

Proper Protection and Automatic Sentences: the mandatory life sentence reconsidered

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R v Offen, McGilliard, McKeown, Okwuegbunam, S [2000] I W.L.R. 253

Court of Appeal (9th November 2000). Lord Chief Justice (Lord Woolf), Steel LJ and Richards J.

Judgment of the Court given by the Lord Chief Justice.

Introduction

Section 2 Crime (Sentences) Act 1997 [now consolidated as s. 109 Powers of Criminal Courts (Sentencing) Act 2000] requires that a sentencing court must impose a sentence of life imprisonment upon a person convicted of a second “serious” offence unless exceptional circumstances apply. While the second “trigger” offence must have arisen since the coming into force of the provision, the first “serious” offence can have taken place at any time.

In previous cases, the Court of Appeal has taken a restrictive approach to the meaning of “exceptional circumstances”. *Offen* - and the four other linked appeals - represents a successful attempt to persuade the court that this earlier restrictive reading of the section can no longer be sustained in the light of the implementation of the Human Rights Act 1998. It is a decision with clear implications for the sentencing of mentally disordered offenders who fall foul of this provision.

The Facts

The facts of the five cases on appeal are instructive, indicating the range of different circumstances capable of falling within the mandatory life sentence provision. It will be noted that two of the five cases involve forms of mental disorder.

Offen

In 1999 Offen pleaded guilty to a charge of robbery using an imitation of firearm. He had previously been sentenced to 30 months imprisonment in 1990 for a virtually identical offence of robbery. In both cases Offen had entered a building society with a toy gun and demanded money. As he left the building society following the 1999 robbery, Offen was followed by a female customer who grabbed the holdall containing the money from him. Offen continued walking away in his slippers. He later told friends what he had done, and the friends rang the police. In interview

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Offen explained that he had not been taking his medication and that he had heard voices that had made him do it. The sentencing judge accepted the medical reports indicating a diagnosis of schizophrenia, but confirming that the defendant was not a danger to society. The judge took the view that there were no exceptional circumstances so that he was bound to impose a life sentence under s.2. Later that year the sentence was upheld by the Court of Appeal². The matter was subsequently referred back to the Court by the Criminal Cases Review Commission³.

McKeown

McKeown was convicted of causing grievous bodily harm with intent (contrary to s.18 Offences Against the Person Act 1861) in May 2000. In May 1990 he had been sentenced to two years detention in a Young Offenders Institution for an offence of wounding with intent (contrary to the same provision). The facts of the first offence were largely obscure save that it arose during the 1989/1990 New Year period. There had been no offending since 1991 until the 2000 offence. This offence arose from an earlier disagreement between McKeown and another man. McKeown later approached the man and demanded an apology, which was not forthcoming. McKeown then punched the man to the ground and kicked him once. The victim sustained fractures of the nose, cheekbone and head. The judge imposed a life sentence, with a determinate sentence of three years.

McGilliard

In December 1998 McGilliard was drunk and abusive in a pub and swore at a Mr Taylor who remonstrated with him. Mr Taylor then assaulted McGilliard. The next day McGilliard returned and stabbed Taylor in the stomach with a kitchen knife with an 8 inch blade. McGilliard pleaded guilty to wounding with intent (contrary to s.18 Offences Against the Person Act 1861). He had previously been convicted of culpable homicide in 1984, and had been sentenced to six years imprisonment, although the facts of that case were not known to the court.

McGilliard was described in a psychiatric report as suffering from a Serious Alcoholic Dependency Syndrome and had taken heroin on the day in question. The report indicated that no medical disposal was appropriate. The pre sentence report and antecedents indicated a large number of repeat offences of violence, dishonesty and drugs related crime. McGilliard was assessed as being at a high risk of offending. The judge imposed the mandatory life sentence, with a determinate element of seven years.

Okwuegbunam

Okwuegbunam pleaded guilty to a charge of manslaughter. He admitted assaulting the mother of his children (with whom he did not live), allegedly in response to her having chastised their son. None of the blows were hard, but they caused a subdural haemorrhage which killed the deceased when Okwuegbunam forced her to take a cold bath the next day.

Okwuegbunam had a conviction for rape dating from 1990. The facts were in dispute, with the prosecution alleging that the rape had involved the abduction of a 13 year old girl and threats with a piece of broken glass. The defence alleged that the girl knew the defendant and that no kind of weapon was used. Since then the defendant had been convicted of three offences, involving

2 [2000] 1 Cr. App. R. (S.) 565

3 Under s.9(1)(b) Criminal Appeal Act 1995

criminal damage and dishonesty - for which he received a conditional discharge and fine respectively. There were no reports before the sentencing judge since the defendant had declined to co-operate, and the judge made no finding as to future risk since he took the view that no exceptional circumstances arose. A notional determinate sentence of six years was indicated, and a life sentence imposed under s.2.

S

In March 2000 S was convicted of 15 offences of indecent assault, attempted rape, rape and buggery - and one offence of actual bodily harm - all in respect of his two daughters. He had a large number of previous convictions, including various assault matters. In November 1993 he had been convicted of a s.18 offence (causing grievous bodily harm with intent), following an unprovoked assault on the victim with a pool cue at a pub. The trial judge took the view that exceptional circumstances existed, since the 2000 offences were of a wholly different character to the earlier offence of violence, and instead imposed a custodial sentence totalling 12 years. The Attorney General referred the matter to the Court of Appeal as an unduly lenient sentence⁴, arguing that a mandatory life sentence should have been imposed.

The Law

s.2 Crime (Sentencing) Act 1997 provides:

(1) *This section applies where—*

- (a) a person is convicted of a serious offence committed after the commencement of this section; and*
- (b) at the time when that offence was committed, he was 18 or over and had been convicted in any part of the United Kingdom of another serious offence.*

(2) *The court shall impose a life sentence, that is to say—*

- (a) where the person is 21 or over, a sentence of imprisonment for life;*
- (b) where he is under 21, a sentence of custody for life under section 8(2) of the Criminal Justice Act 1982 ('the 1982 Act'),*

unless the court is of the opinion that there are exceptional circumstances relating to either of the offences or to the offender which justify its not doing so.

Sub-section 2(5) sets out which offences are “serious offences” for the purpose of s.2. These include: attempted murder; conspiracy to murder or incitement to murder; soliciting murder; manslaughter; wounding or causing grievous bodily harm with intent; rape or attempted rape; sexual intercourse with a girl under 13; an offence under s.16, 17 or 18 of the Firearms Act 1968; and robbery where, at some time during the commission of the offence the offender had in his possession a firearm or imitation firearm within the meaning of the 1968 Act.

⁴ Under s.36 Criminal Justice Act 1988.

The Judgment

The leading authority on s.2 is *Kelly*⁵, which provides that “exceptional” is to be given its dictionary meaning. It therefore applies to “ a circumstance which is such as to form an exception, which is out of the ordinary course, or unusual, or special, or uncommon. To be exceptional a circumstance need not be unique, or unprecedented, or very rare; but it cannot be one that is regularly, or routinely, or normally encountered.” This definition of “exceptional” is not criticised in any of the linked appeals before the court and is therefore adopted.

In *Kelly* and in *Buckland*⁶ the court considered Parliament’s intention in passing s.2 - namely, that “the public should receive proper protection from persistent violent or sex offenders. That means requiring the courts to impose an automatic indeterminate sentence, and releasing the offender if and only if it is safe to do so.”⁷ However, in *Kelly*, Lord Bingham had applied this rationale not to the question of whether there were exceptional circumstances, but to the issue of whether, once exceptional circumstances were established, those circumstances justified the imposition of a sentence other than the life sentence. This has in some cases “accentuated the difficulties” caused by s.2.

Buckland was a case which on its facts was very similar to *Offen*. In that case exceptional circumstances had been found, and the court had concluded that it was not necessary to impose a life sentence. It was seen as a presenting a slightly more flexible approach than *Kelly*.

Quite apart from Human Rights Act arguments, the rationale of s.2 was “highly relevant” in deciding whether exceptional circumstances existed.

“The question of whether circumstances are appropriately regarded as exceptional must surely be influenced by the context in which the question is being asked. The policy and intention of Parliament was to protect the public against a person who had committed two serious offences. It therefore can be assumed the section was not intended to apply to someone in relation to whom it was established there would be no need for protection in the future. In other words, if the facts showed the statutory assumption was misplaced, then this, in the statutory context was not the normal situation and in consequence, for the purposes of the section, the position was exceptional.”⁸

The effect of the Human Rights Act:

Arguments were raised that the s.2 provision was incompatible with Articles 3, 5, 7 and 8 of the European Convention on Human Rights (the Convention).

In relation to Article 7, it was argued that s.2 amounted to a form of retrospective punishment in that it imposed a heavier penalty than the one that was applicable at the time that the offence was committed. Section 2, it was argued, offended against this provision both because it made the punishment for first offence (prior to the implementation of s.2) more serious since it could now lead to a life sentence following a second offence, and also because the life sentence should be seen as being imposed in respect of both serious offences, so that the actual penalty for the first offence was retrospectively increased. However, both elements of this argument relied upon treating the

5 [2000] QB 198

6 [2000] 1 WLR 1262

7 *White Paper: Protecting the Public, the Government’s*

Strategy on Crime in England and Wales (1996), Cm 3190, paragraph 10.11.

8 *Offen, paragraph 88.*

life sentence as imposed for both offences. In the light of cases such as *Taylor v United Kingdom*⁹ this argument could not be sustained. It is the second, “trigger” offence which is changed by s.2; there is no retrospectivity.

The argument under Articles 3 and 5 is based on the premise that an automatic life sentence would operate in an arbitrary manner (offending against Article 5) and thus would amount to an inhuman or degrading punishment, contrary to Article 3. As s.2 has so far been interpreted, it can clearly operate in a disproportionate manner.

“It is easy to find examples of situations where two offences could be committed which were categorised as serious by the section but where it would be wholly disproportionate to impose a life sentence to protect the public. A life sentence in such circumstances may well be arbitrary and disproportionate and contravene Article 5. It could also be a punishment which contravenes Article 3.”¹⁰

However, if the court interprets the exceptional circumstances proviso “in a manner which accords with the policy of Parliament ... the problem disappears.”

Section 2 should be read as establishing a norm.

“The norm is that those who commit two serious offences are a danger or risk to the public. If, in fact, taking into account all the circumstances relating to a particular offender, he does not create an unacceptable risk to the public; he is an exception to the norm.”¹¹

Whether there is a significant risk will depend on the evidence before the court. Factors such as the offences being of a different kind, or a long period between offending may be a “very relevant” indicator as to the degree of risk.

Section 2 will not offend against the Convention if it is read in this way, as is required by s.3 Human Rights Act and by taking into account the rationale of the provision.

Applying the revised test to the cases on appeal:

Offen: the evidence suggests that the appellant presents no significant risk to the public. Exceptional circumstances therefore exist, and a determinate sentence of three years imprisonment is substituted for the life sentence.

McKeown: there is no material to suggest that the appellant presents a significant risk to the public. Exceptional circumstances exist, and a determinate sentence of three years is substituted for the life sentence.

McGilliard: there is evidence that the appellant presents a serious and continuing danger to the public. His record, the circumstances of the instant offence, the pre-sentence and medical reports all indicate that there are no exceptional circumstances. A life sentence falls to be imposed under s.2.

Okwuegbunam: no finding as to dangerousness was made by the judge. The Court of Appeal has considered the appellant’s antecedents and the circumstances of the second offence, in the absence of any reports. The appellant is given the benefit of the doubt as to his account of the circumstances of the first offence (rape) since it is not clear whether his account was accepted at the time. This is a borderline case, but the appellant constitutes a significant risk to the public, and no exceptional circumstances therefore exist.

9 [1998] EHRLR 90: *confiscation orders under the Drug Trafficking Offences Act 1986 - Article 7 argument manifestly ill-founded.*

10 Offen, *paragraph 107.*
11 *Ibid*, *paragraph 109.*

S: again, there was no finding by the judge as to dangerousness. However, the defendant's long history of offending, and the circumstances of the second offence, indicate that he poses a significant risk to the public. The Attorney General's reference succeeds and a life sentence is substituted, with a notional determinate sentence of 12 years.

Commentary

Mere statutory interpretation?

Although the point is curiously blurred in the judgment itself, *Offen* represents a substantial re-writing of s.2 in the light of Human Rights Act arguments.

Lord Woolf takes the line that the *Offen* interpretation of s.2 is required not merely by virtue of s.3 Human Rights Act (which requires courts to read legislation in a Convention compliant way if such a reading is "possible") but also since such a reading is required in order to give effect to the original intention of Parliament. Indeed, the re-reading is, in Lord Woolf's words, "quite apart from the impact of the Human Rights Act."¹² This approach echoes the approach taken by the Court of Appeal in other significant cases¹³, where the court has promoted the line that it is business as usual following the Human Rights Act and that all that is required is to interpret the law as it would in any event have been interpreted under traditional domestic law principles¹⁴. Indeed one commentator has stated:

"It appears that the Court would have adopted this interpretation quite independently of the Human Rights Act 1998, by the application of the traditional "mischief" rule of statutory interpretation. It did not need the Human Rights Act 1998 to reach this conclusion."¹⁵

But while it may not have "needed" the Human Rights Act to arrive at the conclusion, it is noticeable that the approach to s.2 taken by the Court of Appeal prior to the Human Rights Act, (including the decision of that court in *Matthew Offen's* first appellate hearing) suggests that it has taken the implementation of the Human Rights Act before the court was prepared to interpret the provision in a manner that took proper account of the circumstances of the offences - and indeed the offender. Indeed, there is a strong argument that as a matter of pure statutory interpretation - without regard to the Convention issues - the approach taken by earlier courts in cases such as *Kelly* more accurately reflects the intention of the statute. It will be recalled that the White Paper speaks of "requiring the courts to impose an automatic indeterminate sentence, and releasing the offender if and only if it is safe to do so."¹⁶ This needs to be compared with the central contention made in *Offen* - namely that "the section was not intended to apply to someone in relation to whom it was established there would be no need for protection in the future."¹⁷ With respect to Lord Woolf, the

¹² *Ibid*, paragraph 88.

¹³ See for example, *R v Togher*, [2001] Crim.L.R. 124, paragraph 33.

¹⁴ For another example of this approach see *R v Central Criminal Court ex parte Guardian, Observer and Bright*, *The Times*, July 26, 2000 where Judge LJ conducts a wide ranging review of domestic law with the apparent intention of showing that Strasbourg

jurisprudence has little to add to existing domestic safeguards for civil liberties.

¹⁵ David Thomas, [2001] *Criminal Law Review* 63, 67.

¹⁶ *Op cit*.

¹⁷ *Offen*, paragraph 88

¹⁸ "[A] monstrous carbuncle on the face of English criminal jurisprudence.": David Thomas, *Criminal Law Review*, *op cit*.

White Paper does not at first glance seem to create a mere presumption that a second time serious offender will be dangerous to the public - a presumption which can be rebutted if it can be shown to the court's satisfaction that no serious risk exists. Rather it seems to be a provision which "requires" the court to impose a life sentence, with the intention that public safety will then become an issue at the release point - rather than itself being the gateway issue that may or may not permit the life sentence. Indeed, given that many of the serious offences in s.2(5) carry potential life sentences in their own right, the purpose behind the provision was presumably the perceived disquiet at the failure of the courts to use their sentencing powers in a manner that protected the public, with the result that the provision was intended to remove judicial discretion except in specific exceptional circumstances.

Most commentators would take the view that the s.2 provision represents populist law making, by the then Government, which had both eyes firmly on the headlines in the popular press and a forthcoming election. Judicial and academic disquiet over the injustice to which the provision gave rise¹⁸ certainly suggests that the decision in *Offen* is to be welcomed. However, Lord Woolf's statement that the new interpretation of the provision simply gives effect to the original Parliamentary intention may need to be treated with some scepticism.

The effect of Offen:

Offen applies the "serious risk of harm" test to the issue of whether exceptional circumstances exist which permit the court not to impose the life sentence. In the light of *Offen*, it is clear that where a court concludes that there is no serious risk to the public, that of itself will constitute exceptional circumstances, thereby enabling the court to impose a determinate sentence.¹⁹ What then are the relevant factors for the court to take into account in arriving at its decision on risk?

In *Kelly* Lord Bingham rejected arguments that either youth at the time of the first offence or the differing nature of the offences were exceptional circumstances.²⁰ *Offen* indicates that the latter at least may be among the factors to which the court can legitimately have regard, not as exceptional circumstances in their own right, but in deciding whether there is a significant future risk - itself the primary exceptional circumstance. In looking for risk factors, it must be borne in mind that the fact that the defendant has been convicted of two serious offences gives rise to a presumption of future risk - or in Lord Woolf's words: "The norm is that those who commit two serious offences are a danger or risk to the public." It may be relevant that the two offences are of different kinds, but the court's decision in *S*'s appeal shows that this is far from being determinative. Of far greater significance are any reports that are before the court, taken in conjunction with the defendant's general antecedents, including the lack of convictions between the two serious offences. Here it should be noted that *Offen* had only two theft matters dating from 1990 in addition to the two

19 Interestingly, the courts have now had to address the obverse of this situation. In *R v Frost*, *Times*, January 5th, 2001, the court was faced with an offender who was felt to represent a high risk to the public. The trigger offence had been a serious assault using a hot iron. However, the first serious offence had taken place when Frost was 15 in 1991. He had received a supervision order, which the court concluded did amount to a conviction. However, it was pointed out on appeal that had Frost been 17, he would have received a probation

order instead, and that (at that time) would not have been a conviction and hence would not have triggered s.2 ten years later. The court accepted the argument that this anomaly could not be justified "by any apparent or sensible ... sentencing policy", and took the view that the anomaly therefore constituted exceptional circumstances, notwithstanding the serious risk, so that a life sentence could not properly be imposed.

20 *Kelly*, *op cit*.

robberies in issue, and McKeown had not offended since 1991. In both cases there were reports indicating that risk to the public was low. In contrast, however, while Okwuegbunam had only minor convictions in between the first offence of rape and the later manslaughter, there were no reports before either court (Okwuegbunam having declined to co-operate with a pre sentence report). What effect this had on the court is not clear, since apart from indicating that the case was “close to the borderline” the court gives no indication of why they concluded that Okwuegbunam constituted a significant risk to the public. It will be recalled that the court accepted Okwuegbunam’s assertion that the rape was not rape of a stranger, and that the manslaughter was of a family member; however, it is not clear whether these factors were of relevance in the risk assessment process. In the cases of S and of McGilliard, where both defendants had very substantial records for a variety of offences, including offences of violence, the court had no difficulty in concluding that there was a significant risk, and no ground for finding any exceptional circumstances to merit the passing of a sentence other than the mandatory life sentence.

Obviously, the decisions in *Offen* make clear the importance of thorough risk assessment in the pre-sentence reports, and in any medical reports. However the court was faced with the difficulty that there was often no information as to the circumstances of the first offence. In McGilliard’s case there was no information about the circumstances of the earlier culpable homicide. In Okwuegbunam’s the court was again faced with a lack of information about the basis for sentencing on the rape. In McKeown the court knew nothing of the first assault offence. Where the court is taking upon itself the risk assessment in respect of future offending, it is hard to see how the court is going to be equipped to decide whether the statutory “norm” (two serious offences indicates a likelihood of future serious risk) is justified where it only has the circumstances of one of the relevant offences before it. Nor is it clear whether any administrative steps are now to be taken to ensure that information is kept on all “first” serious offences so that this can then be made available to any subsequent court in dealing with a second such offence.

Offen and mentally disordered offenders

Prior to *Offen*, the position of mentally disordered offenders and s.2 had been confirmed by the Court of Appeal in *Newman*.²¹ In 1999 Newman pleaded guilty to manslaughter on the basis of diminished responsibility, having killed his grandmother and violated her body while suffering from a paranoid psychotic illness. Newman had a criminal record dating back to 1987, and had been made subject to a hospital order in 1991 for shoplifting, and again in 1992 for a number of offences of violence, arising from a serious knife attack on a stranger on a train. The 1992 convictions included a charge of causing grievous bodily harm with intent, so that at the sentencing hearing for the 1999 manslaughter offence, the issue of s.2 arose.

Reports before the judge indicated that Newman’s condition was treatable, and recommended a hospital order and a restriction order under sections 37 and 41 of the Mental Health Act 1983. Indeed certificates authorising Newman’s admission to Rampton High Security Hospital were before the judge. The judge indicated that he accepted that Newman was “plainly” mentally ill. However, the judge took the view that mental illness could not be an exceptional circumstance for the purposes of s.2.

21 [2000] 2 Cr. App. R. (S.) 227.

The Court of Appeal agreed. Section 37(1) Mental Health Act 1983 had been amended to take account of the 1997 Act to permit the making of a hospital order but not where:

an offence the sentence for which is fixed by law or falls to be imposed under section 2(2) of the Crime (Sentences) Act 1997 ...

Additionally, while section 37(1)(A) of the 1983 Act permits the making of a hospital order rather than the mandatory sentences imposed under sections 3 or 4 of the 1997 Act (in respect of repeat burglars and drug dealers), s.2 is conspicuously omitted. Finally, s.45A(1) of the 1983 Act provides that it will not apply where the offence “*is one the sentence for which falls under section 2*” of the 1997 Act. The court in *Newman* went on to state:

“It is not suggested that there is here any exceptional circumstance other than mental illness. That alone will not avail the appellant. We must dismiss the appeal. It is a matter for concern that a defendant so obviously and acutely suffering from mental illness should be ordered to prison and not to hospital. Even though, in practical terms, the difference between the two orders may lie less in the mode of treatment after sentence than in the procedure governing release and recall, we regret our inability to make what seems on the medical evidence the more appropriate order.”

There is nothing in *Offen* that changes the propositions put forward in *Newman*. Of itself, mental disorder will not therefore constitute an exceptional circumstance. However, the re-reading of the “exceptional circumstances” test so that lack of risk will constitute an exceptional circumstance has clear implications for those mentally disordered offenders, such as Matthew Offen himself, who are able to show that they pose no future risk to the public. But offenders who do present a future risk - such as Dean Newman - remain excluded from the Mental Health Act sentencing regime, and will be subject to life sentences under s.2²². Given that the rationale of s.2, both as stated by the White Paper and as re-interpreted by the court in *Offen*, remains the imprisonment of offenders only for so long as public safety requires that course, such offenders will need to be kept under assessment. Moreover, in the case of those offenders who would otherwise be subject to hospital orders, it is likely that any failure to provide a similar standard of support and treatment would amount to a breach of Article 3 of the Convention. In this regard, practitioners will note the recent decision of the Strasbourg court in *Keenan v United Kingdom*²³, where a breach of Article 3 was held to have occurred in respect of Mark Keenan, a mentally ill prison inmate who committed suicide having been punished for an assault on prison hospital staff which he alleged arose from a change in his medication:

“The lack of effective monitoring of Mark Keenan’s condition and the lack of informed psychiatric input into his assessment and treatment disclose significant defects in the medical care provided to a mentally ill person known to be a suicide risk. The belated imposition on him in those circumstances of a serious disciplinary punishment – seven days’ segregation in the punishment block and an additional 28 days to his sentence imposed two weeks after the event and only nine days before his expected date of release – which may well have threatened his physical and moral resistance, is not compatible with the standard of treatment required in respect of a mentally ill person. It must be regarded as constituting inhuman and degrading treatment and punishment within the meaning of Article 3 of the Convention.”²⁴

22 Although subsequently of course such offenders may be transferred from prison to hospital in accordance with the provisions of sections 47 and 49 of the Mental Health Act 1983.

23 *The Times* 18th April 2001, Application no. 27229/95, Judgment 3rd April 2001

24 *Ibid*, paragraph 115.

Conclusion

The decision in *Offen* is clearly to be welcomed. Mandatory sentences - as politicians are aware - play well with the press and the public, but inevitably give rise to injustice unless they can be applied according to the circumstances of the offence and offender. By re-reading s.2 Crime (Sentences) Act 1997 (now s.109 Powers of Criminal Courts (Sentencing) Act 2000) in such a way as to create a rebuttable presumption as to sentence, the court has created a greater scope for imposing sentences appropriate to the offence and the offender. Such a re-reading does, however, give rise to the question of whether the s.2 provision can be referred to as an automatic life sentence when in reality that sentence will only be imposed where the court considers that the defendant has failed to rebut the presumption that he will constitute a future risk²⁵. Indeed, it may be queried whether the *Offen* test now brings the s.2 sentence into line with the considerations that will apply in any case where a life sentence falls to be considered. The impact of the provision on dangerous but mentally disordered offenders remains hard to justify, however, and it is to be hoped that the court will be asked to reconsider the decision in *Newman* in the light of the Human Rights Act in the near future.

25 See for example *Close* (unreported, CA, 25th April 2001, *Lawtel*), where psychiatric evidence indicated that the defendant's behaviour had improved following an anger management course and that there was no personality order. The court concluded that there was no

evidence of serious risk and quashed the life sentence under s.2 under the principles in *Offen*. Had a personality disorder been disclosed, it would presumably have been harder for *Close* to satisfy the court that no risk arose, and consequently harder to displace the s.2 "norm".