Time to Repeal the Firearms Minimum Sentence Provision

Martin Wasik

Introduction

The Criminal Justice Act 2003, section 287, inserted section 51A into the Firearms Act 1968, thereby creating a presumptive minimum sentence of 5 years' imprisonment for anyone convicted of possession of a specified firearm. The maximum penalty for the offences is 10 years. The Violent Crime Reduction Act 2006, section 28 extended that provision, and added another minimum sentence to cover cases of using another person to mind a specified firearm. Section 51A, the focus of this article, is a minimum sentence provision which requires that, in the absence of 'exceptional circumstances relating to the offence or the offender which justify its not doing so' the court must impose a custodial sentence of at least 5 years on any offender who was aged 18 or over when he committed the offence, or a custodial sentence of at least 3 years on an offender who was aged 16 or 17 when he committed the offence. While it is of course undeniable that firearms offences are always serious, and that some cases merit custodial sentences of at least the length prescribed by the minimum sentence, this article argues that the minimum sentence provision causes considerable difficulty.[1] It was legislated in haste, has proved to be problematic in practice, and it stands in the way of the development of proper sentencing guidelines for firearms offences.

In the first decision of the Court of Appeal on the provision Lord Woolf CJ in *Rehman and Wood*[2] said that deterrence was the objective of the minimum sentence. His Lordship said that Parliament had listed those weapons in the section the possession of which made it important to pass deterrent sentences to 'convey a message … so as deter others' and therefore 'pay less attention to the personal circumstances of the offender'[3]. The emphasis on *general* deterrence here may be contrasted with other minimum sentence provisions in England and Wales, such as the minimum three-year sentence for the 'third-strike' house

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[1] In the course of her judgment in *Davidson* Sharp LJ said that 'There is no doubt that the statutory provisions requiring the imposition of minimum terms pose a particular challenge for sentencing judges.'

[2] *Rehman and Wood* [2006] 1 Cr App R (S) 77

[3] At para [4]

burglar[4], which is structured much more as an *individual* deterrent. The house burglar falls foul of the minimum sentence only when he has been convicted and sentenced for two earlier house burglaries committed on separate occasions.[5] That minimum sentence is clearly designed to address the repeated failings of an individual defendant, while the minimum sentence for firearms offences applies to a first offender just as much as to the recidivist. That the underlying rationale of the firearms provision is general deterrence is apparent from judicial comments in other decisions of the Court of Appeal, such as those of Lord Judge CJ in *Wilkinson*:[6]

> 'The gravity of gun crime cannot be exaggerated … Sentencing courts must *address the fact that too many lethal weapons are too readily available*: too many are carried, always with devastating effect on individual victims and with insidious corrosive impact on the well-being of the local community.'(emphasis added)

Deterrence is, of course, one of the aims of sentencing listed in the Criminal Justice Act 2003, but no priority is assigned amongst those aims.[7] Regard must always be had to section 143 of the Act, which says that when assessing the seriousness of *any* offence, the court must consider the offender's culpability and any harm caused or risked. All the Sentencing Council offence guidelines are based upon crime seriousness, and require judges to address culpability and harm in detail at Stage 1 of the relevant guideline, in order to select the appropriate sentencing range and starting point at Stage 2. However, the minimum custodial sentence for firearms is one of the provisions which is *exempted* by statute from the normal proportionality requirements - that a custodial sentence should only be imposed where the offence is 'so serious' that neither a fine nor a community sentence can be justified[8] and that any custodial sentence imposed for the offence 'must be for the shortest term that in the opinion of the court is commensurate with the seriousness of the offence'[9] The interplay between these statutory requirements is not as clear as it might be, but it is apparent that the minimum sentence for firearms erects a substantial obstacle to normal proportionality requirements of sentencing, that obstacle being rooted in general deterrence.

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[4] Powers of Criminal Courts Act 2000, s.111

[5] See *Hoare* [2004] 2 Cr App R (S) 50

[6] *Wilkinson* [2010] 1 Cr App R (S) 100. It is fair to say that the minimum sentence was not directly in issue in the appeals heard in this case, but the Court considered the minimum sentence as part of its review of the gravity of gun crime and the need to impose 'deterrent and punitive sentences'.

[7] CJA 2003.s.142, a section referred to Professor Ashworth as embodying 'the worst of 'pick and mix' sentencing': *Sentencing and Criminal Justice,* 6th ed, 2015, p.82

[8] CJA 2003, s.152(1A) and (2)

[9] CJA 2003, s.153(2) and (3)

Problematising General Deterrence

There are, of course, two main problems with general deterrence. The first is the empirical question of whether or not it works to reduce the future offending of others. The second is the level of injustice which may be occasioned to individual defendants who fall foul of the policy and find themselves severely sentenced as a means to achieve a general public goal.[10] As to the first issue, there is a dearth of evidence that mandatory sentences for firearms offences have a general deterrent effect. Most of the research on this issue has been carried out in the United States, where minimum sentences have a much longer history, and the studies have been evaluated by Tonry[11], and by Makarios and Pratt[12]. In England there is little empirical evidence, but the leading academic study on general deterrence is highly sceptical that increases in sentencing levels can generate deterrent effects.[13] These research findings on deterrence were broadly accepted by John Halliday in his Report[14] which prefigured the 2003 Act, but the 5-year minimum firearms sentence stands as an obstinate tribute to legislative reluctance to accept the evidence which is available.

By contrast to the position in England in Wales the Canadian Supreme Court, in the important case of *Nur*[15], recently exercised its power under the Charter of Rights and Freedoms to strike down as 'unconstitutional' mandatory minimum sentences of three years and five years for possession of firearms imposed by section 95 of the Criminal Code. The Code sets out a range of sentencing objectives in section 718, but then goes on to assert that the 'fundamental principle' of sentencing is that the 'sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender'[16] . In giving her judgment on behalf of the majority in this case McLachlan CJC expressly relied upon the research studies (cited in footnote 11) as well as

[10] Andrew Ashworth, *Sentencing and Criminal Justice*, 6th ed, 2015, pp.83-88

[11] A.N. Doob and C.M. Webster, 'Sentence severity and crime: accepting the null hypothesis' (2003) 30 *Crime and* Justice*: A Review of Research* 143; A.N. Doob and C. Cesaroni, 'The political attractiveness of mandatory minimum sentences' (2001) *Osgoode Hall Law Journal* 287; M. Tonry, 'The mostly unintended consequences of mandatory penalties' (2009) *Crime and Justice: A Review of Research*, University of Chicago Press, 65; see also 'Mandatory penalties' chap 5 in M.Tonry, *Sentencing Matters*, 1996, Oxford

[12] M.D. Makarios and T.C.Pratt, ''The effectiveness of policies and programs that attempt to reduce firearm violence: a meta-analysis' (2012) 58 *Crime & Delinquency* 222

[13] A von Hirsch, A.E. Bottoms, E. Burney and P-O Wikstrom, *Criminal Deterrence and Sentence Severity*, 2009, University of Cambridge Institute of Criminology

[14] J. Halliday, *Making Punishments Work: Report of a Review of the Sentencing Framework in England and Wales*, 2001, Home Office

[15] [2015] 1 R.C.S 773

[16] S.718.1

reports of the Canadian Sentencing Commission[17] which has voiced scepticism about efforts to achieve general deterrence through deployment of minimum sentences. It is very unusual, at least from an English perspective, to see an appellate court taking the research evidence seriously, and acting so decisively upon it. Apart from the lack of evidence about the efficacy of deterrence, the court in *Nur* was acutely aware of the risk of injustice to individual defendants. The Court said that: 'Put simply, a person cannot be made to suffer a grossly disproportionate punishment simply to send a message to discourage others from offending.'[18] More is said about the case of *Nur* below.

While never casting doubt on the principle of general deterrence, the English judiciary has on numerous occasions expressed concern about the potential harshness of the minimum sentence for certain defendants. In *Rehman and Wood* Lord Woolf CJ said that section 51A, with its emphasis on the deterrent message rather than the risk actually posed by the offender, was capable of operating in an 'arbitrary fashion'.[19] This was because, in particular, the listed offences were ones of possession, and of strict liability. His Lordship observed that 'if an offender has no idea that he is doing anything wrong, a deterrent sentence will have no deterrent effect on him'.[20] Conviction would follow without proof of intention, or without understanding of the unlawfulness of the conduct: his Lordship said that this was 'of great significance' as to how the minimum sentence should be construed. That is because in offences of strict liability issues of defendant culpability are not relevant to guilt, but should still be accorded appropriate weight at the sentencing stage.[21] An example is *Boateng*[22], where it was accepted that the defendant genuinely did not know that a bag left at her flat by another person contained a gun and ammunition. Another is where the defendant is genuinely unaware that it is against the law to be in possession of the weapon. In a series of cases including *Stoker*[23] and *Beaman*[24] the Court of Appeal was concerned with a defendant in possession of a taser / stun gun disguised as something else – such as a mobile phone. These devices fall within the terms of the section and attract 5 year minimum sentences.[25] Stoker had purchased the item openly over the internet, and

[17] Canadian Sentencing Commission, *Sentencing Reform: A Canadian Approach*, 1987. The Commission expressed 'strong reservations about the deterrence efficacy of legal sanctions … to produce particular effects with regard to a specific offence.'

[18] At [45]

[19] *Rehman and Wood, a*t para [12]

[20] *Rehman and Wood, a*t para [14]. It is noticeable here that the argument slides from general deterrence to individual deterrence.

[21] See A Ashworth, 'Firearms and justice' [2013] Crim LR 447 (editorial)

[22] [2011] 2 Cr App R (S) 104 (five years reduced to two years)

[23] [2014] 1 Cr App R (S) 47 (five years reduced to two years)

[24] *Rogers* [2016] EWCA Crim 801, in relation to the appellant Beaman (five years reduced to two and a half years) See also *Zhekov* [2014] 1 Cr App R (S) 69

[25] See the analysis in *Brereton* [2012] 2 Cr App R (S) 69

Beaman had bought his in Bulgaria, where its possession is not against the law. Both defendants claimed (and this was accepted) that they had no idea that possession of the device was unlawful. In other cases the facts are different but the issue is the same. In *Cochrane v HM Advocate*[26] the defendant was in possession of a handgun which her father, who had died 28 years earlier, had kept as a souvenir from his service in the Second World War. The gun had never been unwrapped or removed from its box, and there was no ammunition for it. The defendant said that it had never occurred to her that she needed a licence for it. In all these cases the minimum sentence of 5 years was imposed by the sentencing court, but later reduced on appeal, by reference to 'exceptional circumstances'.

Legislative Over-reach and the Decision in *Nur*

In 2015 section 95(2)(a) of the Canadian Criminal Code imposed mandatory minimum sentences of 3 years for a first offence and 5 years for a subsequent offence for possession of a prohibited or restricted firearm when the firearm is loaded or kept with readily accessible ammunition. It is important to note at this stage that the Canadian provision allows no concession at all to the presence of 'exceptional circumstances', which the English provision does recognise. 'Exceptional circumstances' are considered further below. The Court in *Nur* held that

> 'mandatory minimum sentences … function as a blunt instrument that may deprive courts of the ability to tailor proportionate sentences [and] they may, in extreme cases, impose unjust sentences, because they shift the focus from the offender during the sentencing process in a way that violates the principle of proportionality.'[27]

The Court found, by a 6-3 majority, that the minimum sentences amounted to a 'cruel and unusual treatment or punishment'[28] since it was clear that they could lead to grossly disproportionate sentences for those offenders at the lower end of the offence spectrum. The Court referred, in particular, to 'the licensed and responsible gun owner who stores his unloaded firearm safely with ammunition nearby, but makes a mistake as to where it can be stored', for whom a 3 year sentence would be grossly disproportionate.[29] The judgement is principled, impressive, and potentially far-reaching. The case is particularly striking, since

[26] [2010] HCJAC 117 This is a Scottish case, but the law is the same (five years reduced to community service order). One judge dissented, and would have upheld the minimum sentence.
[27] At [44]
[28] Thereby violating section 12 of the Charter
[29] At [82]. The minority judges argued that this hypothetical was far-fetched, and that no such cases had actually come before the courts.

neither of the two appellants fell at the lower end of the range, and the Supreme Court in fact upheld sentences longer than the respective minimum terms in both their cases. Nur was a 19 year-old student of previous good character who was convicted of 'possessing a prohibited firearm when the firearm is loaded or kept with readily accessible ammunition'. That offence attracts a minimum three-year sentence, and Nur received a custodial sentence of 40 months. The defendant had been reported to the police as being in possession of a loaded semi-automatic weapon, which he discarded when the police arrived on the scene. The other appellant, Charles, was convicted of a second or subsequent like offence, which carries a minimum five-year sentence. He was found by police to have a semi-automatic handgun and ammunition at his apartment, and he was a man with a serious criminal history including five offences of violence and five firearms-related offences. He received a seven-year sentence.

The judges in the majority did accept that, in principle, minimum sentences might be appropriate legislative tools, and might be deployed in dealing with gun crime. These particular provisions were, however, struck down because of their potential over-reach. The majority also roundly rejected an argument that such over-reach could be dealt with by relying upon the prosecution to proceed summarily and thereby avoid the maximum penalties, or by choosing to charge offences which did not carry them:

> '… the section cannot be salvaged by relying on the discretion of the prosecution not to apply the law in those cases where, in the opinion of the prosecution, its application would be a violation of the Charter … [T]he courts are duty bound to make that pronouncement, and not to delegate the avoidance of a violation to the prosecution or to anyone else for that matter.'[30]

The Supreme Court had to deal with another challenge to a different minimum sentence in *Lloyd*[31], where the defendant was made subject to the one-year minimum sentence for drug possession with intent to traffic (supply). That sentence was increased to 18 months by the British Columbia Court of Appeal, but the Supreme Court again moved to declare the minimum sentence provision to be unconstitutional. Noting that the minimum sentence was capable of applying not just to the serious drug trafficker but also to an offender who was an addict, in possession of a small quantity of drugs to share with a friend, McLachlan CJC said that imposition of the mandatory one-year sentence in such a case would be 'grossly disproportionate to what is fit in the

[30] For consideration of the circumstances in which it might be appropriate to prosecute an offence involving a disguised stun-gun by charging an offence which does not carry the minimum sentence see *Ramzan* [2013] 2 Cr App R (S) 33 and the commentary on that case by Dr Thomas at [2013] Crim LR 526.
[31] *Lloyd* [2016] SCC 13

circumstances, and would shock the conscience of Canadians'.[32] The judges in the minority pointed out that, in respect of this minimum sentence, there was an exemption provided for an offender who chose to attend and completed successfully an approved treatment programme between his conviction and sentence. This did not impress the majority, however, who said that the exemption was too narrow. What was needed was a proper 'safety valve' written in to the legislation to allow judges to exempt cases where the minimum sentence would be unjust.

Exceptional Circumstances

As explained above, the Canadian firearm minimum sentence which was declared unconstitutional in *Nur* allowed for no exceptional circumstances. The English provision in section 51A does do so, and that is an important difference between the English and Canadian provisions. While the English firearms provision requires '*exceptional* circumstances' to avoid the maximum sentence, other English minimum sentences, such as the 'three-strikes' burglary provision, require '*particular* circumstances' relevant to the offender or to the offence(s) which would render the minimum sentence 'unjust', and it has become clear that the former is the more stringent test. The judicial power to find exceptional circumstances was, however, central to the reasoning of the Court of Appeal in *Rehman and Wood* when it rejected an argument that section 51A was incompatible with Arts 3 and 5 of the ECHR.[33] The Court found that the words of the section were *capable* of being interpreted as complying with the Convention. In that case Lord Woolf CJ said that the sentencing judge must decide what the exceptional circumstances were, and unless the judge had clearly made a mistake the Court of Appeal would not interfere. His Lordship said that circumstances were exceptional

> '… if it would mean that to impose five years imprisonment would result in an arbitrary and disproportionate sentence … A holistic approach is needed. There will be cases where there is one single striking feature, which relates either to the offence or the offender, which causes that case to fall within the requirement of exceptional circumstances. There can be other cases where no single factor by itself will amount to exceptional circumstances, but the collective impact of all the relevant circumstances truly makes the case exceptional'.

His Lordship also said that it was important *not* to divide circumstances into those which are capable of being exceptional and those which are not.

[32] At para [33]
[33] See also *Barber* [2006] 1 Cr App R (S) 90

Exceptional circumstances were found in *Rehman*, one of the two cases under appeal, where the defendant was a man of previous good character who had pleaded guilty at the first opportunity, and the weapon was a replica which he had purchased as a collector's model. The gun had not been converted for use, there was no ammunition for it, and it was still in its original wrapping. The 5 year sentence imposed by the sentencing judge was accordingly reduced to 12 months. In the years since that decision there has been much case law on the issue of exceptional circumstances. Most of it is highly fact-specific, and the cases are summarised in the standard works.[34] That material is not repeated in any detail here but, for the purpose of this article, it is important to note that the Court has over time retreated from the flexible approach set out in *Rehman*. It has reasserted the importance of the underlying policy of general deterrence, and has become much more reluctant to accept that circumstances really are 'exceptional'. In *Jordan*[35] the Court stressed that findings of exceptional circumstances would be 'rare', and in *Wilkinson*[36] the Court said that possession of a firearm was always a grave crime, and if the offence was within the terms of the minimum sentence provision, something 'truly exceptional' was required before a lower sentence could be passed. An important re-emphasis of deterrence policy came in *Culpeper*[37], where the Court effectively put an end to a line of decisions including *Edwards*[38] where exceptional circumstances had been found in relation to vulnerable women who had accepted custody of a firearm when under threats short of duress.[39] *Culpeper* was strongly endorsed in *Greenfield*[40], where the Court repeated that the phrase 'exceptional circumstances' must not be diluted, would be found only in 'rare cases', and that sentencing judges must do their statutory duty and not be swayed by sympathy for the offender (nor for the offender's family[41]). The facts of that case (female drug addict pressurised by drug dealer to store firearm at her flat) were 'all too familiar' and '*do not come close* to equating to exceptional'[42]. The Court also took the view (contrary to what was said in *Rehman and Wood*), that 'in determining what constitutes exceptional circumstances, we are in as good a position as the trial judge'.

The Guilty Plea Problem

[34] Such as DA Thomas, *Current Sentencing Practice*, A1-15A
[35] [2005] 2 Cr App R (S) 44
[36] *Wilkinson* [2010] 1 Cr App R (S) 100
[37] [2014] 1 Cr App R (S) 62 (two years increased to five years)
[38] [2007] 1 Cr App R (S) 111
[39] See also *Jones* [2012] 1 Cr App R (S) 25 (5 years reduced to 6 months – 'if ever there was a case of exceptional circumstances, this was it' *per* Laws LJ
[40] [2016] 2 Cr App R (S) 23 (three and a half years increased to 5 years)
[41] *Davidson* [2016] EWCA Crim 1626 (12 months suspended sentence increased to 5 years)
[42] *Greenfield*, *a*t [24] (emphasis added)

Section 51A is famously silent on what, if any, credit is available in these cases for a guilty plea. The standard provision in section 144 of the 2003 Act and the associated sentencing guideline, are extremely well known, and there is a provision dealing with reduction for plea attached to every other minimum sentence provision. There is no indication in the Parliamentary debates on the firearms minimum sentence that a stand-alone rule was intended, there was nothing in the explanatory notes issued to accompany the Act, and no satisfactory explanation has ever been advanced since. The most likely explanation is that the legislature simply overlooked the guilty plea issue. The Court of Appeal in *Jordan*[43], however, said that omission of the guilty plea reduction was 'plainly deliberate' and rejected the view advanced by counsel (and some academic writers[44]) that the standard requirement for reduction for plea could properly be read into the firearm sentence. The Court concluded that if exceptional circumstances did *not* apply a reduction for plea should be given, always provided that the final sentence did not fall below the minimum of 5 years.[45] If the court *does* find exceptional circumstances then the appropriate proportionate sentence should be imposed, having made the normal adjustment for plea.

The operation of this rule adds a further level of complexity, and disproportionality, to sentencing in this area, and it was roundly criticised by Lord Judge CJ in *Nightingale*, a case which his Lordship said had been 'bedevilled' by section 51A, a provision 'which was liable to distort the sentencing process'[46]. If we take the minimum sentence of five years for an adult defendant, it is clear that a defendant who would have received a sentence of seven and a half years had he contested the case could receive the full one-third discount in the normal way. However, a defendant who would have received a sentence of six years had he contested the case could receive only a maximum discount of one sixth, and a defendant who would have received a sentence of five years had he contested the case can receive no discount at all. This is bizarre in proportionality terms, it conflicts with sentencing practice for other offences and, of course, it runs against the normal policy of encouraging all defendants to plead guilty at the earliest opportunity. If the sentencing court does, in spite of everything, manage to find that there are exceptional circumstances, then according to *Jordan* the reduction for plea is then 'at large' and the normal reduction should be given. However, there is some authority

[43] [2005] 2 Cr App R (S) 266
[44] Taylor, R, Wasik, M and Leng, R. *Blackstone's Guide to the CJA 2003*, 2004, Oxford, p.208
[45] This is of course different from the reduction for plea available in other minimum sentence cases, such as the 3-strikes house burglary. There the appropriate discount should be given, but (unless 'particular circumstances' apply) the final sentence must not fall below 80 per cent of the 3 year minimum sentence.
[46] [2012] EWCA Crim 2734

which states that even where exceptional circumstances are found, the sentence starting point should still be five years.[47]

Towards Sentencing Guidelines in Firearms Cases

Section 51A was not the first minimum sentence to reach the statute books, and it has not been the last. Nobody doubts the right of Parliament to set sentencing policy through legislation, and the temptation to pass minimum sentences as a public relations exercise is obvious. Even so, given the role of the Sentencing Council, there is simply no need for minimum sentences at all. Sentencing ranges and starting points based on harm and culpability should be set for all offences (including firearms offences), and that is the job description of the Sentencing Council, as provided for by statute. Minimum sentences are generally an obstacle to the development of sentencing guidelines. The 'three-strikes' burglary minimum sentence caused problems in early attempts to develop a sentencing guideline for burglary.[48] In the Sentencing Council guideline it is dealt with by a very short comment to judges that when they have worked through the guideline they should make sure that the statutory provision has not been infringed.[49] Could a similar line be taken in a firearms guideline? Judges could be required to work through the guideline to determine the proportionate sentence (absent the minimum sentence provision) and then compare the proportionate sentence with the minimum sentence to decide whether to impose the minimum sentence would be 'arbitrary or disproportionate' (as Lord Woolf expressed it in *Rehman and Wood*). It seems, however, that the firearms minimum sentence would be much harder, if not impossible, to incorporate into a Sentencing Council guideline. That is because (i) a minimum sentence based on the idea of general deterrence is completely at odds with a guideline rooted in proportionality, (ii) the firearms minimum sentence is five years (not three years) and it applies to all defendants irrespective of their record, (iii) there is a higher hurdle to find 'exceptional circumstances' so as to pass a sentence of less than five years than the 'fairly substantial degree of discretion'[50] which judges have to find 'particular circumstances' for not imposing the minimum sentence for the third burglary, and (iv) there is the completely anomalous rule on reduction for a plea of guilty.

There is appellate guidance for courts on sentencing in firearms cases. This was provided by the Court of Appeal in 1998 (well before the creation of the

[47] *Beard* [2008] 2 Cr App R (S) 41
[48] See *McInerney and Keating* [2003] 2 Cr App R (S) 29 considering the advice of the Sentencing Advisory Panel on this issue; *Saw* [2009] 2 Cr App R (S) 54
[49] See *Andrews* [2013] 2 Cr App R (S) 5 and *Silvera* [2013] EWCA Crim 1764
[50] Per Lord Woolf CJ in *McInerney and Keating*, at [16]

minimum sentence) in *Avis*[51], and later expanded upon in *Wilkinson*[52] and *Sheen*[53]. *Avis* says that a judge sentencing a firearms case must consider the following questions:

(i) what sort of weapon is involved?
(ii) what use, if any, was made of the firearm?
(iii) with what intention, if any, did the defendant possess the firearm?
(iv) what is the defendant's record?
(v) where was the firearm discharged, and who and how many were exposed to danger by its use?
(vi) was any injury or damage caused by its discharge, and if so how serious was it?

Sentencing in firearms cases requires a 'structured approach'[54], including an explicit consideration of the *Avis* questions in every case, whether section 51A is engaged or not. If section 51A is in issue, *Avis* must be gone through first. While the *Avis* questions are fine as far as they go, they fall well short of the structure and detail of a comprehensive Sentencing Council guideline. In the *Avis* questions issues of harm and culpability are mixed together, rather than being addressed and rated separately, and in a guideline the defendant's record should not be a primary issue but operate as a secondary matter of aggravation or mitigation. The answers to the *Avis* questions might help to identify what circumstances, if any, are sufficiently 'exceptional' to avoid the minimum sentence. Recent decisions, including *Rogers*[55], have stressed that disputed issues of fact, especially those relating to the defendant's degree of culpability for the offence, must be clearly identified. Defence counsel should set these out in writing and, if they are disputed by the prosecution, the judge should hold a *Newton* hearing to resolve them, with the prosecution required to prove their version to the criminal standard.[56] As Sharp LJ observed in *Davidson*[57], the benefit of adopting the *Newton* hearing approach in a minimum sentence case is that

> 'it prevents 'fudge': it concentrates the mind of all in court before the sentence is determined on the matters that are said to be exceptional and whether they surmount the exceptionality threshold, whether on their own or looked at collectively'.

[51] [1998] 1 Cr App R 420
[52] *Wilkinson* [2010] 1 Cr App R (S) 100
[53] [2012] 2 Cr App R (S) 3
[54] *Withers* [2015] EWCA Crim 132
[55] *Rogers* [2016] EWCA Crim 801 *(in respect of the appellant Beaman).* See also *McCleary* [2014] EWCA Crim 302 and *McCarthy [2013]* EWCA Crim 2500
[56] And see *Lashari* [2011] 1 Cr App R (S) 72
[57] *Davidson* [2016] EWCA Crim 1626

Greater clarity as to the approach in determining exceptional circumstances is welcome, but it should be remembered that an important consequences for the defendant of not being believed on a *Newton* hearing is loss of some of the normal discount for plea. As we have seen, reduction for plea in firearms cases operates in a highly eccentric fashion, and where the starting point (before reduction for plea) is at or around the five year mark no reduction at all can be given. If the defendant loses the *Newton* hearing in such a case, it will become highly artificial for the judge to explain in open court what proportion of the reduction for plea has thereby been forfeited.

Conclusion

It is submitted that proper sentencing guidelines, set out in the now-familiar Sentencing Council format, are required for firearms offences, and only the Sentencing Council (and not the Court of Appeal) can provide them.[58] The underlying rationale for Council guidelines is proportionality, not general deterrence. The minimum sentence in firearms cases is an unprincipled and unnecessary exception to the prevailing principle of proportionality in determining the form and length of sentence. It shares the usual defects of minimum sentences, in being over-broad, and allowing insufficient scope for judges to make appropriate adjustment for individual cases. In addition, it seriously distorts the otherwise generally applicable principles of reduction for a guilty plea. Its repeal should be a legislative priority, because its removal is a prerequisite to the production of comprehensive sentencing guidelines for firearms offences.

[58] See the remarks of Leveson LJ in *Dyer* [2014] 2 Cr App R (S) 11 as to the respective roles of the Court and the Council