

IN THE COUNTY COURT AT BRISTOL

Neutral Citation Number [2022] EWHC 3618 (Admin)

Case No. CO/1254/2022

Courtroom No.16

2 Redcliff Street
Bristol
BS1 6GR

Thursday, 13th October 2022

Before:
THE HONOURABLE MR JUSTICE CHAMBERLAIN

B E T W E E N:

DAVID NOEL

Appellant

and

CHIEF CONSTABLE OF DORSET POLICE

Respondent

MR K HILL appeared on behalf of the Appellant
MR J UNDERHILL appeared on behalf of the Respondent

JUDGMENT
(Approved)

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MR JUSTICE CHAMBERLAIN:

1. This is an appeal by case stated against a decision of 6 July 2021 by HHJ Climie and two lay justices, sitting at Bournemouth Crown Court. They dismissed an appeal against a decision of 12 March 2021 by Poole Magistrates' Court to make a sexual harm prevention order, "SHPO" against David Noel. The application for the SHPO had been made by Dorset Police. It is unnecessary to set out the terms of the SHPO in full. It is sufficient to say that it prevents Mr Noel from being alone with children under the age of 16, save in certain unavoidable situations or with protective measures, which include disclosure, both of the order and of Mr Noel's past offending. The order also prevents online communications with those under 16 and restricts Mr Noel's use of computers and his access to the internet, save in circumstances which permit monitoring by the police.
2. The case stated poses two questions which are described as "questions of law":
 - a) Was the Court right to conclude that the necessity threshold was crossed, based on its assessment of risk?
 - b) Was the Court right to conclude that the order was proportionate, given the evidence of the risks posed by the applicant?

The law

3. Section 103A of the Sexual Offences Act 2003 enables a Court to make an SHPO where, among other circumstances, it is proved the defendant is a qualifying offender and the Court is satisfied that the defendant's behaviour, since the appropriate date, makes it necessary to make such an order for one of two purposes. The purpose relevant here is that of protecting the public or any particular members of the public from sexual harm from the defendant: see section 103A(3) of the 2003 Act. "Qualifying offender" is defined by section 103B(2) as including a person who has been convicted of certain listed offences, which include offences that are not sexual. Insofar as relevant here, the list includes offences under section 1 of the Theft Act 1968.
4. In *R v NC* [2016] EWCA Crim 1448, the Court of Appeal Criminal Division confirmed that the questions the Court must ask when considering whether to make an SHPO are these:
 - (i) Is the making of an order necessary to protect the public from sexual through the commission of scheduled offences?
 - (ii) If some order is necessary, are the terms imposed, nevertheless, oppressive?
 - (iii) Overall, are the terms proportionate?
5. In *R v Parsons & Another* [2017] EWCA Crim 2163, the Court of Appeal Criminal Division underlined four further points:
 - (i) As with sexual offences prevention orders, no order should be made by way of SHPO unless necessary to protect the public from sexual harm as set out in the statutory language. If an order is necessary, then the prohibitions imposed must be effective. If not, the statutory purpose will not be achieved.

- (ii) Any SHPO prohibitions imposed must be clear and realistic. They must be readily capable of simple compliance and enforcement. It is to be remembered that breach of a prohibition constitutes a criminal offence punishable by imprisonment.
 - (iii) None of the SHPO terms must be oppressive, and, overall, the terms must be proportionate.
 - (iv) Any SHPO must be tailored to the facts. There is no one size that fits all factual circumstances.
6. In *R v Lui* [2021] EWCA Crim 1125, the Court of Appeal (Criminal Division) heard an appeal from an SHPO which restricted the appellant's access to children generally. The Court held that it was unnecessary to make an order that broad because the appellant posed a risk only to boys.

Factual background

7. The Crown Court's reasons for concluding that an order should be made are contained in a detailed written judgment. The background there set out is not said to be inaccurate. What follows is taken from the judgment. Mr Noel was, at the time of making the order, nearly 24 years old and had an extensive history of previous convictions beginning when he was 12. Most of these were for comparatively minor offences of dishonesty and violence including antisocial behaviour and criminal damage and for drugs offences. There were no convictions for sexual offences. The judgment records that the application made to the Magistrates was triggered by intelligence that Mr Noel was experiencing sexualised thoughts towards children. The detail of the intelligence was set out as follows:

“David Noel states he hears voices in his head described as ‘nonce-related thoughts’. Contained on David’s internet Google search history recently was similar to ‘Does it make you a nonce if you mess about with a nine-year-old when you’re 15 years old?’. David also has internet searches similar to ‘big cock in tight pussy’. David disclosed a couple of months ago that when he took [his friend’s] young daughter to the shop, he had to take her back home because he had voices in his head telling him to take her away. David has said that if he was to do anything with the child, it would be the voices in his head making him do it and not actually himself”.

I interpolate, at this point, that no challenge was made to the admissibility of this evidence. The questions before the Court are set out in the case stated. They do not include any question touching on admissibility.

8. Mr Noel served a custodial sentence in early 2020 and was released on 9 April of that year. On release, he was fitted with a voluntary GPS tracking tag which showed a number of apparent visits to the home of the friend whose daughter he had mentioned. After an emergency hearing on 17 April 2020 before District Judge Simmonds in the Family Court at Bournemouth, an exclusion order was made by agreement, preventing Mr Noel from attending at the friend's address. The evidence supporting the application for an SHPO included material from Mr Noel's school records which included both violent and sexualised

behaviour. It also included mental health assessments. In particular, there was a report from a consultant forensic psychiatrist, Dr Rathod.

9. During an interview with Mr Noel, when he was in custody on 28 January 2021, Dr Rathod was told that Mr Noel had heard a voice telling him “I like kids”, though he also expressed disgust at what the voice was suggesting. Dr Rathod noted his history of self-harm, psychotic episodes and admissions to mental hospitals. She diagnosed him as suffering from emotionally unstable personality disorder, mixed personality disorder and antisocial personality disorder, conditions characterised by a tendency to act impulsively and without consideration of the consequences of his actions. He had no adequate security in the community, in part due to his use of drugs and lack of a stable partner. Dr Rathod concluded that, given that he had not acted on his psychotic symptoms until now, the risk of his doing so in the future was low, “...unless they change in quality or there are other precipitating factors, like life stresses, substances etc.”. Further mitigation measures included ongoing antipsychotic medication, therapy, support with abstinence from drugs and a socially supportive care package.
10. The Court started by considering the risk assessment in Mr Noel’s case. It noted that the factors which support a lower risk of sexual harm, were, in particular, the absence of any sexual offending to date. On the other hand, there were factors which indicated a higher risk:
 - 1) The fact of a voice being heard and an indication that it involved some form of attraction to children.
 - 2) The fact that Mr Noel had potentially been exploring issues around child sexual abuse together with his internet history.
 - 3) His history of criminal conduct which showed that his personality disorder frequently manifests itself in unpredictable behaviour, albeit not of a sexual nature thus far.
 - 4) The lack of evidence that Mr Noel would avoid taking Class A drugs in the future; a specific risk factor identified by Dr Rathod.
 - 5) The lack of any evidence to suggest that Mr Noel would be living in a secure or stable home environment which was significant, given that in the community, he remains, in Dr Rathod’s view, “a highly vulnerable individual with no supportive factors in place”.
11. For these reasons, the Court concluded, unanimously, that the order was necessary to protect the public from sexual harm from Mr Noel. The Court considered a submission that the terms of the order were too complicated for Mr Noel to understand. Its response was that the principles were capable of simple explanation and it would be of assistance to all if those principles were explained to Mr Noel by a police officer and a record made of the explanation given. Taking into account the unpredictable nature of Mr Noel and his condition, the Court decided that the order should have effect indefinitely but, depending on Mr Noel’s criminal offending, or lack thereof, the matter could be returned to the Court for further consideration of the appropriate time limit. I should make clear, at this stage, that the basis on which the order was challenged does not include any reference to the indefinite nature or lack of any time limit.

Submissions for Mr Noel

12. Mr Noel's counsel, Kevin Hill, challenges the order, both in general, because it fails to satisfy the requirement of necessity, and in its specific terms, in that its requirements are not proportionate. In order to satisfy the test of necessity, the risk of sexual harm must be substantive and must go beyond a risk of harm in general. The factors identified by the Court as supporting the assessment that Mr Noel posed a higher risk were too speculative. The fact that the appellant had heard voices, evidenced by undisclosed and ungraded police intelligence, was not sufficient to prove a risk of sexual harm in circumstances where Dr Rathod concluded that the risk of acting on the voices was low. The internet searches appeared to be related to explorations of his own behaviour rather than attempts to seek out sexual material online, and he had returned his friend's daughter home after experiencing thoughts that concerned him. There had been no actual sexual contact with children and no sexual offences. The trigger offences which were thefts in 2006, were not relevant because they had no sexual element and there was, therefore, no nexus between them and the application for the SHPO. The other factors identified could only support the risk of committing further offences generally rather than, specifically, the risk of sexual harm.
13. As to the terms of the order, Mr Hill submits as follows. The order makes no difference between male and female children and is disproportionate in that respect. It significantly restricts Mr Noel's use of computers and access to the internet despite the fact that there is no evidence of his using the internet to contact children. The only instance of contact was one occasion when he had taken his friend's daughter to the shop, heard voices to take her away, and returned her home. Any risk to that particular child was met by the exclusion order which had been made by the Family Court and which remains in place.

Submissions for Dorset Police

14. For Dorset Police, Jonathan Underhill submits as follows. There is no requirement in the legislation that the subject of an SHPO must have committed a sexual offence. The purpose of the legislation is preventive. The Crown Court had to evaluate the risk posed by Mr Noel. The material before the Court included school records from Australia and the UK and reports from a secure unit where Mr Noel was held as a child. It also included psychiatric reports from 2019 indicating that Mr Noel was hearing voices, was a heroin and crack user and presented a high risk of causing harm to both adults and children. Mr Noel's criminality had escalated over the years. His mental health had deteriorated and he had experienced hearing voices for a number of years. His personality disorders gave rise to behaviours which increased the risk of harm, as did his drug misuse, including heroin, cocaine and spice. In the circumstances, the Court was entitled to conclude that an SHPO was necessary. As to proportionality, the level of restriction was appropriate and there was no basis on which to disturb the Court's judgment as to the precise requirements that should be imposed.

Discussion

15. The questions, as posed in the case stated, invite this Court to consider whether the Crown Court was "right" to conclude that the SHPO was necessary and that the requirements imposed by it were proportionate. This mischaracterises the role of the High Court on an appeal by case stated. In a case of this kind, this Court can interfere with the decision of the Crown Court on an appeal by case stated, only if it involves an error of law or has reached a decision not open to it on the evidence before it; in other words, a decision

that no reasonable Court could reach. As is common ground, Parliament has empowered the Courts to make SHPOs, even in cases where the subject has committed no sexual offence. In such cases, the task of the Court is to analyse all the available material, concentrating on whether the offender poses a risk of sexual harm to members of the public. On this question, the Court had before it, Dr Rathod's opinion that Mr Noel posed a low risk unless his symptoms changed in quality or "there were other precipitating factors, like life stresses, substances, etc."

16. The Court emphasised this latter qualification. In my judgment, it was right to do so. The Court then went on to consider whether Mr Noel's lifestyle might give rise to such precipitating factors. The answer was "Yes" because there was good evidence to suggest chronic drug misuse and no evidence to suggest that he would be living in a stable or supportive environment. In my judgment, the factors which led the Court to the conclusion that Mr Noel presented a significant risk were all relevant. It was for the Court to weigh these against the factors suggesting lower risk. The nuanced and detailed judgment shows that the Court reached a properly-reasoned conclusion as to risk. It properly focused on the risk that Mr Noel would cause sexual harm to children. On the basis of the findings which were open to it, it could properly conclude that an SHPO was necessary; the first of the questions identified by the Court of Appeal in *NC*.
17. As to proportionality, there are two points: first, that the order applies to children rather than only to girls, and, secondly, that there is no proper basis for the restrictions on computer and internet use. I take these in turn. There will, no doubt, be cases where the evidence shows a risk to boys only or girls only. In such cases, it is important that the particular requirements in the order be tailored to apply to boys or girls so as not to impose a greater burden than necessary. That was the position in the case of *Liu*, where the Court of Appeal varied the requirements in the order so as to make them more narrowly tailored. In this case, however, the evidence about Mr Noel's intrusive thoughts shows that the voices he heard were about "children" or "kids", although the information about his internet searching and the single incident with his friend's daughter suggest an interest in girls. It is well known, however, that some people who have paedophilic tendencies are attracted to both boys and girls. On the evidence in this case, as a whole, the Court could properly conclude that Mr Noel posed a risk to children as a whole, so the imposition of an order preventing contact with children under 16 was, in my judgment, proportionate.
18. As to the requirements about devices and internet use, it is true that there was no evidence of Mr Noel seeking to use computers or the internet to contact children. There was, however, some evidence of his use of the internet to search for sexual content relating to children. There was a sufficient basis for concluding that restrictions on the use of electronic devices and the internet were necessary, providing that the restrictions, themselves, were not unduly onerous. In this case, there is no requirement for prior authorisation for the use of any device or the internet. The requirements are, in essence, that he notifies the police within three days of the acquisition of a relevant device, that the device is one which can retain the history of internet use and does not delete that history and that he must make the device available for inspection, upon request. There are also some certain ancillary restrictions.
19. In my judgment, the Crown Court was entitled to conclude that these are proportionate restrictions which are sufficiently justified by the evidence in this case. To the extent that it

is necessary for me to say so, I would, myself, regard them as proportionate, given the findings made by that Court. The appeal will, therefore, be dismissed.

End of Judgment.

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