that it was no longer necessary for the protection of the public that he be detained. These release provisions were for most practical purposes the same as (although not quite identical to) those which applied and still apply to life sentences: see *R v Lang* [2005] EWCA Crim 2864; [2006] 2 Cr App R (S) 3, at para 8. But IPP was available, if the offender met the statutory test of serious danger to the public, for those specified offences which did not otherwise carry life imprisonment as well as for those which did.

10. The extended sentence provided for by the CJA was broadly similar to previous forms of sentence with the same name. It consisted of a commensurate determinate term plus an elongated period of licence beyond that which would normally attend that length of sentence.

11. As is now well documented, there ensued considerable difficulty in the administration of IPP sentences. As originally framed, the CJA 2003 created a presumption of dangerousness and made the sentence mandatory. This led to a large number of IPP sentences being passed, including many for offences which did not otherwise carry life imprisonment. Some IPP sentences, passed according to the statutory rules, had quite short specified minimum periods. All those thus sentenced had to be treated in prison in the same way as those sentenced to life imprisonment, because the test for release was the same. There were far too many IPP prisoners for the rehabilitative systems of the prisons to cope with. This resulted in decisions both domestically and in the Strasbourg court that the duty to provide reasonable facility to the prisoner to reform himself and to demonstrate that he was no longer a public danger was too often not discharged: see *James, Lee and Wells v United Kingdom* (2013) 56 EHRR 12, *R (James, Lee and Wells) v Secretary of State for Justice* [2009] UKHL 22; [2010] 1 AC 553, and *R (Kaiyam) v Secretary of State for Justice* [2014] UKSC 66; [2015] AC 1344. The prison administration of life prisoners was distorted. From 2008, modifications were made by the Criminal Justice and Immigration Act of that year to the conditions for imposing an IPP sentence, which reduced the numbers. But in due course the decision was made to abolish altogether that form of sentence for the future, and this was accomplished by Parliament in LASPO. By section 123 of LASPO the sections of the CJA 2003 providing for both IPP and the 2003 model of extended sentence (and for their equivalents for those under 18) were repealed.

12. LASPO did not, however, simply remove IPP from the sentencing armoury. It substituted one menu of preventive sentencing for another, just as previous legislation had done. Insofar as it is new, the scheme has been inserted into the CJA 2003 as new sections of that Act. Overall, it comprises three elements.

(i) A life sentence, where that is the statutory maximum for the offence committed, if the court is of the opinion that there is a significant risk to members of the public of serious harm occasioned by the commission by the defendant of further offences specified in Schedule 15 and the gravity of the offence(s) is such as to call for such a sentence - section 225(2); this part of the scheme is unaltered from the 2003 regime. (There might be cases where a discretionary life sentence is justified for an offence outside Schedule 15 if its gravity and the danger presented by the defendant are sufficient - see the discussion in *R v Saunders* [2013] EWCA Crim 1027; [2014] Cr App R (S) 258, para 11 - it is not necessary to discuss this possibility in the present case).

(ii) A new obligatory life sentence, unless its imposition would be unjust in the circumstances, if the defendant is now convicted for a second time of one of a defined group of violent or sexual offences (Schedule 15B), where both the previous and current offences have been met by, or would call for, determinate terms of ten years or more, or their equivalent - section 224A. This is entirely new. If the conditions are met, it may, even if not frequently owing to the levels of determinate term required, lead to the passing of a life sentence for offences which otherwise have a statutory maximum well below life imprisonment - examples include several forms of sexual offence, contrary to sections 9-12 and 48-50 of the Sexual Offences Act 2003, and offences of child pornography contrary to section 1 of the Protection of Children Act 1978, all of which are listed in Schedule 15B.

(iii) A new form of extended sentence under section 226A. Although the expression is not used in the statute, the Ministry of Justice appears to have adopted the label "Extended Determinate Sentence" ("EDS") for this latest model of extended sentence, and this is certainly a convenient means of distinguishing it from its predecessors. For similar reasons the CJA 2003 model of extended sentence, as amended in 2008 and now abolished by LASPO, has had bestowed on it the label "EPP" (extended sentence for public protection). The new EDS is discretionary and, like the former EPP, consists of a commensurate determinate term plus an additional period of licence beyond the usual licence for the remainder of the custodial term which follows early release. The superficial similarity of the two conceals, however, significant differences between them.

13. EPP (as amended from 2008 onwards) and EDS share the following features.

(a) The basic condition for the imposition of both is that the defendant is being dealt with for a "specified" offence, which means one contained in Schedule 15 to the CJA 2003 (section 224), and that he presents a significant

risk to the public of serious harm through the commission of further such offences;

(b) Both are constructed of custodial term and extension of licence period;

(c) In both cases the total of those two periods must fall within the statutory maximum for the offence;

(d) For both, the custodial term is measured by what would be the commensurate determinate term if an extended sentence were not being passed;

(e) It is a condition for the imposition of both that the custodial term is four years or more or that there is a qualifying previous conviction (though not identical in each case: see para 14(ii) below);

(f) For both, the extension periods have a maximum of five years for violent offences and eight years for sexual offences; and

(g) For both, the criterion by which the length of the extension period is to be fixed is the period (within the maximum) required for the purpose of protecting the public from serious harm occasioned by the commission of further specified offences.

14. But there are significant differences between the two.

(i) EPP could be imposed only for an offence committed after the commencement of the CJA 2003 (4 April 2005), but EDS is expressly made available by section 226A(1) for an offence whenever committed. EDS but not EPP is thus available when sentencing so-called historic cases, especially those of sexual abuse, which are often uncovered many years after the event.

(ii) EPP was available only (unless the custodial term would be at least four years) where the defendant has previously been convicted of an offence listed in Schedule 15A to the CJA 2003, but EDS is available when he has previously been convicted of one listed in Schedule 15B. Those two lists are not the same, and neither is the same as Schedule 15. The EDS list in Schedule 15B is appreciably wider and covers many offences for which EPP was not available. These include many sexual offences (sections 7, 9, 10, 11,

14, 15, 25, 26, 48 and 49 Sexual Offences Act 2003), a number of terrorist offences, of which there are none in the EPP list in Schedule 15A, the very common offence of possessing (etc) indecent photographs of children contrary to section 1 Protection of Children Act 1978 and an entirely new category of offence consisting of abolished offences which amounted to the same as listed ones (no doubt inserted because of point (i) above); moreover two of the sexual offences which are listed in both Schedules (sections 4 and 47 Sexual Offences Act 2003) are, for the purposes of EPP, confined to cases where the defendant would be eligible for life imprisonment, but that restriction is removed from the EDS list in Schedule 15B. In short, EPP and EDS are not available for the same offences.

(iii) An EDS extension period must be for at least one year (for offences committed after the commencement of amendments brought about by the Offender Rehabilitation Act 2014 on 1 February 2015), but there was no minimum length for an EPP extension period.

(iv) Within the sentence imposed, there are very significant differences in the rules for early release. For EPP (as amended in 2008) release was automatic at half the custodial term. By new section 246A, the rules for EDS are that there can be no early release before two-thirds of the custodial term has been served, and if either the offence was a Schedule 15B offence or the custodial term was ten years or more, (and, after 13 April 2015, in all cases: section 4 of the Criminal Justice and Courts Act 2015) there can be early release only on the recommendation of the Parole Board. Thus an EDS prisoner must serve two-thirds in prison and may have to serve the whole of the custodial term imposed by the court.

15. It follows that the temptation to summarise the effect of LASPO as replacing IPP with EDS ought to be resisted. IPP, if it is replaced by anything, is replaced by the new obligatory life sentence under section 224A, but this latter is available for a very much more restricted group of defendants and offences. EDS is similarly constructed to EPP, but different in availability and effect. Meanwhile, there remains, unaltered, for offences where the statutory maximum sentence is life imprisonment, that sentence (section 225(2)). It is, however, clearly true that the wider availability of EDS, in comparison with EPP, is premised on the disappearance of IPP and the narrower availability of the new obligatory life sentence. That is an illustration of the necessity to consider the CJA 2003 and LASPO schemes as a whole in each case. The reality is that no sentence is a direct replacement for a former one. The 2003 regime as a whole has been replaced by the LASPO regime as a whole. When the question arises which sentence, if any, of the ones newly prescribed, will fit a particular offence, it will not be answered by referring back to the previous regime, but must be tackled afresh.

16. One example of this proposition is afforded by the guideline decision of the Court of Appeal (Criminal Division) in *Attorney General's Reference No 27 of 2013 (Burinskas)* [2014] EWCA Crim 334; [2014] 1 WLR 1409. This makes it clear that courts may well have to consider life sentences in future (where the offence carries such a sentence) in cases where previously the necessity to do so did not in practice arise because an IPP sentence was virtually indistinguishable from it: see in particular paras 15 to 18 and the example provided by the different statutory context of *R v DP* [2013] EWCA Crim 1143, discussed in *Burinskas* at 21. In both *Burinskas* and the earlier case of *Saunders* successive Lords Chief Justice were at pains to emphasise that EDS cannot be regarded simply as a replacement for IPP.

LASPO: commencement and transitional provisions

17. The general rule of English law, not confined to the criminal law, is that a statute is prospective rather than retrospective in effect unless it distinctly says otherwise: see for example the discussion in a very different context in *Wilson v First County Trust Ltd (No 2)* [2003] UKHL 40; [2004] 1 AC 816 at 19, 98, 152 and 186. The presumption against retrospective operation applies equally to repeals. Section 16 of the Interpretation Act 1978, re-enacting a provision which was formerly contained in section 38 of the Interpretation Act 1889, provides:

> "(1) where an Act repeals an enactment, the repeal does not, unless the contrary intention appears, -
>
> …
>
> (b) affect the previous operation of the enactment repealed or anything duly done or suffered under that enactment;
>
> (c) affect any right, privilege, obligation or liability acquired, accrued or incurred under that enactment;
>
> (d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against that enactment;
>
> (e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment;

> and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing Act had not been passed."

18. As to the operative date, ordinarily thus for prospective effect, it is standard practice for UK statutes either to prescribe a commencement date in the body of the Act or, more frequently, to provide for such date(s) to be appointed by the Secretary of State by order, that is to say by delegated legislation. This standard practice is recognised by, inter alia, section 4 of the Interpretation Act. It is particularly necessary where a single statute legislates on a range of unconnected topics, as LASPO does. Section 151 of LASPO contains this standard form of provision. By section 151(5), also in standard form, different dates may be appointed for different purposes and the Order may make transitional, transitory or saving provision. The commencement order in question here is Number 4 (SI 2012/2906), made on 17 November 2012.

19. Some of the provisions of LASPO contain explicit statements as to the chronology of events to which they apply. One of them is the new section 226A, inserted into the CJA 2003, which creates the EDS sentence:

> "226A Extended sentence for certain violent or sexual offences: persons 18 or over
>
> (1) This section applies where -
>
> (a) a person aged 18 or over **is convicted** of a specified offence (whether the offence was committed **before or after** this section comes into force) …" [emphasis supplied]

The new section 226A may be contrasted with the new section 224A (which creates the new obligatory life sentence). The latter says:

> "224A Life sentence for second listed offence
>
> (1) This section applies where -

> (a) a person aged 18 or over **is convicted** of an offence listed in Part 1 of Schedule 15B,
>
> (b) the offence was committed **after** this section comes into force, and …" [emphasis supplied]

The obvious reason for the difference is to be found in article 7 ECHR (see below) or an analogous principle well established in English legislative practice. Section 224A (new obligatory life) creates for some offenders (those whose offence does not otherwise carry a maximum of life imprisonment) a sentence which may be heavier than was available under the old CJA 2003 regime, since life is, technically at least, heavier than IPP. By contrast, section 226A (EDS) does not, for although the mechanics of EDS operate more severely on offenders than those of EPP did, still EDS is not more severe than was available under the old regime; in particular it is not more severe than IPP or (where the offence carries it) life. Moreover, the release conditions applied to a sentence are not part of the "penalty" for the purposes of article 7: *R (Uttley) v Secretary of State for the Home Department* [2004] 1 WLR 2278 and *Uttley v UK* in Strasbourg, Application No 36946/03, and see para 47 below. This is thus an example of invariable English practice conforming to article 7 ECHR.

20. Both the new sections distinguish events according to whether they fall before or after "this section comes into force." The Commencement Order then supplied the dates. By article 2 of that Order much of the Act, including, by 2(e), the part which deals with the sentencing of dangerous offenders (Chapter 5 of Part 3), was brought into force on 3 December 2012. By articles 3-4 a number of sentencing provisions outside Chapter 5 were, however, stipulated <u>not</u> to come into force in relation to offences committed, or breaches of community orders occurring, before that date. These sentencing provisions are all ones by which the court is given somewhat more severe powers than it had under the previous legislation. So, by article 3, sections 65, 71, 72 and 81 are not commenced in relation to offences prior to 3 December 2012; these are provisions for new aggravating factors affecting sentence or for new restrictive orders such as curfew requirements to be added to sentences. Similarly a new power to extend the length of a community order is, by article 5, to apply only to orders first made after the commencement date. These are again plainly provisions designed to ensure, in compliance with article 7 ECHR, that no greater punishment is imposed than was available at the time of the offence.

21. Article 6 of the Commencement Order (2012 No 2906 (c 114)) is directly in point in this case. It provides:

> "Saving provision in relation to persons convicted before 3 December 2012.
>
> 6. The coming into force of the following provisions of the Act is of no effect in relation to a person convicted before 3 December 2012 -
>
> (a) section 123 (abolition of certain sentences for dangerous offenders);
>
> … [equivalent provisions for offenders under 18 and for those subject to armed service law]"

22. The effect of article 6(a) is clear: IPP and EPP disappear from the judicial armoury on 3 December 2012 except for anyone already convicted but not yet sentenced. The effect of section 224A is also clear: the new obligatory life sentence is only available where the offence (and thus inevitably the conviction) falls after 3 December 2012. There was a dispute between the parties as to the effect of section 226A(1)(a). The appellant and the Secretary of State submitted that it clearly meant that EDS became available for anyone **convicted** after 3 December 2012, whenever the offence was committed, but was not available for someone convicted before that date even if his sentencing was, in the ordinary course of court process, adjourned until after that date, for example for reports. This approach reads "is convicted" in section 226A(1)(a) as "is hereafter convicted". By contrast, the Crown Prosecution Service advanced the submission that the section could be read as making EDS available to anyone **sentenced** after the commencement date, whenever convicted. This involves reading "is convicted" in section 226A(1)(a) as "has been convicted" or "stands convicted".

23. It may be true that, taken alone, the words "is convicted" could, as a matter merely of grammar, sustain either sense. But there is not much doubt that the ordinary meaning is the former. If "has been convicted" had been meant, it would have been more natural to use those words. Next, the Act like any other is forward looking. To adopt the CPS reading would give the statute a retrospective element despite the absence of any explicit provision to that effect, contrary to the ordinary approach to statutory construction. Moreover, section 226A(1) contains an express provision making it applicable whatever the date of the offence. If it was also meant to apply whatever the date of conviction, one would have expected it to say so: expressio unius, exclusio alterius. The suggested construction would also, perhaps more importantly, involve reading the same words "is convicted" in a different sense in adjacent provisions of the same statute. The same expression "is convicted" appears in several other places in LASPO, and indeed in other statutes. Within

LASPO, in section 224A(1) those words can only mean "is hereafter convicted" because the offence has to come after commencement, and hence also the conviction. The same is true of section 142 which creates two new public order offences of carrying offensive weapons aggravated by an immediate risk of serious harm. In the case of both, a custodial sentence is ordinarily then required "where a person … is convicted" (of the offence). Similarly, section 146 amends the Scrap Metals Act 1964 which in turn by section 4 gives the court power "where a person … is convicted" of offences, to impose an hour's restriction on his trading; LASPO creates a new offence and uses the same expression to extend that power to conviction also for it. The fact that in those sections the Secretary of State's and appellant's meaning is compelled by the context does not alter the consequence that, on the CPS argument, the same words would mean different things in different places. Nor does it displace the force of the point that when LASPO means to speak of convictions hereafter to come it is "is convicted" which is the expression used.

24. It is also true that in the course of a debate in the House of Lords on the bill which became LASPO, Lord McNally, speaking for the Government, incorporated in responses to proposed amendments the following:

> "The Government took the view from an early stage that IPPs must be replaced, and we have brought forward proposals in the Bill to do so. *Once those provisions are commenced, no further IPPs can be imposed, even for previous offending.* That is a major step forward. We are now concerned with those who have or will receive an IPP sentence prior to abolition …" (Committee stage: House of Lords Debates 9 February 2012 at col 443, emphasis added)

This passage is, however, of no legitimate help in construing section 226A(1). The minister was not considering the clause which became that section, nor any question of commencement date. He was responding to pleas by various members of the House to incorporate extra provisions converting **past** IPP sentences into some other form. Understandably, in rejecting retrospective conversion, he drew attention to the prospective nature of the abolition of IPP. His words do not come near to meeting the conditions in which a ministerial statement can be invoked as an aid to statutory construction under *Pepper v Hart* [1993] AC 593.

25. Once the introduction of EDS was, by section 226A(1)(a), made to apply only to those convicted after the commencement of LASPO, the provisions of article 6(a) of the Commencement Order follow. The old regime was continued for the doubtless very small cohort of offenders, of whom Docherty is one, who had been convicted before the commencement date and had still to be sentenced when that date arrived.

26. The combined effect of section 224A, 226A and article 6(a) is thus, for a person convicted as the appellant was of an offence carrying life imprisonment:

(i) if offence, conviction and sentence are all before 3 December 2012 the old regime applies; Life, IPP and EPP are available;

(ii) if offence and conviction were before 3 December 2012, but sentence comes after that date, there are available: life, IPP and EPP but not section 224A obligatory life nor EDS; this is the appellant's category;

(iii) if the offence was before 3 December 2012, but both conviction and sentence come after that date, neither IPP nor EPP, nor section 224A obligatory life are available; but life and EDS are;

(iv) if offence (and therefore conviction and sentence) all come after 3 December 2012, the old regime of IPP and EPP is not available, and all three elements of the new are, thus life, section 224A obligatory life, and EDS.

In addition of course, for all categories, a determinate sentence and non-custodial sentences are or were available.

27. In summary, the timetable so far as is relevant to the present issues, was:

LASPO Royal Assent:	1 May 2012 (but commencement to be prescribed by Order)
Offences:	12 July 2012
Conviction (guilty plea entered):	13 November 2012
Commencement Order made:	17 November 2012
Commencement date:	3 December 2012
Sentence passed:	20 December 2012.

28. The appellant's argument in the present case essentially accepts that article 6(a) and section 226A(1)(a) were designed to go together. His case is, however, that it was unlawful for the Commencement Order to preserve IPP and EPP for those convicted before 3 December 2012. Article 6(a), he says, should be struck down. His first and principal basis for that argument is article 7 ECHR as interpreted by the Strasbourg court in *Scoppola v Italy (No 2)* [2010] EHRR 12, to which it is now necessary to turn.

Article 7: "lex gravior" and "lex mitior"

29. Article 7(1) ECHR provides:

> "No punishment without law
>
> (1) No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed."

The language follows closely that of article 11(2) of the Universal Declaration of Human Rights, adopted by the General Assembly of the United Nations in 1948. As pointed out by the minority judgment at O-111 in *Scoppola* (see below), it reflects a "fundamental" principle of criminal law:

> "Nullum crimen nulla poena sine praevia lege poenali: no one is to be convicted or punished without a pre-existing criminal law in force."

The second sentence of article 7(1) gives effect to the so-called "lex gravior" principle (no heavier penalty).

30. Quite separate is a principle termed "lex mitior". This is conveniently stated in article 15 of the UN International Covenant on Civil and Political Rights ("ICCPR") (Treaty Series No 6 of 1977). Article 15 is in the same terms as article 7 ECHR but contains an additional sentence:

> "If, subsequent to the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby."

31. As pointed out in the dissenting judgment of the minority in *Scoppola (No 2)* at O-111, this represents a norm of a different order from the principle of no punishment without law. Whilst the lex gravior principle is a fundamental and essential condition of freedom, lex mitior -

> "… expresses a choice that reflects the development of a social process in the context of criminal law. It circumscribes the scope of criminal law by preserving benefits accruing to defendants as a result of substantive laws subsequent to the commission of the offence and applicable while the case was pending."

The difference between the two principles is underlined by the fact that whereas lex gravior prohibits applying to a case a rule which was not the law when the acts under judgment were committed, lex mitior, when it operates, actually requires such a rule to be applied.

32. An additional sentence containing this lex mitior principle (benefit of a more lenient penalty) was considered and rejected when article 7 ECHR was adopted in 1950. As far as appears from the material before us, article 15 of the ICCPR was the first international instrument to give it formal effect, in 1966. Subsequently similar wording appeared in article 9 of the American Convention on Human Rights (adopted on 22 November 1969, and coming into force on 18 July 1978); and also much later (in December 2000) in article 49 of the Charter of Fundamental Rights of the European Union, which applies when EU law is in question, although it does not insert the second sentence into the general domestic law of member states.

33. Notwithstanding these international developments, in 1978, in *X v Germany* Application No 7900/77, the European Commission of Human Rights declared inadmissible a claim that article 7 guaranteed the right to a more lenient penalty provided for in a law subsequent to the offence. It rejected an argument that article 7 should be treated as containing the principle derived from the equivalent article of the ICCPR. The Court reached the same conclusion on the same arguments in *Petit v UK* Application No 35574/97, 5 December 2000 and *Zaprianov v Bulgaria* Application No 41171/98, 6 March 2003. As recorded in the dissenting judgment in *Scoppola* at O-117, the court held categorically in *Zaprianov* that "Article 7 does not guarantee the right to have a subsequent and favourable change in the law applicable to an earlier offence."

34. In 2005 the subject was considered by the Court of Justice of the European Communities in the case of *Berlusconi*, (Joined Cases C-387/02, C-391/02 and C-403/02) [2005] ECR I-3565, in the context of Italian laws on the publication of annual company accounts. Charges had been laid alleging the deliberate falsification of accounts. The offences were alleged to have taken place at a time in the 1980s or 1990s when the prescribed punishment on conviction was one to five years. By an Italian presidential decree of 2002 the penalty was very greatly reduced; the minimum disappeared and a maximum of 18 months was imposed. There were also alterations to the definitions of the offences, and to the limitation periods, which were very favourable to the defendants, to the extent that it might not be possible to prosecute at all. The Tribunale in Milan had felt able to describe the new penalties as "derisory". The issue referred to the CJEU was whether the new, much more lenient, rules failed to meet the requirements of the relevant European Directives on the subject, under which penalties had to be "appropriate" in the sense of providing effective sanction and dissuasion. The Italian Criminal Code contained an express lex mitior provision: if the law in force when an offence was committed differed from later law, the applicable law was that which was more favourable to the accused. Lex mitior was raised by the defendants as a barrier to any decision that the new regime failed to comply with European law. The short answer of Advocate General Kokott (paras AG162 and 165) was that it was no such barrier; the principle is based upon fairness and it cannot prevail against the obligation of the state under the Directives to provide effective penalties. The court, however, declined (at para 71) to answer that question because it held (paras 72-73) that a Directive cannot be relied upon directly against an individual to increase the penalty to which he is liable.

35. En route to her advice, the Advocate General recognised at paras AG 156-157 that the principle of retroactive application of more lenient penalties is recognised not only nationally, in Italy and elsewhere in the EU, but also internationally. She recorded, at note 129, that so far as she had been able to ascertain, lex mitior was not expressly recognised either in the UK or Ireland, although it was in all other EU states. In its turn, the court accepted (at para 68) that such principle represented part of the constitutional tradition common to member states. It did not consider either the content of such principle nor how general the tradition was, given the reservation which the Attorney General had expressed, but, on its conclusion, lex mitior did not arise.

36. In *Scoppola (No 2)* the majority of the Grand Chamber at Strasbourg held that article 7 ECHR is now to be read as if it contained the additional sentence providing for lex mitior. It so held notwithstanding the drafting history and the previous decisions of commission and court to the contrary. In para 107 it held that article 7 does not "exclude" inserting the addition, which plainly it does not. In para 109 it went further and held that a lex mitior principle is *implicit* in that article. The latter is a more difficult proposition; if it were wholly accurate none of the debate at

the time of drafting would have been necessary. However, in substance, the majority founded its change of view upon the proposition (at para 106) that:

> "… since the *X v Federal Republic of Germany* decision a consensus has gradually emerged in Europe and internationally around the view that application of a criminal law providing for a more lenient penalty, even one enacted after the commission of the offence, has become a fundamental principle of criminal law. It is also significant that the legislation of the respondent state had recognised that principle since 1930."

At paras 103 and 105, the Court cited as evidence of such a consensus the ICCPR, the American Convention on Human Rights, the Charter of Fundamental Rights of the European Union, the statute of the International Criminal Court, the practice of the Court for former Yugoslavia and the French Cour de Cassation, and it referred to the decision of the CJEU in *Berlusconi*.

37. Scoppola had murdered his wife and injured a son on 2 September 1999. At the time of the murder, the offence carried life imprisonment, it would seem as a mandatory penalty rather than as a maximum. In December 1999 Italy introduced a new abbreviated procedure, for which a defendant could elect; it involved fewer procedural rules from which he might otherwise benefit, but if he chose to elect for it the prescribed penalty became 30 years instead of life. He did elect for it, was convicted on 24 November 2000, and was sentenced accordingly to 30 years. That same day, although coming into effect only after the sentencing was over, a further change in the sentencing law was made, as a result of which someone in the position of the defendant was liable to life imprisonment, albeit without daytime isolation, on the grounds that there were cumulative or continuous offences. There ensued an appeal by the prosecution and such a sentence was substituted. The issue was whether that entailed an infringement of his Convention rights. The court held unanimously that there had been an infringement of article 6, because when he elected for the summary procedure Scoppola had foregone rights which otherwise he would have had in return for the limitation on punishment; accordingly it was a breach of article 6 to go back on that quid pro quo. The sentence of life imprisonment was accordingly a Convention breach independently of the article 7 point. Nevertheless, the latter was an equally central part of the decision of the court.

38. The court explained the rationale for lex mitior in para 108. It is that it is wrong to impose a penalty which the state - by later legislation - has recognised to be excessive. The court said this:

> "108. In the court's opinion, it is consistent with the principle of the rule of law, of which article 7 forms an essential part, to expect a trial court to apply to each punishable act the penalty which the legislator considers appropriate. Inflicting a heavier penalty for the sole reason that it was prescribed at the time of the commission of the offence would mean applying to the defendant's detriment the rules governing the succession of criminal laws in time. In addition, it would amount to disregarding any legislative change favourable to the accused which might have come in before the conviction and continuing to impose penalties which the state - and the community it represents - now consider excessive …"

39. However, some of what the court went on to say in both that paragraph and the ensuing paras 109 and 119 might suggest at least a possibility that the principle should have the effect of requiring a court not only to apply a more lenient penalty currently recognised as appropriate to the crime, but also to select, from all the penalty rules which have existed over the period from the commission of the crime to the date of sentencing, the one most favourable to the defendant. In para 108 the court continued:

> "… The court notes that the obligation to apply**, from among several criminal laws, the one whose provisions are the most favourable to the accused** is a clarification of the rules on the succession of criminal laws, which is in accord with another essential element of article 7, namely the foreseeability of penalties." [emphasis supplied]

In para 109 it said:

> "109. In the light of the foregoing considerations, the court takes the view that it is necessary to depart from the case-law established by the Commission in the case of *X v Federal Republic of Germany* and affirm that article 7(1) of the Convention guarantees not only the principle of non-retrospectiveness of more stringent criminal laws but also, and implicitly, the principle of retrospectiveness of the more lenient criminal law. That principle is embodied in the rule that where there are differences between the criminal law in force at the time of the commission of the offence and **subsequent criminal laws enacted before a final judgment is rendered**, the courts must apply the law whose provisions are most favourable to the defendant." [emphasis supplied]

And in para 119 it said of Scoppola himself:

> "It follows that the applicant was given a heavier sentence than the one prescribed by the law which, **of all the laws in force during the period between the commission of the offence and delivery of the final judgment,** was most favourable to him." [emphasis supplied]

40. There is a very clear difference between (1) a principle which prevents a court from imposing a penalty above and outside the range currently provided for by the State as appropriate to the crime and (2) a principle which requires the court to seek out and apply the most favourable rule which has existed at any intervening time since the offence was committed, even if it has since been abandoned. The first would fall within the rationale of confining the court to a range currently considered appropriate for the offence; the latter would not. The difference between the two is not adverted to, still less explored, in the judgment in *Scoppola.* It is, accordingly, by no means clear that the court intended to expand its incorporation of lex mitior into article 7 by including the latter proposition.

41. The arguably wider statements just described need to be read in the Italian domestic context in which they arose. The eventual sentence under question (passed on appeal) might not have been more severe than would have been applicable at the time the offence was committed (both were life imprisonment), but it was more severe than was provided for by the law in force at the time of his trial and sentence. The Italian Criminal Code contains, as noted in *Berlusconi*, an express lex mitior provision couched in terms which would give a defendant in the position of Scoppola the benefit of (at least) the law operative at the time of trial and sentence. As will be seen below, there could be no question of English law adopting, between trial and appeal, a new more severe penalty regime. However that may be, there is no discussion in *Scoppola* of the difference between the two principles identified in para 40 above. Clearly, on this point, *Berlusconi* is of no assistance, since lex mitior was not applicable to the decision and the question of its extent therefore did not arise.

Lex mitior: English practice

42. As Advocate General Kokott correctly noted in *Berlusconi* English law does not identify a rule by the name of lex mitior. Nor, although that principle appears in a few constitutional instruments in the common law world, such as the Canadian Charter, the New Zealand Bill of Rights and the State of Victoria's Charter of 2006, can it be said that it is recognised by name generally in jurisdictions based on the common law. It is clearly adopted only piecemeal in the USA, whilst being wholly

rejected by some 22 states - see *Western, University of Michigan Public Law and Legal Theory Research Paper No 455, March 2015*. But England's longstanding common law practice is to recognise the principle, at least in the narrower form justified in *Scoppola* as abstaining from imposing a sentence now recognised as excessive. English criminal courts sentence according to the law and practice prevailing at the time of sentence, whenever the offence was committed, subject only to scrupulous observance of the lex gravior principle of article 7, namely that no sentence must be imposed which exceeds that to which the defendant was exposed at the time of committing the offence. The Scottish practice is the same.

43. With the exception of the mandatory life sentence for murder, the sentence for English criminal offences is not prescribed by statute. The statute prescribes the maximum. Sentence within that maximum is a matter for the judgment of the judge according to the individual aggravating and mitigating factors relating to the offence and to the offender. Nor, with very few exceptions, does the statute prescribe a minimum sentence. English sentencing statutes do not, as many laws in other countries do, fix a range between top and bottom points within which a sentence must fall. Guidance is given as to the assessment of the gravity of offences, and as to the *likely* range of sentence, by both the Court of Appeal (Criminal Division) when hearing individual appeals, and, now, by the Sentencing Council, which publishes general guidelines. But the judge remains the arbiter of when justice requires him to depart from the guidelines: see for example the explicit provision to that effect in the legislation relating to Sentencing Council guidelines, by way of section 125(1) of the Coroners and Justice Act 2009.

44. Thus:

> (a) if the maximum sentence has been increased by statute since the offence was committed, the English court cannot sentence beyond the maximum which applied at the time of the offence, because that is the sentence to which the defendant was at that time exposed (lex gravior);
>
> (b) if the maximum sentence has been reduced by statute since the offence was committed, the English court will sentence within the now current maximum; in *R v Shaw* [1996] 2 Cr App R (S) 278 the statute reducing the maximum sentence (for theft) was held as a matter of construction to apply to past as well as to future offences, but in *R v H (J)* (Practice Note) [2011] EWCA Crim 2753; [2012] 1 WLR 1416, a guideline case dealing principally with the sentencing of cases of historic sexual abuse, Lord Judge CJ stated the general approach at para 47(b):

> "Similarly, if maximum sentences have been reduced, as in some instances, for example theft, they have, the more severe attitude to the offence in earlier years, even if it could be established, should not apply."

(c) if sentencing practice as to the assessment of the gravity of an offence has moved downwards since the offence was committed, the court should sentence according to the now current view, and if it did not do so the sentence would be vulnerable to reduction by the Court of Appeal on the grounds that it was manifestly excessive;

(d) if a new sentencing option which is arguably less severe is added by statute or otherwise to the menu of available sentences after the commission of the offence but before the defendant falls to be sentenced, that new option will be available to the court in his case, unless the statute expressly otherwise directs; in the Canadian case of *The Queen v Johnson* 2003 SC 46 the menu of sentencing options for those presenting a future risk had had added to it a new, and for some offenders a possibly less severe, option of post custody supervision in the community; this was applied to the defendant although his offence had been committed before the change in the law; if such circumstances were to occur in England the result would be the same.

(e) appeals against sentence to the Court of Appeal are not conducted as exercises in re-hearing ab initio, as is the rule in some other countries; on appeal a sentence is examined to see whether it either erred in law or principle or was manifestly excessive, and those questions are determined by reference to the law and practice obtaining at the time that the sentence was passed by the trial judge: see *R v Graham* [1999] 2 Cr App R (S) 312 and *R v Boakye* [2012] EWCA Crim 838 discussed at para 53 below; accordingly the situation which arose in *Scoppola* out of a change in the law between sentence and appeal could not raise a similar difficulty here;

(f) moreover, except in very limited cases the Court of Appeal has no power to increase a sentence on appeal (Criminal Appeal Act 1968 section 11(3)); in the exceptional case where it can do so on the application of the Attorney General, its power is limited to putting itself in the position of the trial judge and asking whether on the rules then applying he passed an unduly lenient sentence; for this reason also if the circumstances of *Scoppola* were to occur in England there could be no question of the trial judge's 30 year sentence being replaced on appeal by a life sentence;

(g) similarly, in the separate case of sentences for minor offences which are appealable from the Magistrates' Court to the Crown Court, an appeal lies only at the suit of the defendant; although the Crown Court re-sentences ab initio and can thus pass a more severe sentence than did the magistrates, the practice, if such a step is contemplated, is to give notice of this risk to enable the defendant to abandon his appeal if he wishes; once again therefore the kind of sequence of events which obtained in *Scoppola* would not occur.

45. English practice does not, however, attempt to examine all intervening rules or practices which have obtained over the period between the offence and the sentencing process with a view to finding whether at any time there has been a more favourable practice. To that extent it does not accord with any wider expression of lex mitior, if such was indeed suggested in *Scoppola* by the second half of para 108, the last sentence of 109 and the words of 119 (see para 38 above). Nor is there any reason for such an extension. Sentencing legislation and practice may well go up and down as public policy is held by legislators to change, or current responsible views on particular offending are perceived by courts to develop. But there is no injustice to a defendant to be sentenced according either to the law as it existed at the time of his offence or, if more lenient, according to the law as it exists when he is convicted and sentenced. To insist that a defendant should not be sentenced on a basis now authoritatively regarded as excessive is one thing. It is quite another to say that he should be sentenced according to a practice which did not obtain when he committed the offence and does not obtain now, merely because for some time in the interim, however short, a different practice was adopted which has now been abandoned as wrong.

46. This can be illustrated by a provision of the Criminal Justice Act 1991. Parliament having, by section 2(2)(a) of that Act, introduced the concept of the commensurate sentence measured only by the seriousness of the offence, went on to provide by section 29, controversially, that an offence could not be considered to be more serious than otherwise it would by reason either of the defendant's previous offending or his failure to respond to past sentences. Consistently with the English practice explained above, that provision, which operated to the advantage of most defendants, was applied immediately to all those coming before the courts, whenever their offences had been committed. But the rule was rapidly found to be unrealistic and wrong, requiring habitual criminals such as sexual predators or fraudsters to be treated as if they were first offenders. Parliament reversed it by section 66 of the Criminal Justice Act 1993. It is not English law that every defendant whose offence was committed before the commencement of section 29 of the 1991 Act is now entitled to be sentenced on the basis that, however often he had done the same thing before, his crime has to be treated as if it were a first offence, simply because for the two years 1991-1993 that section had been in force. The section's brief stay on the statute book after the offence was committed can have had no conceivable impact on such a defendant and should have nothing to do with

his sentencing in 2016. It seems unlikely that the Strasbourg court, which was not in *Scoppola* considering any such scenario, would hold otherwise. The lex mitior principle should not be held to extend to such a proposition.

47. The well settled aspects of English legislative and judicial practice set out above in relation to the penalties provided for need to be distinguished from the exercise of the sentencing judge's discretion *within* the maximum permitted at any time. The sentence to which a defendant was exposed, at the time of his offence, is, by English law, a sentence up to the maximum then permitted. It is well recognised that the multifarious factors which fall to be considered when fixing a sentence will inevitably vary in weight as time passes. New aggravating or mitigating factors will be recognised from time to time, or the weight accorded to such factors will alter. The long term damage to victims of sexual abuse, for example, is very much better understood now than it was 30 years ago. Very large numbers of crimes of persistent sexual abuse committed many years ago are now coming before the courts, principally because victims are belatedly feeling able to reveal them. New investigation techniques, such as DNA testing, may also identify various types of offender, by no means only sexual offenders, years after the event. The discovery of a recent offence may not infrequently lead to the revelation that the offender has been committing similar offences for many years. Although a court sentencing today for an offence committed many years ago must confine itself within the maximum which was available by statute at the time of the offence, it is not required, nor should it be, to apply an outdated assessment to the gravity of the conduct. Nor, if the impact of the offending on the victim has been greatly increased by years of suppression in consequence of the manner of abuse, should the court ignore that fact. The basic rule, as carefully explained by Lord Judge CJ in *R v H* (supra) is that the applicable maximum is that in force at the time of the offence, but it is positively wrong for a court in 2016 to attempt to evaluate the particular offence by hypothesising that it is sitting in (say) 1984.

48. That it is the maximum sentence which matters to lex gravior is the approach which has been consistently adopted. In *Coeme v Belgium* [2000] ECHR 250, considering the lex gravior rule in article 7, the Strasbourg court held (at para 145) that article 7 required that it be shown that when the offender's act was done there was in force a legal provision making it punishable "and that the punishment imposed **did not exceed the limits** fixed by that provision." (emphasis supplied). That was the meaning of the expression "penalty … applicable" in article 7. In *R (Uttley) v Secretary of State for the Home Department* [2004] 1 WLR 2278 the House of Lords applied the same approach. All the law lords expressly rejected the contention that that article is concerned with the penalty "which the court could in practice have been expected to impose". As Lord Rodger pointed out at para 42, that would involve "speculative excursions into the realm of the counterfactual". What matters is the maximum penalty permitted. The same approach was expressly adopted by the Strasbourg court when application was made to it in that same case:

Uttley v UK Application 36946/03. This learning is confirmed in *Scoppola*. At para 95 the court held, citing *Coeme*:

> "The court must therefore verify that at the time when an accused person performed the act which led to his being prosecuted and convicted there was in force a legal provision which made that act punishable, and that the punishment imposed **did not exceed the limits** fixed by that provision." [emphasis supplied]

And at para 98 it reiterated the rule that the court, like the Commission before it, draws a distinction between a measure that is in substance a penalty and a measure, such as one relating to the regime for early release, which concerns the execution or enforcement of the penalty.

49. In countries, unlike England, where sentencing laws prescribe a range between a minimum and a maximum, the raising of the minimum has an effect comparable to the raising of the maximum: both constrain the court by creating a more severe regime, thus engaging the rule against lex gravior. Such a situation came before the Strasbourg court in *Maktouf v Bosnia & Herzegovina* (2014) 58 EHRR 11. The effect of the change was to alter the range for the defendant Maktouf (an accomplice) from 1-15 to 5-20 years. For the defendant Damjanovich (a principal) the range was altered from 5-15 to 10-20. Maktouf was expressly sentenced to the new minimum of five years, but the court could not go below that figure as previously it could have done. Damjanovich was sentenced to 11 years, just one year above the new minimum, and the Court was satisfied that if the old range had been treated as governing the case he might well have received less. Accordingly there were breaches of the lex gravior rule in article 7, although it did not follow that lower sentences ought to have been imposed: that was a matter for the sentencing court. What the Strasbourg court appears to have been contemplating was the possibility that in order to maintain the differential between Damjanovicj and someone else who had committed the same offence but in a less grave manner, the court might have had to raise his sentence a little above the new minimum, thus to leave room below it for the less grave example of similar offending. It was not suggesting that the revision of the minimum prevented a contemporaneous assessment of the gravity of his offence. There was no reason why that assessment should not have been undertaken according to the practice at the time of sentencing, as it appears that it was, and as would occur in England. Thus the ECtHR was concerned with altered statutory constraints operating on the sentencing court, of which one, the new minimum, might have (but had not necessarily) prevented the court from sentencing as it otherwise would have done. Similar considerations might apply in the present case <u>if</u> IPP was not legitimately available to the judge (as to which see below). But there is nothing in this which is inconsistent with the English practice in relation to historic offences as explained in *R v H (J)*, and no question of

either the lex gravior or the lex mitior principles requiring the court to undertake the hypothetical exercise of imagining itself sentencing many years ago. That exercise would be both artificial and unjust.

Phased commencement and anticipation

50. New legislation frequently calls for carefully planned and phased commencement. That is a fact by no means confined to sentencing legislation, but that field is certainly no exception. New sentencing regimes may require quite extensive administrative adjustments, for example to the organisation of the probation service or the prisons. They may also, and in England and Wales often do, entail complex adjustments to the associated rules for early release, as do the new EDS provisions in LASPO. Phased introduction of sentencing changes is perfectly sensible. The decision about what to introduce when can be complex and may well admit of more than a single solution, but there is nothing unlawful about leaving it to the minister charged by the statute with making the necessary commencement orders.

51. Some sentencing changes may be relatively simple. A change in the maximum sentence may be one. The Canadian case of *The Queen v Johnson* is an example of a more sophisticated change of regime, and would no doubt have entailed putting in place new offender-management administrative arrangements; it was nevertheless comparatively simple because the existing options remained with a fresh one added. That may be contrasted with a case such as the present. If regime A, consisting of options 1, 2 and 3, is to be replaced by regime B, consisting of options 1, 4 and 5, and the new options are positively inconsistent with the old, commencement and transition are likely to require careful handling. The wish to provide for lex mitior may collide with the greater imperative not to impose lex gravior. If one or more of the new options cannot be brought into force in relation to past offences, in order to avoid infringement of lex gravior, it may be necessary to defer repeal of one or more of the old options until there is a coherent scheme in place. The objects of sentencing include of course fairness to the offender, but they also include proper punishment, the deterrence of crime and, most significantly, the protection of the public from dangerous offenders.

52. In the transition from the scheme of the CJA 2003 to that of LASPO several of these difficulties arose. First, the new obligatory life sentence was more severe for some offenders than what went before. Second, the new EDS, despite its nominal similarity to EPP, affected different offenders. EDS and EPP could not sensibly co-exist, and not simply because the prospect of the court having to consider two possible regimes is alarming. There would be an unacceptable risk of unfairness and of arbitrariness. For example, a great many sexual offences can be charged under several different sections of the Sexual Offences Act 2003. The same act of sexual

abuse of a child under 13 can easily fall within both sections 7 and 8. But whilst if charged under section 8 it qualifies for both an EPP and an EDS, if charged under section 7 EPP would not be available but EDS would. Two defendants, differently charged for essentially the same behaviour, might have to be sentenced differently, whilst a single defendant's sentencing regime would vary for the same conduct according to which charge had been preferred. Even if it were possible to postulate a rule that the more lenient sentence had to be applied, this would not solve the problem of potentially unfair differential between similar defendants where either only one sentence is available for each, or one defendant could be subject to both, and another to only one.

53. The reality is that all changes in sentencing law or practice have to start somewhere. It is perfectly rational, indeed sensible, for a date to be fixed and for the sentencing of any offender which takes place after that date to be governed by the new rule/practice, whenever the offence was committed, in accordance with the usual English approach and subject only to avoiding lex gravior. That is the practice now adopted by the Sentencing Council when promulgating new guidelines. Such guidelines are issued on the explicit basis that they are to become applicable from a stated date, as soon after publication as it is practicable for courts and practitioners to be equipped with and digest copies. The new guidelines are made applicable to any sentence passed after that date, whenever the offence was committed. In 2012 a guideline for drug offences included the recommendation that the offences of some couriers from abroad, where they were vulnerable and exploited by others, ought not to be treated as quite so grave as other drug importation cases. The guideline was stated to operate for sentences from 27 February 2012, whenever the offence had been committed. It had been preceded in the usual way by a public consultation, in which this change, like others, had been canvassed as a possibility. A number of previously sentenced defendants who said they were in this category (although they were not) abstained from appealing their sentences until after the new guideline was published. Their offences and sentences had been between 2008 and 2011; all the appeals were very much beyond the time limit. In *R v Boakye* [2012] EWCA Crim 838 the Court of Appeal held that even if these cases had been within the new assessment of gravity, it was not possible retrospectively to re-visit unappealed sentences. That was to apply well established law: see *R v Graham* [1999] 2 Cr App R (S) 312, where the court had considered a reference to the court by the Criminal Cases Review Commission long after sentence and following a change in sentencing practice. Rose LJ had there said, at p 315:

> "A defendant sentenced lawfully, in accordance with the prevailing tariff, and when all factors relevant to sentence were known to the sentencing judge, can, in our view, hardly be described as the victim of [a miscarriage of justice]. Secondly, an alteration in the statutory maxima or minima penalty

> between sentence and reference cannot, in our view, give rise to legitimate grievance. ..."

54. Whilst a court will faithfully give effect to a change in a sentencing regime from the time that it is introduced, it is not permissible for it to anticipate its commencement. That way lies chaos. Sometimes, indeed, changes which are legislated for in statute are never brought into force. That was the case with a raft of new provisions for intermittent custody enacted by the Criminal Justice Act 2003. The present appeal amounts to a claim by Docherty to anticipate the commencement of the change of regime, to the extent that he wishes the disappearance of IPP to be effective for him before the Commencement Order (by article 6(a)) abolishes it. He can no more do that than it would be possible for him to contend that IPP should be treated as unavailable for every court from the day that LASPO received the Royal Assent on 1 May 2012. Anticipation of a change which is yet to take effect is no part of lex mitior. Lex mitior, as explained in *Scoppola* at para 108, prevents the imposition of a sentence which the system has now adjudged, by a change of law, to be excessive. But if the change has yet to be made, that judgment has not yet been given effect; it is in prospect only. The fixing of the date for the change is part of the change itself. If a conscious decision has been made not yet to commence the new law/practice, it cannot yet be said that "society now considers excessive" the old. And it may well consider, rationally, that a penalty shall be regarded as excessive for the future but not for the past.

Conclusion: lex mitior

55. There are real difficulties in interpreting the decision in *Scoppola*, both with the insertion of a new sentence into article 7 when such was deliberately left out at the time of drafting, and with its extent if it is to be considered inserted. As to the first, the decision is the considered view of the Grand Chamber. It is not necessary to revisit the controversy because English practice recognises lex mitior in its ordinary form, namely the principle that an offender should be sentenced according to the law and practice prevailing at the time of his sentence, subject to not exceeding the limits (ie in England normally the maximum) provided for at the time the offence was committed. If it were necessary to investigate the second difficulty, and the possibility that a defendant is entitled to insist on being sentenced according to any more favourable law or practice which has at any time obtained between the commission of the offence and the passing of sentence, that extended rule is not clearly adopted by the Grand Chamber, appears not to be within the stated rationale for the principle of lex mitior, and would entail unwarranted consequences. Such an extended concept of the principle should, with great respect, not be applied.

56. Given these conclusions, the various other examples, to which we were referred, of express inclusions in national and international instruments of an

additional sentence stating the lex mitior rule, do not take the matter any further forward. Unlike ECHR article 7 they are not part of domestic English law. They do not in any event shed any light on the second question examined above, as to the extent of the lex mitior principle, assuming it is to be read into article 7.

Application to the present case

57. If the new LASPO regime had been commenced for a defendant in Docherty's position at the time he fell to be sentenced, then in accordance with English practice, it would have been applicable to him, notwithstanding that his offence had been committed before the change in the law.

58. But the new regime was not in force for his case. It was the subject of legitimate phased introduction. For the reasons set out in para 54 above, lex mitior does not entitle Docherty to anticipate the statutory commencement of LASPO. The case made on his behalf was, both in the Court of Appeal [2014] EWCA Crim 1197; [2014] 2 Cr App R 76, and before this court, that he ought to have been sentenced to EPP. That exposes the flaw in the argument, for it would seek to insist on the benefit of (accelerated) removal of one part of the old regime (IPP) whilst at the same time claiming the preservation of another part of it (EPP).

59. The Court of Appeal also upheld the sentence of IPP on an additional basis. It accepted that the principle of lex mitior should be followed, without needing to resolve the possible debate as to its extent. But it adverted to the fact that Docherty's offences were punishable by a maximum of life imprisonment. It correctly rejected the conclusion that that maximum was, by itself, enough to show that no question of lex mitior arose. It by no means follows that every case which would have been met by IPP will now be met by a life sentence: see for example the case of *Smith* dealt with in *Burinskas* at para 138 of the transcript at [2014] EWCA Crim 334. But the Court of Appeal went on to hold that the lex mitior principle did not apply if there was a reasonable possibility that, had IPP not been legitimately applicable, Docherty would have been sentenced to life. Since there was the real possibility that such a sentence would have been passed, that was held to constitute a further reason for dismissing the appeal.

60. The Court of Appeal was plainly right that the judge might, if IPP had not been available, have passed a life sentence. He said that he did not need to do so, because IPP was available to him, and he expressly remarked that "the position may well change with the changes in the law". *Burinskas* (para 16 above) has since shown that to have been a far-sighted observation. But if lex mitior had meant that IPP, although technically available, should not have been passed, the sentence of IPP passed would fall to be quashed as wrong in principle or manifestly excessive unless

in its absence a life sentence would have been the correct sentence and thus lex mitior could not have availed Docherty. On this hypothesis, whether or not a life sentence would, absent IPP, have been the correct sentence would fall to be determined by the Court of Appeal itself. It would not be sufficient that life might well have been the judge's sentence. This did not, however, arise.

Article 6(a) ultra vires?

61. The appellant's alternative argument is that once the decision had been made, for good reasons, to abandon IPP as a form of sentence, it was unlawful, as contrary to the clear purpose of LASPO, to preserve it for anyone who had yet to be sentenced after that Act was commenced. For that reason, he contends, article 6(a) of the Commencement Order, at least insofar as it preserved IPP, was not properly made within the purpose for which such an order can be made under the power given by LASPO. It offends the Padfield principle (*Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997).

62. This alternative argument founders on the same rock as the argument from lex mitior. There is nothing irrational, and therefore nothing contrary to the statutory purpose, in phased commencement. It is no more permissible for the appellant to use this argument to anticipate the planned commencement of LASPO than it is to deploy lex mitior to do so.

Discrimination

63. The suggested discrimination is said to arise as between a defendant in the position of the appellant, and a defendant who committed an identical offence on a similar date, but who was convicted on 4 December 2012. It is certainly true that the effect of the Commencement Order is that IPP is available to be imposed in the case of the appellant but not in the case of that comparator. The appellant submits that this discriminates objectionably against him on grounds of "other status", namely either (i) his status as a convicted person prior to 3 December or (ii) his status as a prisoner who is subject to an indeterminate sentence. Assuming for the sake of argument that status as a prisoner subject to a particular regime can in some circumstances amount to sufficient status to bring article 14 into question (*Clift v UK* [2010] ECHR 1106), it cannot do so if the suggested status is defined entirely by the alleged discrimination; that was not the case in *Clift*. For that reason, the second suggested status cannot suffice. As to the first, even if it be assumed in the appellant's favour that the mere date of conviction can amount to a sufficient status, which is doubtful, the differential in treatment is clearly justified. All changes in sentencing law have to start somewhere. It will inevitably be possible in every case of such a change to find a difference in treatment as between a defendant sentenced

on the day before the change is effective and a defendant sentenced on the day after it. The difference of treatment is inherent in the change in the law. If it were to be objectionable discrimination, it would be impossible to change the law. There are any number of points which may be taken as triggering the change of regime. The point of conviction is clearly one, and the point of sentence is another. Neither is, by itself, irrational or unjustified.

Disposal

64. It follows that the several challenges to the sentence of IPP fail and the appeal must be dismissed.