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IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Thursday 21 May 2020

B e f o r e:

LORD JUSTICE HOLROYDE
MRS JUSTICE ANDREWS DBE
MR JUSTICE MARTIN SPENCER

R E G I N A
v
PETER ASHFORD

R E G I N A
v
STEPHEN KING

R E G I N A
v
TOBY ROGERS

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Miss K Walton appeared on behalf of the **Applicants King and Rogers (via videolink)**
Mr S Dyble appeared on behalf of the **Applicant Ashford** (**via video link**)
Mr P Grieves-Smith appeared on behalf of the **Crown** (**via videolink**)

J U D G M E N T
(Approved)

1. LORD JUSTICE HOLROYDE: Breach of a sexual harm prevention order ("SHPO") or a sexual offences prevention order ("SOPO") is an offence punishable with imprisonment. It is not however an offence listed in either schedule 3 (sexual offences) or schedule 5 (other offences) to the Sexual Offences Act 2003. A court dealing with an offender for breach of an SHPO or SOPO therefore does not have the power to make a new SHPO. The consequences of that limitation upon the court's powers, and the scope of the court's power to vary an existing SHPO, arise for consideration in each of these three cases. It is for that reason that, although otherwise unconnected, they have been listed for hearing together.

2. We express at the outset our gratitude to all counsel for their written and oral submissions.

3. Peter Ashford, now aged 67, was sentenced on 14 May 2019, in the Crown Court at Ipswich to a total of six years' imprisonment for two offences of breach of a SOPO and three offences of breach of a SHPO. He was also made subject to a SHPO. His grounds of appeal challenge the length of his prison sentence and the lawfulness of the SHPO. His application for leave to appeal against sentence has been referred to the full court by the Registrar.

4. Stephen King, now aged 70, was sentenced on 24 April 2019 in the Crown Court at Croydon to 14 months' imprisonment for one offence of breach of an SHPO. He was also made subject to an SHPO. His grounds of appeal challenge the lawfulness of that order. His application for leave to appeal against sentence has been referred to the full court by the Registrar.

5. Toby Rogers, now aged 26, was sentenced on 4 March 2019 in the Crown Court at Warwick, to a total of three years' imprisonment for one offence of breach of a SHPO and one offence of failing to comply with notification requirements. The judge also ordered that an existing SHPO of five years' duration be extended by 10 years from the date of sentence. His original grounds of appeal challenged the extent of the credit he received for guilty pleas. Leave to appeal was refused by the Single Judge. He now seeks leave to renew his application for leave to appeal on the basis of fresh grounds of appeal which challenge the lawfulness of the extension of the SHPO.

6. Before going into more detail about the individual applications, it is convenient first to set the statutory framework and then to make some general observations.

7. Provision is made in respect of SHPOs by sections 103A – 103K of the Sexual Offences Act 2003, which replaced (with effect from 8 March 2015) earlier provisions relating to SOPOs.

8. Section 103A(1) and (2), so far as material for present purposes, give a court the power to make an SHPO where it "deals with" a defendant for an offence listed in schedule 3 or schedule 5 and is satisfied that it is necessary to make an SHPO for the purpose of protecting the public or any particular members of the public from sexual harm from the defendant. As we have indicated, the offence of breach of an SHPO is not included in either schedule. That fact was overlooked in each of these three cases and, we understand, has been overlooked in other cases as well. Perhaps that is because many would assume that the offence of breach ought to be, and therefore is, included when in fact it is not. That, however, is a matter for Parliament.

9. There is a separate power under subsections (3)-(7) for a magistrates' court, on application by a chief officer of police or by the Director General of the National Crime Agency, to make an SHPO against a "qualifying offender" who has "acted in such a way as to give reasonable cause to believe that it is necessary for such an order to be made". Where an application under subsection (4) has been made but has not yet been determined, section 103F gives the court a power to make an interim SHPO for a fixed period specified in the order.

10. By section 103C, an SHPO prohibits the defendant from doing anything described in the order. It has effect for a fixed period specified in the order of at least five years, or until further order. Subsection (6) provides:

    i. "(6) Where a court makes a sexual harm prevention order in relation to a person who is already subject to such an order (whether made by that court or another), the earlier order ceases to have effect."

11. It is necessary to quote in full the provisions of section 103E:

    i. "**103E SHPOs: variations, renewals and discharges**

    (2) A person within subsection (2) may apply to the appropriate court for an order varying, renewing or discharging a sexual harm prevention order.

    (3) The persons are—

    (a) the defendant;

    (b) the chief officer of police for the area in which the defendant resides;

    (c) a chief officer of police who believes that the defendant is in, or is intending to come to, that officer's police area;

(d) where the order was made on an application by a chief officer of police under section 103A(4), that officer.

(4) An application under subsection (1) may be made—

(a) where the appropriate court is the Crown Court, in accordance with rules of court;

(b) in any other case, by complaint.

(5) Subject to subsections (5) and (7), on the application the court, after hearing the person making the application and (if they wish to be heard) the other persons mentioned in subsection (2), may make any order, varying, renewing or discharging the sexual harm prevention order, that the court considers appropriate.

(6) An order may be renewed, or varied so as to impose additional prohibitions on the defendant, only if it is necessary to do so for the purpose of —

(a) protecting the public or any particular members of the public from sexual harm from the defendant, or

(b) protecting children or vulnerable adults generally, or any particular children or vulnerable adults, from sexual harm from the defendant outside the United Kingdom.

ii. Any renewed or varied order may contain only such prohibitions as are necessary for this purpose.

(7) In subsection (5), 'the public', 'sexual harm, 'child' and 'vulnerable adult' each has the meaning given in section 103B(1).

(8) The court must not discharge an order before the end of 5 years beginning with the day on which the order was made, without the consent of the defendant and—

(a) where the application is made by a chief officer of police, that chief officer, or

(b) in any other case, the chief officer of police for the area in which the defendant resides.

(9) Subsection (7) does not apply to an order containing a prohibition on

foreign travel and no other prohibitions.

(10) In this section, 'the appropriate court' means –

(a) where the Crown Court or the Court of Appeal made the sexual harm prevention order, the Crown Court;

(b) where an adult magistrates' court made the order, that court, an adult magistrates' court for the area in which the defendant resides or, where the application is made by a chief officer of police, any adult magistrates' court acting for a local justice area that includes any part of the chief officer's police area;

(c) where a youth court made the order and the defendant is under the age of 18, that court, a youth court for the area in which the defendant resides or, where the application is made by a chief officer of police, any youth court acting for a local justice area that includes any part of the chief officer's police area;

(d) where a youth court made the order and the defendant is aged 18 or over, an adult magistrates' court for the area in which the defendant resides or, where the application is made by a chief officer of police, any adult magistrates court acting for a local justice area that includes any part of the chief officer's police area.

ii. In this subsection ‘adult magistrates' court' means a magistrates' court that is not a youth court."

12. Section 103I, so far as material for present purposes, makes it an offence for a person, without reasonable excuse, to do anything which he is prohibited from doing by an SHPO, an interim SHPO or an SOPO. A defendant guilty of such an offence is liable on summary conviction to imprisonment for a term not exceeding six months and/or a fine and, on conviction on indictment, to imprisonment for a term not exceeding five years.

13. As we have noted, this offence of breach of an SHPO, etc, is not one of the offences listed in schedules 3 and 5 to the Act. There is therefore no power to make a fresh SHPO where a court is dealing with a defendant solely in respect of an offence of breach of an SHPO, etc, or in respect of an offence of breach and another offence or offences, none of which are listed in schedules 3 and 5. In R v Hamer [2017] EWCA Crim 192, [2017] 2 Cr App R 13 this court confirmed that that was so, and went on to consider whether the same prohibitions could have been imposed by amending the existing SOPO. The then provisions of section 108 of the 2003 Act made provision for variation of SOPOs in terms which are materially identical to the present section 103E. It was held that there

had been no valid application complying with the requirement that the application be made by a chief officer of police. There was, therefore, no power to vary the existing order.

14. It may be noted that in R v Hamer there had been other procedural deficiencies, including a failure to give the defendant notice of an application to amend the existing SOPO: rule 31.5 of the Criminal Procedure Rules, applicable both to magistrates' courts and to the Crown Court, requires service of a written application, and the application cannot be granted unless the persons required to be served have had at least 14 days in which to make representations. In view of its decision that the application had not been made by a person entitled to apply, the court did not need to reach any conclusion about those other deficiencies. It is not clear from the judgment whether any point was taken as to whether, in any event, the Crown Court would have jurisdiction to vary an SOPO made by a magistrates' court.

15. Section 103E, which we have quoted in full, is prescriptive as to the only persons who may make an application for a variation of an SHPO, and as to the court to which any application must be made.

16. In R v Ashton [2006] EWCA Crim 794, [2007] 1 WLR 181 this court considered the legal consequences of an irregularity in the way an accused came to be sentenced in the Crown Court. It referred to the earlier decisions in R v Sekhon [2003] 1 WLR 1655 and R v Soneji [2006] 1 AC 340 and concluded [at 4, 5] that:

    i. "... it is now wholly clear that whenever a court is confronted by failure to take a required step, properly or at all, before a power is exercised ('a procedural failure'), the court should first ask itself whether the intention of the legislature was that any act done following that procedural failure should be invalid. If the answer to that question is no, then the court should go on to consider the interests of justice generally, and most particularly whether there is a real possibility that either the prosecution or the defence may suffer prejudice on account of the procedural failure. If there is such a risk, the court must decide whether it is just to allow the proceedings to continue.

    ii. 5. On the other hand, if a court acts without jurisdiction - if, for instance, a magistrates' court purports to try a defendant on a charge of homicide - then the proceedings will usually be invalid."

17. The court accepted a submission that the approach to such issues is to avoid determining cases on technicalities when they do not result in real prejudice and injustice and to ensure that they are decided fairly on their merits.

18. It does not appear that R v Ashton was cited to the court in R v Hamer. It is however clear that the court in R v Hamer regarded a contravention of the statutory provision as to who might make the application as going to the jurisdiction of the court. We respectfully agree. In our view, it is to be inferred from the terms of section 103E that Parliament intended that a court should only have jurisdiction to vary an existing order if the application was made by one of the persons whom the section permits to make it, and made to the court prescribed by the section. If Parliament had intended otherwise, it could easily have legislated in more permissive terms, to the effect (for example) that a court may vary an SHPO on application by the prosecutor. We think it significant in this respect that when SHPOs replaced SOPOs in 2015, Parliament chose to enact section 103E in materially the same terms as the predecessor legislation.

19. We take a different view, however, of Parliament's intention in respect of the requirements of section 103E(3) as to the form of the application and as to strict compliance with all applicable rules of procedure. A failure to comply with one of those requirements can in our view be regarded as a procedural defect, not intended to invalidate the proceedings, and to be addressed in accordance with the principles stated in R v Ashton at [4].

20. It follows from what we have said that the Crown Court does not have power under section 103E to vary, renew or discharge an SHPO which was made by an adult magistrates' court or a youth court. It does not, however, follow that in such circumstances there must always be a separate hearing in the magistrates' court or youth court. By section 66 of the Courts Act 2003 a Circuit Judge or Recorder has the powers of a District Judge (Magistrates' Courts) in relation to criminal causes and matters. Provided that an application under section 103E has been made to the prescribed court by one of the persons who is permitted to make it, a judge or recorder dealing with the defendant in the Crown Court may be invited to exercise the power of a District Judge (Magistrates' Courts) sitting in that prescribed court to grant a variation pursuant to section 103E.

21. The final situation which we must consider is that of an offender who has previously been sentenced for an offence listed in schedule 3 or schedule 5 and was made subject to a suspended sentence of imprisonment and an SHPO. If he is subsequently convicted of a breach of that SHPO and consequently falls to be dealt with for breach of the suspended sentence order, but is not also before the court for any offence listed in schedules 3 and 5, can the Crown Court make a fresh SHPO? In our view, it cannot. Where an offender is convicted of an offence committed during the operational period of a suspended sentence, the court is required to deal with him in one of the four ways specified in paragraph 8 of schedule 12 to the Criminal Justice Act 2003. In doing so, the court is not "dealing with the defendant in respect of an offence listed in schedule 3 or 5" for the purposes of section 103A: it is imposing upon the defendant the consequences of his reoffending

during the operational period of the suspended sentence. An SHPO made when the suspended sentence was imposed remains in force unless and until action is taken to revoke or vary it.

22. We now turn to consider the individual cases.

23. Mr Ashford had been made subject to an SOPO by a magistrates' court on 2 August 2010. He had been released in March 2010 from a lengthy prison sentence and his behaviour had caused the police to apply for an SOPO. He was quickly in breach of the order and on 13 January 2011 was sentenced to three years' imprisonment for four offences of breach.

24. On 9 January 2019 he was sentenced by a magistrates' court to a suspended sentence of 16 weeks' imprisonment for offences of failure to comply with notification requirements and sending an obscene communication. The latter offence is listed in schedule 5 to the Act, and the magistrates' court exercised its power to make a new SHPO to continue until further order. He was prohibited from, amongst other things, "contacting or communicating with any female child under the age of 16 years by any means". Paragraph 7 of the SHPO prohibited him from "loitering within 20 metres of playgrounds, parks or designated play areas where children under the age of 16 may be present". We are surprised that it was thought appropriate to use such an imprecise term as "loitering" to define the prohibited conduct.

25. Almost immediately, Mr Ashford breached that new order. It appears that he regularly walked his dog in a particular area at a particular time of day, and he had since September 2018 had a number of meetings with a woman and her six-year-old daughter who were walking their dog. He had given the girl gifts of painted stones and sweets. He continued to talk to the girl (always in the presence of her mother) on at least six further occasions between the new SHPO being imposed on 9 January, and 24 January when he was seen by a police officer. These events were charged on indictment as two offences of breaching the SOPO of August 2010 and two offences of breaching the SHPO of January 2019.

26. On 30 January 2019, Mr Ashford was seen near the playing field of a primary school. He was there for about half an hour in company with another man who had a camera with a zoom lens, which was said to be used to photograph wild flowers. On 16 April 2019 he was convicted by a magistrates' court of an offence of breaching paragraph 7 of the SHPO and was committed to the Crown Court for sentence for that offence. The breach of the suspended sentence order was to be dealt with by the magistrates' court.

27. On 14 May 2019 in the Crown Court, Mr Ashford pleaded guilty to the offences charged

on indictment.

28. The judge was faced with a more difficult sentencing process than he should have been. It appears that much of the relevant material had not been uploaded onto the Digital Case System or had only been uploaded at a very late stage. Perhaps for that reason, the prosecution opening of the facts lacked clarity. In the course of it the judge, on learning of the terms of the SHPO of 9 January 2019, suggested that the terms of paragraph 7 were ambiguous and invited the prosecution advocate to redraft it so that defence counsel could decide whether to "consent to that amendment". An amended draft was later agreed between counsel.

29. Mr Ashford has previous convictions as a young man for offences of dishonesty, but more importantly he also has convictions over many years for offences reflecting his sexual interest in children. Those convictions include offences of unlawful sexual intercourse with girls aged under 16, offences of indecent assault on a female and offences of buggery and attempted buggery. A pre-sentence report assessed a very high risk of sexual recidivism and a high risk of harm to children. It noted that when supervised in the past, Mr Ashford had sought to minimise the seriousness of his offending and had denied any sexual intent.

30. The judge commented in his sentencing remarks that Mr Ashford had continued to reoffend despite the sentences and orders imposed by the courts and assessed him as being unable to avoid communicating with very young children, despite the courts' attempts to prevent him from doing so. The judge placed each of the offences in the highest category of the relevant definitive guideline, with a starting point of three years' custody and a range up to four-and-a-half years. He concluded that there was no prospect of reform or rehabilitation, that Mr Ashford was a danger to young children and that his primary duty was to protect the public from further harm. As to the suspended sentence imposed on 9 January 2019, which he mistakenly said was a term of four weeks, the judge said:

    i. "If I'm required to sit as a district judge under section 66 of the [Courts] Act, then I do so. And I will send that suspended sentence breach to myself and deal with it at the same time. But I emphasise that Mr Dyble had no objection to me doing that in any event, to provide a speedy resolution to your criminal course of conduct. And therefore, I sentence you for those matters on the indictment for which you pleaded guilty, the committal for sentence in respect of loitering within 20 metres of the play area. And for the breach of the suspended sentence order."

31. The judge had regard to totality. He sentenced Mr Ashford to concurrent terms of three years' imprisonment for each of the two breaches of the SOPO. He also imposed sentences of three years' imprisonment for each of the two breaches of the SHPO charged

on indictment and for the third breach which was the subject of the committal for sentence. Those sentences were concurrent with each other but consecutive to the other sentences. As to the breach of the suspended sentence, the judge said this:

> i. "... there's absolutely no reason why that shouldn't be activated in full, making a four-week sentence to be imposed but that too will run concurrently with all other sentences."

32. Thus, the total prison sentence was six years.

33. The judge was satisfied with the amended terms which counsel had agreed in relation to paragraph 7 of the SHPO and said:

> i. "The sexual harm prevention order, which continues to run indefinitely, will be amended in paragraph 7 so that it reads that you are prohibited from being within 20 metres of playgrounds, parks or designated play areas."

34. The grounds of appeal are that the total sentence was manifestly excessive in length, in particular because the judge placed the offences in too high a category when applying the guideline and wrongly imposed a consecutive sentence, and that the variation of the SHPO was unlawful. The respondent submits that the total sentence was just and proportionate to the seriousness of the offending.

35. We consider first the challenge to the length of the sentence. In terms of the Sentencing Council's definitive guideline, we agree with the judge that each of the breaches of the SOPO and the SHPO fell into Category A culpability. We see some force in Mr Dyble's submission that the harm fell short of Category 1 and should have been in Category 2, so that the starting point for a single offence would be two years with a range up to three years. We are however unable to accept that the total term of six years was manifestly excessive. There were repeated offences which continued even after the fresh SHPO had been made, and each offence was seriously aggravated by the many previous convictions for sexual offences against young children. Even if the judge had taken the Category A2 starting point for any one offence, he would have been entitled to adjust that starting point upwards to reflect the aggravating features; and there was no error of principle in making one group of sentences consecutive to the other. The Totality guideline requires the court to impose a total sentence which, whatever its precise structure, reflects all the offending behaviour and is just and proportionate. The total sentence was stiff, but there is, in our view, no ground on which it can be argued that it was disproportionate.

36. As to the suspended sentence, there was no power to commit that separately to the Crown Court for sentence and therefore the course suggested by the judge, in the remark which we have quoted, could not have been taken. The judge was, however, empowered by section 66 of the Courts Act 2003 to exercise the powers of a District Judge and so to deal with the breach of that suspended sentence as a magistrates' court. The judge

clearly fell into error as to the total length of the suspended sentence which had been imposed on 9 January 2019. Nonetheless, the order which he pronounced was that the suspended sentence should be activated in full. The effect, in law, was that he activated the total term of 16 weeks but ordered it to run concurrently with other sentences.

37. As to the SHPO, it follows from our general observations that the judge had no power to make a fresh SHPO. He had no power as a Crown Court judge to vary the SHPO made by a magistrates' court. No application under section 103E to vary the SHPO had been made to the appropriate magistrates' court and the judge therefore could not exercise the power of a District Judge in that regard. In any event, given that the offence of breach of the SHPO had been the subject of a committal for sentence, there was, as we have said, no power for a magistrates' court or a District Judge to commit the breach of the suspended sentence order alone to the Crown Court for sentence. In those circumstances the judge could not make the purported variation of the SHPO, which was accordingly of no effect.

38. It follows that the SHPO continued in the terms ordered by a magistrates' court on 9 January 2019. We agree with the judge that the terms of paragraph 7 are ambiguous and inappropriate. Any variation of them must however be the subject of a separate application properly made to the appropriate magistrates' court.

39. In the result, our order in Mr Ashford's case is as follows. We grant leave to appeal. We allow the appeal to the limited extent that we quash the order purporting to vary the terms of the SHPO of 9 January 2019. The sentences of imprisonment remain as before. We direct that the Crown Court record be amended to show that the total suspended sentence of 16 weeks, not 4 weeks, was activated in full but ordered to run concurrently with other sentences.

40. We turn to the case of Mr King. Originally, his grounds of appeal were limited to a challenge to the width of one of the prohibitions contained in the SHPO. Additional grounds have however been prepared as a result of the Registrar’s alerting the parties to other issues. Leave is now sought to rely additionally on those amended grounds, which argue that there was no power to impose a new SHPO and no power to vary the existing order.

41. Mr King has convictions over five decades for many offences, the majority being for sexual offences. His previous convictions include offences of sexual intercourse with a girl aged under 13, gross indecency with a child, indecent assault on a female aged under 14 years and offences relating to indecent images of children.

42. On 3 December 2016 an interim SHPO was made by a magistrates' court. A final order, to continue until further order, was made on 15 December 2016. It prohibited Mr King

from, amongst other things, having contact with "any other registered sex offender" without prior approval from the local Public Protection Unit. In June 2017, and again in September 2017, he was sentenced to terms of imprisonment for offences of breaching the order. One of his breaches involved his having contact with his friend Mr Cater, a registered sex offender.

43. Whilst serving the sentence imposed in September 2017, he continued to have contact with Mr Cater, by phone calls from the prison. On 20 March 2019 he pleaded guilty before a magistrates' court to that offence of breach of the SHPO and was committed for sentence to the Crown Court. On 24 April 2019, in the Crown Court, he was sentenced to 14 months' imprisonment for the offence of breach. As we have indicated, there is no challenge to the length of that sentence, and it is therefore unnecessary for us to say anything more about that. We focus on the SHPO which the judge purported to make.

44. It appears that a Detective Constable had made a statement or written submission seeking a variation of the terms of the existing SHPO. That was not an application by a chief officer of police, and it was made to the Crown Court rather than to the magistrates' court which had made the existing SHPO: it therefore failed to comply with the requirements of section 103E. Prosecution counsel nonetheless put forward this application to the judge and it appears to have been the subject of some discussion during the hearing. In his sentencing remarks, the judge said:

    i. "You will be subject to the Sexual Harm Prevention Order, a new one. That is the one we have just discussed, with those amendments suggested by your counsel, and that will last for an indefinite period of time."

45. The SHPO which the judge purported to impose included, at paragraph 13, a prohibition on contact with "a registered sex offender or convicted sex offender". The original ground of appeal challenges that part of the order on the basis that it would unfairly prevent Mr King from having contact with his friend even if Mr Cater's name is removed from the sex offender register and would thereby improperly subvert the notification regime.

46. In the additional grounds of appeal, it is submitted that the judge clearly stated that he was imposing a new SHPO, but he had no power to do so. Nor was there any power to vary the existing SHPO because no proper application had been made to the appropriate court by a person entitled to make it.

47. The respondent accepts these submissions. It follows from the observations which we made much earlier in this judgment that we too accept the submissions as correct. The

judge had no power either to make a fresh SHPO or to vary the existing one.

48. The respondent – understandably anxious that the consequence of quashing the SHPO made by the judge might be to leave Mr King free from any SHPO - draws attention to the magistrates' court's record for 20 January 2019. This shows that the District Judge who committed Mr King to the Crown Court for sentence purported to grant an application to discharge the SHPO made on 15 December 2016 and revoked that order; and purported to make an interim SHPO "for 6 weeks or until the main application is determined". This interim order prohibited Mr King (subject to the usual savings) from having contact of any kind with "any other registered sex offender or convicted sex offender".

49. In our judgment, the District Judge had no power to make either of those orders. As we have noted, section 103E(7) limits the circumstances in which an order may be discharged before it has been in force for five years: those circumstances could not apply in Mr King's case because there was no application by a chief officer of police. The power to make an interim SHPO only arises where a valid application to vary has been made but not yet determined; and, as is now common ground, there was here no valid application to vary.

50. In those circumstances, the respondent invites this court either to make no order on the application for leave to appeal, or to reconstitute as a Divisional Court and quash the orders purportedly made by the District Judge on 30 January 2019, thus restoring the SHPO made on 15 December 2016. It is implicit in this second invitation, and counsel Mr Grieves-Smith confirmed in his oral submissions, that if there was an application for judicial review of the District Judge's orders, it could not and would not be resisted by the defendant magistrates' court.

51. We do not think it appropriate to take the first of the two proposed courses. We do not accept the submission that the making of no order could be justified by reference to the decision of this court in R v Reynolds [2007] EWCA Crim 538, [2008] 1 WLR 1075. The court there was dealing with a very different situation where a judge had passed a sentence which was valid and effective but was less severe than the sentence which should have been imposed in accordance with mandatory sentencing provisions. The court was unable to substitute the sentence required by those provisions, because to do so would breach the restriction in section 11 of the Criminal Appeal Act 1968, but was able to respect the judge's finding of dangerousness by leaving in place the sentence which had been imposed. Here, in contrast, the procedural history which we have briefly summarised has involved a succession of errors, culminating in an order which we have found to have been made without jurisdiction. In all the circumstances of this case, it would not be right to take a course which would leave that order in place.

52. We are however persuaded that the second course is appropriate.

53. For those reasons, my Lady Andrews J and I reconstitute ourselves as a Divisional Court of the Queen's Bench Division, Administrative Court. We treat the Form NG1 and amended grounds of appeal as an application by Mr King for judicial review of the District Judge's orders of 30 January 2019. We dispense with service, dispense with the need for an acknowledgment of service and waive all time limits. We are satisfied that the District Judge's orders on 30 January 2019 purporting to revoke the SHPO of 15 December 2016 and to make an interim SHPO were unlawful. We quash those orders.

54. Returning to a constitution of three judges of the Court of Appeal, Criminal Division, we grant leave to appeal. We allow the appeal to the extent that we quash the SHPO purportedly made by the judge. The sentence of imprisonment remains as before.

55. The consequence of our orders is that Mr King remains subject to the SHPO of 15 December 2016. Any application to vary the terms of that order must be made to the appropriate magistrates' court by a person who is permitted to make it.

56. We turn finally to the case of Mr Rogers. On 20 March 2015, having been convicted of a number of sexual offences, he was made subject by the Crown Court to an SHPO for five years. The terms of the SHPO prohibited him from seeking, or being in, the company of any child under the age of 16 "other than that which is inadvertent and unavoidable in the course of the defendant's lawful daily activities or with the prior written permission of the relevant child's parent or guardian (who has been informed of the defendant's convictions) and the prior written permission of the social services or the chief constable for the area concerned." Within months, he began a relationship with a woman who had children aged six and four. He pleaded guilty in January 2017 to four offences of breach of the SHPO and one of breach of the notification requirements. He was committed for sentence to the Crown Court where, on 24 March 2017, he received a total of 20 months' imprisonment. The SHPO remained in force.

57. He was released on licence from that sentence in September 2017, but recalled to prison a year later. He had formed a relationship with a woman who had children aged 10 and eight and had on a number of occasions stayed overnight in her home. He resumed that relationship upon his release in October 2018.

58. On 12 October 2018 he pleaded guilty before a magistrates' court to an offence of breaching the SHPO by staying overnight with his partner on five occasions and an offence of failing to comply with notification requirements. He was committed for sentence to the Crown Court, where on 4 March 2019 he was sentenced to three years' imprisonment for the breach offence and 12 months' imprisonment concurrent for the notification offence. In addition, the judge purported to extend the duration of the

existing SHPO.

59. The judge held that the breach offence fell into Category A1 of the guideline. Having regard to the aggravating features of the offence, the appropriate total sentence after trial would have been 45 months' imprisonment. The judge gave credit of one-quarter for the guilty pleas.

60. The original grounds of appeal did not challenge the length of the notional sentence after trial but argued that the level of credit was insufficient. Leave to appeal on that basis was refused by the single judge, and that application has not been renewed to the full court. Instead, leave is sought to add a fresh ground of appeal to the effect that the judge had no power to make the SHPO.

61. Prosecuting counsel in his opening address had said that the current SHPO "needs addressing". He apologised for the fact that he had not had time to draft "a fresh order", but indicated that there was nothing in the existing order which needed to be amended except the end date.

62. The judge in his sentencing remarks said:

    i. "I am going to extend the sexual harm prevention order; it is going to last from ten years from today, ten years from today. The sexual harm prevention order in the same terms that it was made on the earlier occasions as are uploaded will be in existence."

63. It is common ground between the parties, and we agree, that the judge had no power to make a fresh SHPO. However, we accept the submission that the judge in his sentencing remarks did not purport to do so, but rather to vary the existing SHPO by extending its duration. The order which was drawn up in the Crown Court was in ambiguous terms, apparently referring both to a new order and to an extension of the existing order; but the order of the court is that which was pronounced by the judge.

64. As to whether the judge had power to vary the existing order, the respondent submits that there was substantial compliance with the requirements of section 103E, such that it would be appropriate for this court to make no order on the application for leave to appeal, thus permitting the SHPO, as extended in duration by the judge, to remain in force. The respondent relies on the fact that at an early stage of proceedings a Detective Sergeant who compiled a form MG5 case summary noted the following in a section of the form headed "Application for order(s) on conviction":

    i. "Order applied for: SOPO

ii. Application for extension of sexual harm prevention order (SHPO)

iii. Conditions: continuation of current conditions".

65. It is submitted that the intention of the prosecution to seek an extension of the SHPO was thus made clear to Mr Rogers at an early stage and there was ample time for him to make representations.

66. We see the force of that argument by the respondent and we acknowledge the practical convenience of approaching the matter in that way. We are conscious that the SHPO of 23 March 2015 has by now expired and that accordingly, if the judge's order is quashed, there will be no SHPO in force unless and until a fresh application is made. We are not however able to accept the submission. Just as there was ample time for the defence to consider the prospect that an extension might be sought, so there was ample time for the prosecution to ensure that any application was correctly made by the appropriate person. If the only deficiencies were those relating to compliance with the Criminal Procedure Rules, the position might be different, though even then it would be necessary to give careful consideration to the facts that no written application for an extension was ever made to the Crown Court (or any court) and that the first formal indication of any such application was given orally by counsel towards the end of his opening, in the muddled terms to which we have referred. But, consistently with the decision in R v Hamer and with our observations earlier in this judgment, there is in our view no escape from the fact that the application was not made by a chief officer of police. We accept that in principle a chief officer of police may authorise one or more junior officers to make written applications for variations on his behalf and in his name; and we accept that when the application has properly been made, it can be presented in court by the prosecution advocate. But there is no suggestion in this case (or indeed in Mr King's case) that there was in fact authorisation of r junior officer to make an application on behalf of and in the name of the chief officer. All that happened here was that the prospect that an extension of the SHPO would be sought was mentioned by the Detective Sergeant in the case summary. The only application was that made orally by the prosecuting advocate.

67. For those reasons, the order which we make in Mr Rogers' case is as follows. We grant leave to vary the grounds of appeal and leave to appeal. We allow the appeal to this extent: we quash the order purporting to extend the SHPO. The prison sentence remains as before.

68. As these three cases illustrate, sentencing in cases of breach of an SHPO can give rise to a number of difficulties. We are very conscious of the pressures on busy judges and advocates, and that these are matters which may fall to be dealt with at the last stage of proceedings, often following shortly after the verdict of a jury. We hope that this judgment will alert them to some of the potential pitfalls.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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