

# The Sentencing of Young Adults: A Distinct Group Requiring a Distinct Approach

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*This article examines the impact of the remarkable recent progress of the criminal justice system in recognising that young adults aged 18–25 years should be treated as a distinct category of defendant for the purposes of sentencing. The authors chart the historic treatment of this issue and consider the growth of a substantial body of sentencing authorities which have established the particular importance of age and lack of maturity as a mitigating factor for young adults. These developments are now reflected in the Sentencing Council’s expanded explanation of “age and/or lack maturity” as a mitigating factor, with significant implications for practitioners.*

## Introduction

The criminal law has long recognised the need for a different approach when dealing with young people who offend.

The concept has its origins in s.103 Children’s Act 1908, colloquially known as the Children’s Charter. The intention of Parliament in the 1908 Act was, in the words of the government’s representative, the Lord Advocate, “to shut the prison door and open the door of hope”.

Historically, it has been difficult to identify what approach the law should take to youth and at what age limit any age-based approach should cease to apply. Thus, the late Lord Bingham began his lecture for the Prison Reform Trust in 1997:

“In a judgement twice quoted with approval by the House of Lords, an Australian judge sitting in the Supreme Court of Victoria said: “No civilised society ... regards children as accountable for their actions to the same extent as adults.” ... The wisdom of protecting young children against the full rigour

of the criminal law is beyond argument. The difficulty lies in determining when and under what circumstances that protection should be removed.”<sup>1</sup>

There is no doubt that the age of 18 is acknowledged in law as a turning point for young people. Section 105 of the Children Act 1989 defines a child as a person under the age of 18.<sup>2</sup> Section 44 of the Children and Young Person’s Act 1933, read with s.107 of that Act, establishes the statutory duty of the sentencing court to have regard to the welfare of a child aged under 18. Section 37 of the Crime and Disorder Act 1998 states that the principal objective of the youth justice system is to prevent offending by children under the age of 18.

We shall argue in this article that the age threshold fails to recognise that young people continue to mature after they have turned 18 and, therefore, reaching 18 does not present a cliff edge for the purposes of sentencing.

Until the Latey Report in 1967, the prevailing view was that adulthood was not attained until the age of 21.<sup>3</sup> It was not until the late 1960s and early 1970s that we saw legislation bringing the age of voting<sup>4</sup> and marriage<sup>5</sup> without parental consent down to 18.

However, neuroscientific research now clearly points to maturation not being complete in the majority of young people until the age of 25.<sup>6</sup> In the course of two inquiries, the Justice Committee has accepted the need to acknowledge a category of defendants aged between 18 and 24 who are neither children nor fully mature adults.<sup>7</sup>

Not long after his appointment as Lord Chief Justice, Lord Burnett gave an interview to *The Times* newspaper<sup>8</sup> in which he identified the need for defendants aged 18–24 to be given specific recognition and pointed to a lack of understanding as to how immaturity may affect a young person’s culpability.

At that time, the Sentencing Council guidelines<sup>9</sup> for adults did include “age and/or lack of maturity” within the list of mitigating factors to be considered in Step Two of any sentencing exercise. As, however, was the case with all the general aggravating and mitigating factors listed in Sentencing Council guidelines at that time,<sup>10</sup> there was no further information to assist practitioners or the court as to how these factors should be applied. It is of no surprise then that the *Times* article stated “Lord Burnett said the age of an offender was meant to be a mitigating factor but added; ‘I have a sense it’s not applied as it should be’”.

In this article we look at the Court of Appeal’s emerging appreciation of the impact of immaturity on culpability and the promotion of these factors in sentencing

<sup>1</sup> Delivered as the Prison Reform Trust Annual lecture on 25 June 1997; Lord Bingham of Cornhill, *Justice for the Young: Prison Reform Trust Annual Lecture 1997* (Prison Reform Trust, 1997), p. 1.

<sup>2</sup> In this article we use the term “children” to refer to those aged 10–17, “young adults” to refer to those aged 18–21/25 and “young people” for both groups.

<sup>3</sup> Lord High Chancellor Latey, *Report of the Committee on the Age of Majority (The Latey Report)* (1967), Cmnd 3342.

<sup>4</sup> Representation of the People Act 1969.

<sup>5</sup> Marriage Act 1949 c.76, as amended by the Family Law Reform Act 1987, Sch.2, paras (9)–(10).

<sup>6</sup> See, e.g. M. Arain, M. Haque, L. Johal, P. Mathur, W. Nel, A. Rais, R. Sandu and S. Sharma, “Maturation of the adolescent brain” (2013) 9 *Neuropsychiatric Disease and Treatment* 449.

<sup>7</sup> House of Commons Justice Committee, *The Treatment of Young Adults in the Criminal Justice System* Seventh Report of Session 2016–17 (26 October 2016), HC 169; House of Commons Justice Committee, *Young Adults in the Criminal Justice System* Eighth Report of Session 2017–19 (20 June 2018), HC 419.

<sup>8</sup> *The Times* 3 May 2018.

<sup>9</sup> See, e.g., Sentencing Guidelines Council, *Magistrates’ Court Sentencing Guidelines* (2008) <https://www.sentencingcouncil.org.uk/wp-content/uploads/Final-MCSG-2017-1-1.pdf> [Accessed 17 December 2020].

<sup>10</sup> Sentencing Guidelines Council, *Magistrates’ Court Sentencing Guidelines*.

policy, in the context of widespread recognition of there being a discrete category of “young adult” defendant.

Instrumental in this progress is the Lord Chief Justice’s decision in *Clarke*<sup>11</sup> in January 2018. We look at how this decision has stimulated the Court of Appeal’s appetite for grappling with age and immaturity and the key principles to emerge from these cases, which are now reflected in the Sentencing Council’s expanded explanation of “age and/or lack of maturity”.<sup>12</sup>

Finally, we consider the implications of these developments for practitioners.

## Background

There is precedent for taking a different approach to young adults in the criminal justice system and for the system making adjustments in recognition of the ability of young people to change and develop well into young adulthood. For example, in accordance with s.227 of the Sentencing Code,<sup>13</sup> children and young people under the age of 21 cannot legally be “imprisoned” but only “detained”.

The best example of nuanced judicial treatment of the ability of young people to change in adulthood can be found in the minimum term review process. This process is available of all those convicted of a murder that was committed when the defendant was under 18. Anyone in this category receives a mandatory life sentence of detention during Her Majesty’s Pleasure previously in accordance with s.90 of the Power of Criminal Courts (Sentencing) Act 2000 and now in accordance with s.259 of the Sentencing Act 2020. No other sentence has an in-built review process that specifically tasks the Court with considering the maturation and development of a young person, even after they have turned 18.

In recognition of the importance of the welfare principle,<sup>14</sup> and the capacity for change in young people, the sentence includes a right to a review of the minimum term that must be served before parole can be considered.<sup>15</sup> The review process was adopted as official policy in 2000,<sup>16</sup> is known as the minimum term review and only applies to those who committed the offence of murder under the age of 18. It involves the opportunity for an individual to apply to the High Court for a reduction in the minimum term at the halfway point of that term. The court is tasked with assessing whether the applicant has made exceptional progress.

The rationale for this review process flows from the special considerations that apply in punishing those who offend as children. These were explained by Lady Hale in *Smith*. Lady Hale examined the conclusions in the American Supreme Court case of *Roper v Simmons*<sup>17</sup> that: (1) a juvenile’s irresponsible conduct was not as morally reprehensible as that of an adult, (2) juveniles had a greater claim to be forgiven for failing to escape the negative influences around them, and (3)

<sup>11</sup> *Clarke* [2018] EWCA Crim 185; [2018] 1 Cr. App. R. (S.) 52.

<sup>12</sup> Sentencing Council, *General guideline: overarching principles*, [Step 2 Aggravating and Mitigating Factors], <https://www.sentencingcouncil.org.uk/overarching-guides/crown-court/item/general-guideline-overarching-principles/> and <https://www.sentencingcouncil.org.uk/overarching-guides/magistrates-court/item/general-guideline-overarching-principles> [Both accessed 17 December 2020].

<sup>13</sup> Formerly, Power of Criminal Courts (Sentencing) Act 2000 s.162.

<sup>14</sup> Children and Young Persons Act 1933 s.44.

<sup>15</sup> *Secretary of State for the Home Department Ex p. Venables and Secretary of State for the Home Department Ex p. Thompson* [1998] A.C. 407; [1997] 3 W.L.R. 23. This was considered in *Secretary of State for the Home Department Ex p. Smith* [2005] UKHL 51; [2006] 1 A.C. 159.

<sup>16</sup> *Hansard*, HC, cols 22–23 (13 March 2000), Statement of Secretary of State for the Home Department

<sup>17</sup> *Roper v Simmons* 543 U.S. 551 (2005).

even the most heinous crime was not necessarily evidence of an irretrievable depraved character. She concluded:

- “25. These considerations are relevant to the retributive and deterrent aspects of sentencing, in that they indicate that the great majority of juveniles are less blameworthy and more worthy of forgiveness than adult offenders. ... [A]n 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. That is no doubt why the Children and Young Persons Act 1933, in section 44(1), required, and still requires, every court dealing with any juvenile offender to have regard to his or her welfare. It is important to the welfare of any young person that his need to develop into fully functioning, law abiding and responsible member of society is properly met. But that is also important for the community as a whole, for the community will pay the price, either of indefinite detention or of further offending, if it is not done.”

Most HMP detainees are young adults by the time they come to be considered for their minimum term reviews. Research by the Howard League (2017), which involved detailed analysis of 23 minimum term reviews by the High Court of 18 to 25 year olds between 2011 and 2016 concluded that these cases demonstrated the ability of the courts to consider the maturation of young adults in depth, provided they have the relevant information available to them.<sup>18</sup>

In *Jobson*,<sup>19</sup> which concerned a young adult, 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.” (at [35])

A further example can be seen in the review of the tariff in the case of *F*<sup>20</sup> in which the minimum term of a young adult 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.” (at [14])

<sup>18</sup> Howard League for Penal Reform, “Judging maturity: exploring the role of maturity in the sentencing of young adults” (2017) *howardleague.org*, <https://howardleague.org/publications/judging-maturity/> [Accessed 17 December 2020].

<sup>19</sup> On the review of the tariff in the case of *Jobson* [2014] EWHC 3254 (Admin).

<sup>20</sup> On the review of the tariff in the case of *F* [2016] EWHC 1294 (QB).

The maturation process described here fits with what is now known about the sociological and neurological development of young adults,<sup>21</sup> the full range of which has been explored in depth by the Transition to Adulthood Alliance in recent years.<sup>22</sup> Yet the in-built review process is not available for any other sentence than the mandatory life sentence and it is only relatively recently that the Court of Appeal has urged a different approach to sentencing in light of the immaturity of young adults.

## Peters (2005)

In *Peters*<sup>23</sup> the then Lord Chief Justice, Lord Judge, recognised that attaining the age of 18 has the potential to act as an arbitrary threshold in the analysis of culpability. This was in the context of the setting of the minimum term in mandatory life sentence cases (Sch.21 Criminal Justice Act 2003, now Sch.21 Sentencing Act 2020) where there are lower starting points for those under 18 and a whole life tariff can only be passed on those who offend when aged 21 and over.<sup>24</sup> Lord Judge acknowledged that these different starting points are limited in terms of providing insight into a defendant's developmental age. Giving judgment in the case he said:

“Although the passage of an 18th or 21st birthday represents a significant moment in the life of each individual, it does not necessarily tell us very much about the individual's true level of maturity, insight and understanding. These levels are not postponed until nor suddenly accelerated by an 18th or 21st birthday.” (at [11])

Despite Lord Judge's acknowledgement in *Peters* of the unreliability of chronological age as an indicator of maturity,<sup>25</sup> it appears that for many years the Court of Appeal tended only to apply it in life sentence cases. It is only recently, with a new Lord Chief Justice at the helm, that the Court of Appeal has made the point that the observation in *Peters* is relevant to all sentencing cases involving young adults.

## Clarke: the landmark case

### *Attorney General's Reference (Clarke) (January 2018)*

The Court of Appeal considered an Attorney General's reference made under the unduly lenient sentence scheme under s.36 Criminal Justice Act 1988, which enables the Court to review cases where the sentence has been deemed to be too low. The reference concerned three defendants who were aged 17, 18 and 19 at the time of the commission of the offences (which included kidnaping and

<sup>21</sup> Professor M. Sawyer MD, P.S. Azzopardi PhD, D. Wickremarathne MDS and Professor G.C. Patton MD, “The Age of Adolescence” (2018) 2(3) *The Lancet* 223.

<sup>22</sup> The Transition to Adulthood Alliance, coordinated by the Barrow Cadbury Trust, is a coalition of leading criminal justice and social justice charities and social enterprises concerned with developing and promoting evidence of effective policy and practice for young adults in the criminal justice system. Its many research reports are available at <https://www.t2a.org.uk/about-us/> [Accessed 17 December 2020].

<sup>23</sup> *Peters* [2005] EWCA Crim 605; [2005] 2 Cr. App. R. (S.) 101; [2005] Crim. L.R. 492.

<sup>24</sup> Although the Government's White Paper, Ministry of Justice *A smarter approach to sentencing* (September 2020), CP 292 signals an intention to legislate for an increase in the minimum terms for under 17 to 17-year-olds convicted of murder and whole life orders for 18–20-year-olds in “exceptional cases”.

<sup>25</sup> *Peters* [2005] EWCA Crim 605 at [11].

blackmail). The AG submitted, inter alia, that the sentencing judge had erred in attaching weight to the 18 and 19 year-old defendants' youth and immaturity and that only the 17-year-old was entitled to receive a significant discount by virtue of his youth. Rejecting these submissions, Lord Burnett took the opportunity to reiterate and expand on Lord Chief Justice Judge's wisdom in *Peters*:

“Reaching the age of 18 has many legal consequences, but it does not present a cliff edge for the purposes of sentencing. So much has long been clear. The discussion in *R. v Peters* is an example of its application: see [10]–[12]. Full maturity and all the attributes of adulthood are not magically conferred on young people on their 18th birthdays.” (at [5])

*Clarke* was an apposite case in which to make this point. The spread of the defendants' ages, either side of the threshold of the legal definition of adulthood, gave the Lord Chief Justice the opportunity to make a statement of intent as to how the courts should approach the sentencing of young adults.

The *Clarke* judgment is especially significant because it demonstrates the Court of Appeal's desire to frame the analysis of culpability in the context of scientific recognition of the view that the binary division between childhood and adulthood is too simplistic:<sup>26</sup>

“Experience of life reflected in scientific research (e.g. The Age of Adolescence: [thelancet.com/child-adolescent](http://thelancet.com/child-adolescent); 17 January 2018) is that young people continue to mature, albeit at different rates, for some time beyond their 18th birthdays. The youth and maturity of an offender will be factors that inform any sentencing decision, even if an offender has passed his or her 18th birthday.”

The point is powerfully iterated in the abstract of the Lancet research<sup>27</sup> that was cited in *Clarke*:

“An expanded and more inclusive definition of adolescence is essential for developmentally appropriate framing of laws, social policies, and service systems. Rather than age 10–19 years, a definition of 10–24 years corresponds more closely to adolescent growth and popular understandings of this life phase and would facilitate extended investments across a broader range of settings.”

Despite the serious and deeply unattractive facts of the violent offending in *Clarke*, the Court rejected the Attorney General's submission that the youth of the two adult offenders was of minimal relevance, stating that it was a feature that may be a potent factor in determining the eventual sentence.<sup>28</sup>

It is obvious from the judgment in *Clarke* that the Lord Chief Justice was determined to emphasise the need for the courts to pay far more attention to the fact of youth and lack of maturity when sentencing young adults. Although there is no specific reference to the relevance of age to culpability in the judgment, the

<sup>26</sup> See also *Archbold: Criminal Pleading, Evidence and Practice 2021* (London: Sweet & Maxwell, 2020), Ch.5ASC-76.

<sup>27</sup> Sawyer, Azzopardi, Wickremaratne and Patton, “The Age of Adolescence” (2018) 2(3) *The Lancet* 223.

<sup>28</sup> See discussion on *Clarke* above

reference to the science of brain development<sup>29</sup> suggests that the Court considers the relevance of youth and lack of maturity to be linked to that very issue.

Certainly, the later decisions of the Court relate issues of age to the assessment of culpability. As we shall see later in this article the Sentencing Council's Expanded Explanations<sup>30</sup> brought into force in October 2019 specifically require the court to consider the effect of age and/or lack of maturity on responsibility as part of the consideration of mitigating factors.

## Momentum post *Clarke*

The Court of Appeal has continued to press this agenda through a series of judgments that reiterate and broaden the *Peters* and *Clarke* principle.

### *Hobbs (May 2018)*

In *Hobbs*,<sup>31</sup> a case heard five months after the judgment in *Clarke*, the Lord Chief Justice considered the cases of two appellants who had pleaded guilty to the manslaughter of a man who had burned to death after they had ignited a flare in the car in which he was sleeping.

After a review of manslaughter sentencing authorities involving youths, Lord Burnett emphasised that the “modern approach to sentencing”<sup>32</sup> required the court to “look carefully at the age, maturity and progress of the young offender in each case”.<sup>33</sup>

Although the case involved defendants who had committed the offence when aged under 18<sup>34</sup> the Lord Chief Justice did not miss the opportunity to remind everyone of the decision in *Clarke* and that the same principles applied to the sentencing of “young people who offend in early adulthood but are far from the maturity of adults”.<sup>35</sup>

### *Balogun (November 2018)*

Another significant decision followed in November 2018. In *Balogun*<sup>36</sup> the appeal concerned the sentencing of a young adult who committed a series of very serious sexual offences with a number of aggravating features in the months just after his 18th birthday. The sentencing judge imposed a sentence of detention of 21 years; a period longer than the defendant had been alive. The sentencing judge made only

<sup>29</sup> *Clarke* [2018] EWCA Crim 185; [2018] 1 Cr. App. R. (S.) 52 at [5]; Sawyer, Azzopardi, Wickremaratne and Patton, “The Age of Adolescence” (2018) 2(3) *The Lancet* 223.

<sup>30</sup> Sentencing Council, *General guideline: overarching principles*, [Step 2 Aggravating and Mitigating Factors], <https://www.sentencingcouncil.org.uk/overarching-guides/crown-court/item/general-guideline-overarching-principles/> and <https://www.sentencingcouncil.org.uk/overarching-guides/magistrates-court/item/general-guideline-overarching-principles/> [Both accessed 17 December 2020].

<sup>31</sup> *Hobbs* [2018] EWCA Crim 1003; [2018] 2 Cr. App. R.(S.) 36.

<sup>32</sup> *Hobbs* [2018] EWCA Crim 1003.

<sup>33</sup> *Hobbs* [2018] EWCA Crim 1003.

<sup>34</sup> One had turned 18 by the time of sentence but still fell to be sentenced to a term equivalent to that which would have applied had he still been under 18 in accordance with the dicta in *Ghafoor* [2002] EWCA Crim 1857; [2003] 1 Cr. App. R. (S.) 84; [2002] Crim. L.R. 739. See *Obasi* [2014] EWCA Crim 581; *Danga* [1992] Q.B. 476; [1992] 2 W.L.R. 277; [1992] Crim. L.R. 219, i.e. if a defendant commits the offence aged 17, and is aged 18 on date of sentence, the starting point is the sentence that the defendant would have been likely to receive if he had been sentenced at the date of the commission of the offence.

<sup>35</sup> See fn.34.

<sup>36</sup> *Balogun* [2018] EWCA Crim 2933.

passing reference to his age in his sentencing remarks, in so doing appearing to minimise its relevance. The Court of Appeal concluded insufficient regard had been given to the appellant's age and lack of maturity and reduced the sentence by three years.

Holroyde LJ took the view that the appellant's young age was of paramount importance to the sentencing exercise. Giving judgment he stated:

“[the appellant] had not been invested overnight with all the understanding and self-control of a fully mature adult.” (at [41])

This was a recognition of the sea change in thinking since the decision in *Clarke* and Holroyde LJ did not stop there. In his view, the statutory principles relating to the sentencing of children and young people (as articulated in the Definitive Sentence Guideline for the sentencing of Children and Young People) did not necessarily cease to have any relevance, just because a defendant had attained the age of 18 before he committed the offences.<sup>37</sup> Given that those guidelines require a completely different approach based on welfare and recommend, where appropriate, a sentence broadly within the region of half to two thirds of the appropriate adult sentence for those aged 15–17, this pronouncement was nothing short of ground-breaking.

### *Daniels (February 2019)*

The same approach was endorsed by the Lord Chief Justice (again) in *Daniels*,<sup>38</sup> another Attorney-General's reference where the Court refused the application to increase a sentence formulated on the basis of the defendant's youth and vulnerability. Giving judgment, Lord Burnett observed as follows:

“The guideline to which we have just referred [the Definitive Guideline for the Sentencing of Children and Young People] does not apply in such cases, but the factors quoted from paragraph 1.5 [of said guideline] can weigh in considering the appropriate sentence in cases involving young adults who are not fully mature. No doubt science will in time tell us more about the development of the young adult brain and its impact on behaviour. But there will be cases and this, in our view, is one of them where there is material available to the sentencing court which speaks about the maturity and developmental reality of the offender in question.” (at [32])

These leading decisions of the Court of Appeal, three presided over by the Lord Chief Justice, demonstrate that a young adult defendant, whose culpability is diminished through immaturity, can expect to be sentenced on the basis of their culpability considered in the light of their lack of maturity rather than on a par with a mature adult. These key judgments do not stand alone and the principles have been applied in a number of subsequent decisions.<sup>39</sup>

<sup>37</sup> *Balogun* [2018] EWCA Crim 2933 at [37] and [38].

<sup>38</sup> *Daniels* [2019] EWCA Crim 296; [2019] 4 W.L.R. 52.

<sup>39</sup> *Geoghegan* [2019] EWCA Crim 787; *Ake* [2018] EWCA Crim 392; *Hayward* [2019] EWCA Crim 1501; *Ford* [2019] EWCA Crim 1757; *Mohammed* [2019] EWCA Crim 1881.



### *The objective of rehabilitation*

A consequence of the recognition of maturity as relevant to culpability has been that the objective of rehabilitation has acquired an equivalent level of importance in the sentencing of young adults. This much is clear from the Court's references, in *Balogun*<sup>40</sup> and *Daniels*,<sup>41</sup> to the principles for the sentencing of children and young people where there is a greater emphasis on the effect of sentencing.

The point is exemplified by the Court of Appeal in *Geoghegan*.<sup>42</sup> The appellant was 18 years old at the time he committed a robbery that involved threatening to stab his vulnerable victim and as a result was in breach of a conditional discharge. The Court concluded that the sentencing judge had paid insufficient regard to the appellant's age, specific personal mitigation and in particular his immaturity when reducing the length of sentence. In fact, they went on to suspend the sentence having considered that the prospects of rehabilitation were significantly increased by taking such a course.<sup>43</sup>

### **How is maturity to be judged?**

#### *Are young adults immature by virtue of their age alone?*

In 2016 the Justice Committee conducted an extensive investigation into the issue of maturational development and its impact on offending by young adults.<sup>44</sup> In conclusion, it found there is sufficient evidence for a distinct approach to young adults by virtue of their age:

“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.”<sup>45</sup>

“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

<sup>40</sup> *Balogun* [2018] EWCA Crim 2933.

<sup>41</sup> *Daniels* [2019] EWCA Crim 296.

<sup>42</sup> *Geoghegan* [2019] EWCA Crim 787.

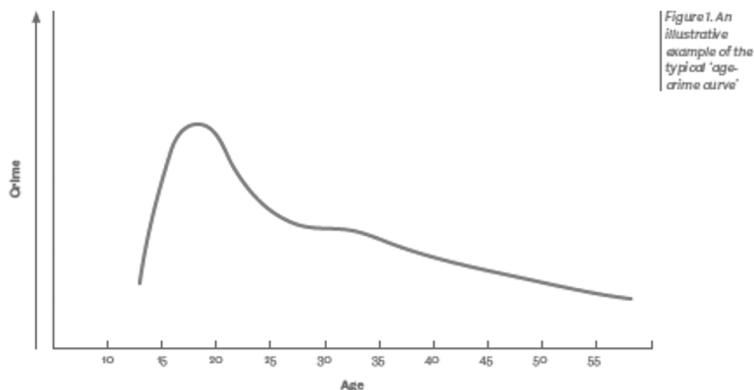
<sup>43</sup> For a case involving a similar issue see *Hayward* [2019] EWCA Crim 1501.

<sup>44</sup> House of Commons Justice Committee, *The Treatment of Young Adults in the Criminal Justice System* Seventh Report of Session 2016–17 (2016), HC 169.

<sup>45</sup> House of Commons Justice Committee, *The Treatment of Young Adults in the Criminal Justice System* Seventh Report of Session 2016–17 (2016), HC 169, p.9.

recognise young adults' maturity can slow desistance and extend the period of involvement in the system."<sup>46</sup>

The "age crime curve" or the tendency of young adults to start to stop committing crime is well recognised by criminologists world over<sup>47</sup> and is even acknowledged in the Sentencing Council's expanded definition of age and/or lack of maturity (see below).



**Source: N. Hughes and T. Hartman (forthcoming), *Young adults in court: shrinking numbers and increasing disparities* (T2A: London)**

### *The Court of Appeal's approach to this issue*

In *Balogun*,<sup>48</sup> *Daniels*<sup>49</sup> and *Clarke*,<sup>50</sup> the defendants' immaturity was specifically identified in Pre-Sentence Reports and these conclusions were treated as persuasive by the Court of Appeal. The Lord Chief Justice has made it clear, however, that even in the absence of a report, material may exist from which immaturity can be concluded. In *Quarley*<sup>51</sup> the appellant had been 20 years old when he committed the murder of a rival gang member. No reports had been obtained prior to sentencing and so there was no independent assessment as to the appellant's level of maturity nor any explanation of how, having been conviction free until he was almost 19, he became involved in such serious criminality.

The Court of Appeal, however, placed reliance on the sentencing judge's account of the appellant's early life and personal circumstances to infer immaturity from the trajectory of the appellant's childhood and his descent into a criminal lifestyle. Lord Burnett drew specific attention to the appellant's "not uncommon" backstory of falling out of mainstream education and into gang-based behaviour. He interpreted this as "indicative of immaturity and a lack of strength to resist peer pressure". In his opinion, this "[represented] a difference between the fully mature

<sup>46</sup> House of Commons Justice Committee, *The Treatment of Young Adults in the Criminal Justice System* Seventh Report of Session 2016–17 (26 October 2016), HC 169, p.13.

<sup>47</sup> S. McVie, *Patterns of deviance underlying the age-crime curve* (Centre for Law and Society, University of Edinburgh: Farrington, D.P., 1986); M. Tonry and N. Morris (eds), "Age and crime" (1986) 7 *Crime and justice: An annual review of research* 189.

<sup>48</sup> *Balogun* [2018] EWCA Crim 2933.

<sup>49</sup> *Daniels* [2019] EWCA Crim 296.

<sup>50</sup> *Clarke* [2018] EWCA Crim 185; [2018] 1 Cr. App. R. (S.) 52.

<sup>51</sup> *Quarley* [2019] EWCA Crim 374.

adult and the developing, but still immature, late adolescent moving into adulthood”. It was this that caused him to “[fall] under the malign influence of individuals ... [and] into a world of drugs and violence”.<sup>52</sup>

This was a murder described by the Court as “despicable” with “undoubted aggravating features”. The appellant was at the wheel of a car that ran another car off the road. He and a number of others, involved in a gang feud, dragged the other driver out of his car and stabbed him to death in what witnesses described as an “inhumane, savage and animalistic attack”.

It was noteworthy that notwithstanding the particularly bad circumstances of the offending, the Court of Appeal still recognised the role that immaturity had played in the appellant’s culpability and concluded that it merited a reduction in the minimum term.

In *Attorney General’s Reference (Long; Bowers; Cole)*<sup>53</sup> the Court of Appeal considered the sentence of a young man who was 18 at the time he committed an offence of manslaughter; the facts of which aroused a substantial degree of public controversy due to the terrible circumstances of the victim’s (an on-duty police officer) death.<sup>54</sup> Unusually, this was a case where the defendant cross-appealed sentence on the basis that it was manifestly excessive. The sentencing judge had identified the defendant’s young age as a factor relevant to the type of sentence imposed and for this reason declined to pass a life sentence, instead imposing an extended determinate sentence of 16 years imprisonment with an extended licence period of three years.<sup>55</sup> Giving judgment in respect of the cross appeal, Dame Victoria Sharp P considered that Long’s lengthy extended sentence of imprisonment “unarguably” entitled the sentencing judge to conclude that objective of protecting the public would be served by it.<sup>56</sup> The Court of Appeal rejected a submission by the Attorney General that an extended determinate sentence of 16 years was unduly lenient and that the circumstances of the case were so serious as to militate against age alone constituting a relevant factor in the sentencing exercise.<sup>57</sup> In refusing the AG’s application the Court of Appeal relied on the decision in *Clarke* and Lord Burnett’s statement of principle at [5] of the judgment. Particular emphasis was placed on the need for any sentencing judge to give proper regard to the prospect of maturation in a young defendant.<sup>58</sup> This case is a further example of how the recognition of the youth and immaturity of young adults is a factor in sentencing that is here to stay.

## A minority of diverging decisions

Despite the decision in *Clarke*,<sup>59</sup> there has been a minority of cases where the Court of Appeal has rejected arguments that insufficient account was taken by the sentencing judge to factor in age and lack of maturity and declined to interfere with a sentence imposed on a young adult.

<sup>52</sup> *Quarley* [2019] EWCA Crim 374 at [19].

<sup>53</sup> *Attorney General’s Reference (Long; Bowers; Cole)* [2020] EWCA Crim 1729

<sup>54</sup> *Attorney General’s Reference (Long; Bowers; Cole)* [2020] EWCA Crim 1729 at [47].

<sup>55</sup> *Attorney General’s Reference (Long; Bowers; Cole)* [2020] EWCA Crim 1729 at [52].

<sup>56</sup> *Attorney General’s Reference (Long; Bowers; Cole)* [2020] EWCA Crim 1729 at [82].

<sup>57</sup> *Attorney General’s Reference (Long; Bowers; Cole)* [2020] EWCA Crim 1729 at [82].

<sup>58</sup> *Attorney General’s Reference (Long; Bowers; Cole)* [2020] EWCA Crim 1729 at [82].

<sup>59</sup> *Clarke* [2018] EWCA Crim 185.

In *Webster*<sup>60</sup> the Court of Appeal relied on the appellant's previous offending and the facts of the offences in refusing an appeal based on the argument that there had been insufficient regard to the appellant's youth in the sentence passed.

The appellant was 18 at the time of the commission of offences including manslaughter in circumstances where he threatened a rival drug dealer with an open bottle of acid during a confrontation in the street. That acid was spilled over a member of the public sitting on a nearby park bench, causing fatal injuries. The appellant had what the court described as an "appalling" criminal record including convictions for violence, robbery and possession of bladed articles. His upbringing was accepted to have been "difficult and abusive" and resulted in his introduction, at the age of 10, to gang association and chronic cannabis misuse. Whilst acknowledging that the appellant's age at the time of the offences (18) did not mean that he should be sentenced in the same way as all adults, nonetheless the Court found that the "wicked" circumstances of the offences displayed "a considerable level of criminal maturity", such as to override their concerns as to the "severe" nature of the sentence imposed.<sup>61</sup>

In *Assaf*,<sup>62</sup> the Court of Appeal, Sir Brian Leveson PQBD presiding, considered the sentences of four defendants who were 19 when they instigated conspiracies to supply Class A drugs, characterised by the Court as "sophisticated and well-planned". The Court rejected the appellants' argument that their young age had not been given proper consideration as mitigation. Instead the Court concluded that the sophistication of the drug dealing enterprise, its duration and the appellants' intelligence and educated background spoke to their maturational development, such that no substantial discount from a sentence appropriate for an adult offender was justified.

The reasoning in these cases appears to fly in the face of the empirical research and the judgment in *Clarke*. Concluding that a good education or, conversely, a bad criminal record necessarily excludes a finding of immaturity could on one view be seen as a failure to grapple with a more nuanced approach to young adult maturational development.

While in these cases the Court of Appeal appears to have dismissed immaturity as having played a role in offending on the basis that the offences are particularly grave, the Lord Chief Justice has repeatedly resisted such an approach. He has remained loyal to the principle in *Peters*<sup>63</sup> and *Clarke*,<sup>64</sup> regardless of how bad the record and how bad the offence.

## Guidance from the Sentencing Council—cementing the change

In October 2019 the Sentencing Council published an expanded guideline addressing age and lack of maturity as a mitigating factor.

The importance of the decision in *Clarke*<sup>65</sup> is acknowledged by the very fact of the expansion. Young adults aged between 18 and 25 must now be given consideration at sentence that is distinct from fully mature adults. It is now expressly

<sup>60</sup> *Webster* [2019] EWCA Crim 758.

<sup>61</sup> *Webster* [2019] EWCA Crim 758 at [32].

<sup>62</sup> *Assaf* [2019] EWCA Crim 1057; [2020] Crim. L.R. 177.

<sup>63</sup> *Peters* [2005] EWCA Crim 605.

<sup>64</sup> *Clarke* [2018] EWCA Crim 185; 2018] 1 Cr. App. R. (S.) 52.

<sup>65</sup> *Clarke* [2018] EWCA Crim 185; 2018] 1 Cr. App. R. (S.) 52.

recognised that age and lack of maturity as factors capable of affecting a young adult's responsibility for their offending should form part of the sentencing exercise. Further, the Court must now specifically consider the impact of sentence on the young adult. Either or both of these considerations are now to be regarded as capable of justifying a reduction in sentence.

The following core principles are now enshrined in the guidelines:<sup>66</sup>

- (i) The emotional and developmental age of an offender is of at least equal importance to their chronological age (if not greater).
- (ii) Young adults (typically aged 18–25) are still developing neurologically and consequently may be less able to: evaluate the consequences of their actions; limit impulsivity and limit risk taking.
- (iii) Young adults are likely to be susceptible to peer pressure and are more likely to take risks or behave impulsively when in company with their peers.
- (iv) Immaturity can result from atypical brain development.
- (v) Environment plays a role in neurological development and factors such as adverse childhood experiences including deprivation and/or abuse may affect development.
- (vi) Many young people who offend either stop committing crime, or begin a process of stopping, in their late teens and early twenties. Therefore a young adult's previous convictions may not be indicative of a tendency for further offending.
- (vii) There is a greater capacity for change in immature offenders and they may be receptive to opportunities to address their offending behaviour and change their conduct.

The expanded explanation also sets out factors relevant to suitable disposal; recognising that an immature defendant may:

- (i) find it particularly difficult to cope with custody and therefore may be more susceptible to self-harm in custody; and
- (ii) find it particularly difficult to cope with the requirements of a community order without appropriate support.

Finally, the guidance explicitly directs sentencing courts to ensure that:

- (i) Where the defendant is a care-leaver, enquires are made as to any effect a sentence may have on an offender's ability to make use of support from the local authority.
- (ii) When considering a custodial or community sentence for a young adult, a pre-sentence report is ordered.
- (iii) Where an offender has turned 18 between the commission of the offence and conviction, the court takes as its starting point the sentence likely to have been imposed on the date at which the offence

<sup>66</sup> Sentencing Council, *General guideline: overarching principles*, [Step 2 Aggravating and Mitigating Factors], <https://www.sentencingcouncil.org.uk/overarching-guides/crown-court/item/general-guideline-overarching-principles/> and <https://www.sentencingcouncil.org.uk/overarching-guides/magistrates-court/item/general-guideline-overarching-principles/> [Both accessed 17 December 2020].

was committed, but applying the purposes of sentencing adult offenders.

It is hoped that by placing these core principles at the heart of sentencing a young adult, the expanded explanation that underpins mitigating factors in every guideline will reduce the inconsistency of approach occasionally seen in the Court of Appeal post-*Clarke*.

The statutory obligation on sentencing judges to have regard to the Sentencing Council guidelines will necessarily impel those judges, who may have instinctively rejected the notions of youth and immaturity as significant mitigation, to have these factors at the forefront of the sentencing process. In this way the sentencing court may move closer towards achieving the careful analysis of youth and immaturity that was envisaged by the Lord Chief Justice in *Clarke* and which had been lacking for many years.

### Implications for practitioners

The implications for the practitioner are also positive. Previously all of the relevant principles applicable to age and lack of maturity were embedded within case law. Unless the practitioner and judge were aware of these relevant cases the principles could easily be (and often *were*) overlooked.

Now, with the consolidation of these principles into the expanded definitions which underpin the mitigation that applies to all sentencing guidelines, there can be no excuse for the court or practitioner to overlook them to the young adult defendant's detriment. The advocate can have no doubt that these are proper matters to draw to the court's attention. Practitioners ought to ensure, in all cases, that the court is aware of this guidance and applies it appropriately.

In the light of the inconsistency in approach that has been taken by the Court of Appeal in some post-*Clarke* cases, practitioners should also ensure that they actively consider gathering evidence as to a young adult's level of maturational development from independent sources, such as a psychological report or pre-sentence report in accordance with ss.30, 34 and 37 Sentencing Act 2020. This work should be done if the young adult faces a custodial sentence of any length, as it may be the case that some judges will not be prepared to recognise a lack of maturational development that justifies a reduction in sentence without some independent evidence.

Finally, practitioners are encouraged to consider their approach to mitigating on behalf of a young adult with reference to careful guidance on this topic issued by the Howard League for Penal Reform. The Howard League has published sentencing principles that complement guidance articulated in the Sentencing Council's expanded definitions, as well as pointers to assist practitioners in adapting mitigating factors for children for young adults.<sup>67</sup>

The net effect of these developments is that practitioners are now able to draw on an abundance of resources to assist in the proper representation of young adults at sentence.

<sup>67</sup> Howard League for Penal Reform, Sentencing Principles for Young Adults; "Adapting Mitigating Factors for Young People" (2019) [howardleague.org](https://howardleague.org), <https://howardleague.org/wp-content/uploads/2019/01/Sentencing-principles-for-young-adults.pdf>; <https://howardleague.org/wp-content/uploads/2019/01/Table-of-mitigating-factors.pdf> [Accessed 17 December 2020].

## **Conclusion**

If practitioners and judges alike consistently champion these principles by reflecting them in the approach to sentence they will become embedded within best practice. There is, in conclusion, every reason to be optimistic that the modern approach to sentencing young adults, envisaged by the Lord Chief Justice when he gave judgment in *Clarke* two years ago, will become the new normal.