

EXECUTIVE NOTE

THE OFFENDERS ASSISTING INVESTIGATIONS AND PROSECUTIONS (SUBSTITUTED SENTENCES) ORDER 2008 - SSI/2008/232

This instrument was made in exercise of the powers conferred by Section 94(3) of the Police, Public Order and Criminal Justice (Scotland) Act 2006 (“the 2006 Act”). It is subject to negative resolution procedure.

Background

Sections 91 to 96 of the 2006 Act make provision for offenders to assist prosecutions. In particular section 91 makes provision whereby the court, in sentencing an offender, must take into account assistance given or offered by that offender. That is in circumstances where the offender has: (a) pled guilty and been convicted on indictment, and (b) entered into a written assistance agreement with a prosecutor to assist with the investigation or prosecution of that or other offences.

In these circumstances the court must explain how the fact that the offender assisted the investigation or prosecution of offences impacted on the sentence that it gave. If the court reduced the sentence it gave as a result of the assistance or the offered assistance then it must set out what the greater sentence would have been if the assistance had not been given. The court’s duty to give reasons publicly is subject to a public interest test, because in certain circumstances it will not be appropriate to reveal that an offender has given assistance to the prosecution.

Section 92 of the 2006 Act makes provision in relation to the review of sentences in circumstances where: (a) an offender has received a discounted sentence (under section 91) on account of assistance which has been offered to the prosecution, but subsequently the offender fails to give that assistance; (b) the offender has received a discounted sentence on account of assistance offered to the prosecution, and subsequently gives or offers to give further assistance; (c) the offender receives a sentence which is not discounted but subsequently gives or offers to give the prosecution assistance in respect of the investigation or prosecution of an offence.

In the scenario envisaged at (a) above the court may substitute an increased sentence on account of the failure to give assistance which has been offered. In scenarios (b) and (c) the court may substitute a lesser sentence on account of the assistance of further assistance given or offered.

A reference to the court to impose a substitute sentence, as describe above, is made by the prosecutor in circumstances where the offender is still serving the sentence and the prosecutor considers it is in the interests of justice to do so.

Section 93(10) provides that any part of a sentence which has already been served under the original sentence is to be taken into account in determining when a greater or lesser sentence which has been substituted under that section comes to an end.

Policy Objective

Section 94(3) of the 2006 Act provides an order-making power for the Scottish Ministers to make provisions as to how periods of time served in custody, on release on license or on release unconditionally under Part 1 of the Prisoners and Criminal Proceedings (Scotland) Act 1993 (“the 1993 Act”) are to affect corresponding periods of time to be served under the 1993 Act as they apply to a substitute sentence imposed under either section 92(7) or (9) or on appeal under section 92(11) of the 2006 Act.

The overall policy aim is to provide, as far as is possible, that the effect of the substitute sentence is the same as if it was imposed at the point that the offender was first sentenced under the original sentence. Following comments made by the Law Society of Scotland it was recognised during the drafting of the Bill that led to the 2006 Act that there may be situations where assistance has been offered, the offender has spent time in custody and then been released on license, or unconditionally, and then the offender refuses to give the assistance offered. In those circumstances the offender would be returned to custody, however, due recognition has to be made of time already spent in custody, time already spent on license or time already spent between the date of unconditional release and the expiry of the sentence under the original sentence.

The Order expands on the basic proposition found at section 93(10) of the 2006 Act and described above. It makes provision for calculating (under Part I of the 1993 Act) the total periods that must be spent in custody, on release on license, and on unconditional release when a substitute sentence has been imposed under section 92(7), (9) or (11) of the 2006 Act. Under article 3(1) any period of time that has already been spent in custody under the original sentence is to be deducted from the total period due to be spent in custody under the substitute sentence. Under Article 3(2) any period of time spent in custody which is surplus to that which an offender requires to spend in custody under a substituted sentence (which, in practice, will occur where a reduced sentence is substituted in circumstances where the offender has given or offered more assistance to the prosecutor); any period already spent on release on license; or any period on unconditional release under the original sentence, is to be deducted from the total period due to be spent on release on license under the substitute sentence. Similar provision is made in article 3(3) in relation to the total period due spent on unconditional release under a substitute sentence.

Articles 3(2)(a) and 3(3)(a) of the Order recognise the situation where a sentence is reduced due to the offender offering or giving more assistance to the authorities. In those circumstances it is thought appropriate to give the offender credit for any period which has been spent in custody and which is in excess of that which is required to be spent under the substitute sentence. The surplus period spent in custody is deducted from the period which still requires to be spent on license or on unconditional release.

While periods where an offender is on release on license and periods in which the offender is on release unconditionally are not exact comparators it is recognised that the offender is not absolutely free of the sentence while on unconditional release. Notably provision is made at section 16 of the 1993 Act for returning such an offender to prison under that sentence should they commit a further offence before the expiry of that sentence. On this basis the policy view is that periods on release unconditionally could not be “written-off” even though the offender is subject to less stringent conditions than when he is on license.

An example may help to explain the working of the Order.

An offender is sentenced to a 6-year sentence from 7 May 2008. This is a reduced sentence because the offender has undertaken to give assistance to the prosecutor in terms of an assistance agreement. This could be, for example, to provide evidence at a trial diet. The sentence is due to expire on 6 May 2014.

Under section 1(3) of the 1993 Act the prisoner is entitled to be considered for parole when half of the sentence has been served. This is on 7 May 2011. Following a parole hearing the prisoner is released on parole on 19 May 2011.

Some time later the offender confirms that the assistance promised will not be given. The case is therefore referred to the court to consider imposing a substitute sentence. On 14 May 2012 the court substitutes the original 6-year sentence with a 12-year sentence, and the accused is returned to custody.

This means that the notional sentence expiry date now becomes 6 May 2020 (i.e. 12 years from 7 May 2008). This is a total sentence of 4383 days. The earliest date that the offender will now qualify for parole is at the half-way point of that sentence, after having served 2192 days. In terms of article 3(1) of the total time spent custody under a substitute sentence must be reduced by any time already spent in custody. 1108 days have already been spent in custody (i.e. from 7 May 2008 to 19 May 2011). So a further 1084 days must be spent in custody before the accused becomes entitled to parole. The earliest date of parole will therefore be 2 May 2015 (i.e. 1084 days from the date of imposition of the substitute sentence assuming the offender is remanded in custody on the date on which the substitute sentence is imposed).

Section 3(2) of the 1993 Act provides that a long-term prisoner shall be released on license when the offender has served two-thirds of their sentence in custody. In this instance the two-thirds point of this sentence is after 2922 days (i.e. $\frac{2}{3}$ of the 4383 day substitute sentence). Article 3(1) of the Order, again, bites here thus the total period to be spent in custody under the substitute sentence is to be reduced by the period spent in custody under the original sentence. 1108 days have been spent in custody prior to the imposition of the substitute sentence. Assuming the offender had not be given parole by that stage he would need to serve 1814 days in custody from the date he was remanded following the imposition of the substitute sentence before being entitled to automatic release on license. This would make the earliest date on which he would be automatically released on license May 2017.

Let us assume that the offender is released on license at the two-thirds point of the sentence. The total period of the sentence is 4383 days. At that point the offender will have served 2922 days in custody, leaving, notionally, 1461 days to serve on license (i.e. one third of the total sentence). However, Article 3(2) of the Order means that any time due to be spent on license under the substitute sentence is to be reduced by the period spent on license under the original sentence. Under the original sentence 360 days (from 20 May 2011 to 13 May 2012) were spent on license. So only a further 1101 days need be spent on license, thus making the license end date and the actual sentence end date 6 May 2020.

Consultation

There is no statutory requirement to consult in relation to this Order. The Order has been drafted in discussion with colleagues in the Scottish Prison Service and the Crown Office.

Financial Effects

There will be no financial effects in relation to this Order. Consideration of the financial effect of the parts of the 2006 Act which deal with offenders assisting prosecutions and immunity from prosecution were set out in the Financial Memorandum which accompanied the Police, Public Order and Criminal Justice (Scotland) Bill.

Scottish Executive Criminal Justice Directorate
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