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IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
The Strand
London
WC2A 2LL

Date: Thursday 16th May 2019

B e f o r e:

LORD JUSTICE HOLROYDE

MR JUSTICE POPPLEWELL

and

THE RECORDER OF CARDIFF
(Her Honour Judge Rees)
(Sitting as a Judge of the Court of Appeal Criminal Division)

R E G I N A

- v -

JOGINDER CHALL
MARK WILLIAM ALLEN
OLIVER WELSBY
NIGEL BRENT WILKINSON
GERSON DEISS-DIAS

Computer Aided Transcript of Epiq Europe Ltd,
Lower Ground, 18-22 Furnival Street, London EC4A 1JS
Tel No: 020 7404 1400; Email: rcj@epiqglobal.co.uk
(Official Shorthand Writers to the Court)

A P P E A R A N C E S:

Miss Caroline Goodwin QC appeared on behalf of the Applicant Joginder Chall

Mr John Dunning appeared on behalf of the Applicant Mark William Allen

Mr David Bright appeared on behalf of the Appellant Oliver Welsby

Miss Kate Brunner QC appeared on behalf of the Applicant Nigel Brent Wilkinson

The Applicant Gerson Deiss-Dias was unrepresented

Mr John Price QC appeared on behalf of the Crown

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J U D G M E N T (Approved)

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LORD JUSTICE HOLROYDE:

1. The five cases which are now before the court, though otherwise unconnected, have been listed together because they raise a common issue as to the approach a sentencing judge should take when assessing for the purposes of a relevant sentencing guideline whether a victim of crime has suffered severe psychological harm. They accordingly provide an opportunity for this court to give guidance in that regard.

2. In this judgment, to which we have all contributed, we shall for convenience refer to the one appellant and the four applicants by their surnames. We mean no disrespect in doing so. We shall, also for convenience, refer to them collectively as "the defendants".

3. Chall, Allen, Wilkinson and Deiss-Dias were all convicted of sexual offences. Each of the victims of those offences, to whom we shall refer by the use of initials, is entitled to the protection of the provisions of the Sexual Offences (Amendment) Act 1992. Accordingly, during their respective lifetimes no matter may be published if it is likely to lead members of the public to identify any of them as the victim of one of the offences concerned.

4. We are grateful to all counsel for their written and oral submissions. We are particularly grateful to Miss Goodwin QC, who appears for Chall, and Mr Price QC, who appears for the respondent. At the direction of the court, they prepared and presented general submissions as to the issue which is common to all of the cases.

5. The issue arises in this way. A number of the definitive guidelines published by the Sentencing Council direct sentencers to consider whether the victim of an offence has suffered severe psychological harm. In some guidelines, that question has to be considered at step 1 of the sentencing process: a finding of severe psychological harm places the case into a higher category and thus increases the starting point for sentence. In other guidelines, the issue of whether the victim has suffered psychological harm – and if so, the degree of that harm – falls to be considered at step 2 as a potential aggravating factor which justifies an increase above the guideline starting point for the relevant category of offence.

6. The cases before the court involve offences covered by the definitive guidelines in respect of sexual offences and offences of causing grievous bodily harm with intent. But those are by no means the only types of offence which may call for consideration of psychological harm. For example, the categorisation of offences under both the harassment guideline and the making a threat to kill guideline involves an assessment of whether the victim has suffered "significant psychological harm" or "some psychological harm"; and the categorisation of offences under the domestic burglary guideline requires an assessment of whether the victim has suffered "trauma … beyond the normal inevitable consequence of intrusion and theft".

7. The questions which were raised in the grounds of appeal in the present cases, and which not infrequently arise in other cases, are these:

- Must the court obtain expert evidence before making a finding of severe psychological harm?

- If not, on what evidence can it act?

- In particular, can the court make such a finding on the basis only of the contents of a Victim Personal Statement ("VPS")?

8. The starting point for any consideration of these questions is section 143(1) of the Criminal Justice Act 2003, which provides:

> "In considering the seriousness of any offence, the court must consider the offender's culpability in committing the offence and any harm which the offence caused, was intended to cause, or might foreseeably have caused."

That statutory emphasis on the combination of culpability and harm underpins the structure of the sentencing guidelines which, at step 1, direct the sentencer to assess culpability and harm by reference to specified factors, and thus to place an offence into a category for which the guideline identifies a sentencing starting point and a sentencing range. By way of illustration, in the guideline applicable to offences of rape, step 1 requires a sentencer to determine into which of three categories of harm the case falls. One of the factors indicating category 2 harm is "severe psychological or physical harm". Category 1 is reserved for extremely serious cases. Category 3 is indicated by the absence of factors applicable to categories 1 and 2. We should add for the sake of clarity that in other sexual offence guidelines, cases of severe psychological harm fall within the highest category of harm.

9. In the guideline for offences contrary to section 18 of the Offences against the Person Act 1861, category 1 is indicated by the presence of both greater harm and higher culpability. One of the factors indicating greater harm, and which must normally be present, is "injury (which includes disease transmission and/or psychological harm) which is serious in the context of the

offence".

10. Miss Goodwin, in written submissions which were adopted by counsel for the other defendants, initially submitted that in the absence of expert evidence a court should not place an offence into a higher category of harm on the basis of a finding of severe psychological harm. She accepted that expert evidence was not necessary in every case but submitted that consideration should be given to obtaining a clinical assessment of the psychological state of a victim whenever there is scope for argument as to the degree of psychological harm. She submitted that the court should be able to identify exactly what harm has been caused, for example, a diagnosis of PTSD or other specific anxiety disorder, and not rely on the mere assertion of the victim. The court, she submitted, should therefore require a clinical assessment of the victim before making a finding of severe psychological harm.

11. In response, Mr Price submitted that there is no such requirement and that it is appropriate for judges to use their forensic experience to make the necessary judgment. Expert evidence may be received, but it is not a necessary requirement and will only rarely help a judge.

12. That initial written submission on behalf of the defendants has been modified in the oral submissions presented to the court today. It is now submitted that in the absence of expert evidence a judge has no benchmark against which to assess whether psychological harm is severe. No guidance is given as to whether, for example, such an assessment can be made on the basis of a single adverse psychological impact or whether a combination of psychological impacts is necessary. Yet, submits Miss Goodwin, guidance could be provided by reference to, for example, a list of the common signs and symptoms of PTSD or of depression.

13. Moving away from her initial submission that a clinical test of a victim is required before any finding of

necessary in every case, because she recognises that in some cases the process of clinical assessment might in itself add to the trauma suffered by the victim. But she argues that it should not be left to a sentencing judge to make a purely subjective assessment when a list of relevant considerations could and should be provided.

14. In response to this oral submission, Mr Price submits that such a list of categories of adverse impact or of commonly encountered signs and symptoms would be impracticable. He points out that the circumstances of cases vary and that no such list could foresee all possible combinations of adverse impacts. He submits that the sentencing guidelines are properly predicated upon an experienced judge being able to assess in a particular case whether the psychiatric harm suffered by a victim can properly be described as severe.

15. As to the initial submission advanced on behalf of the defendants, we have no doubt that Mr Price's submissions in response are correct. When a sentencing guideline directs a sentencer to assess whether the victim of an offence has suffered severe psychological harm or to make any other assessment of the degree of psychological harm, a judge is not thereby being called upon to make a medical judgment. The judge is, rather, making a judicial assessment of the factual impact of the offence upon the victim. Thus, submissions to the effect that a judge who makes a finding of severe psychological harm is wrongly making an expert assessment without having the necessary expertise are misconceived. The judge is not seeking to make a medical decision as to where the victim sits in the range of clinical assessments of psychological harm, but rather is making a factual assessment as to whether the victim has suffered psychological harm and, if so, whether it is severe.

16. The assessment of whether the level of psychological harm can properly be regarded as severe may be a difficult one. The judge will, of course, approach the assessment with

appropriate care, in the knowledge that the level of sentence will be significantly affected by it, and will not reach such an assessment unless satisfied that it is correct. But it is an assessment which the judge alone must make, even if there be expert evidence. It is the sort of assessment which judges are accustomed to making. An analogy might be drawn with the assessment which a judge has to make when considering under the Criminal Justice Act 2003 whether an offender is dangerous. In that context, the judge may have to assess whether there is a significant risk of serious psychological injury being caused by the commission of further specified offences.

17. The judicial assessment may in some cases be assisted by expert evidence from a psychologist or psychiatrist. However, we reject the submission that it is always essential for the sentencer to consider expert evidence before deciding whether a victim has suffered severe psychological harm. On the contrary, the judge may make such an assessment, and will usually be able to make such an assessment, without needing to obtain expert evidence.

18. The flaw in the argument initially advanced on behalf of the defendants is that, taken to its logical conclusion, the court would be barred from making any finding as to the degree of psychological harm in a case in which the victim had made a detailed, clear VPS providing strong evidence of severe harm but, for understandable reasons connected to that very harm, was not willing to be assessed by a psychologist.

19. The cases of *R v Dalton* [2016] EWCA Crim 2060, *R v Egboujor* [2018] EWCA Crim 159 and *R v Boyle* [2018] EWCA Crim 2567 provide recent examples of the application in practice of the principle that expert evidence is not a necessary precondition of a finding of severe psychological harm. We note that counsel for the defendants have not cited any authority to the contrary effect. In *Dalton* the point was made that the judge had presided over the trial, heard

the victim give evidence and seen the effect of the sexual abuse upon her. It was held on appeal that he was entitled to make a finding of severe psychological harm, even without a psychiatric report upon the victim. In *Egboujor* it was held on appeal that a judge's assessment of whether severe psychological harm has been caused may be based upon expert evidence, but may be reached without an expert's opinion. In that case also the point was made that the judge had been able to observe the victim when she gave evidence during the trial. In *Boyle* the judge had, on the basis of the VPS, made a finding of severe psychological harm caused by the offence, notwithstanding that there was evidence that the victim had suffered from at least minor mental health issues before the offence. On appeal, it was held that the judge was entitled to reach the conclusion that she did. The VPS was not contradicted by any of the other evidence and showed that the offence had resulted in a general deterioration in the victim's psychological and psychiatric condition.

20. For those reasons, the initial argument advanced by the defendants was correctly not pursued at the hearing today.

21. As to the revised argument advanced today, we are not persuaded that any such checklist as is suggested is necessary or appropriate, or indeed that it would be workable. We note the concern expressed on behalf of the defendants that a judge is left to make a subjective assessment. However, in making the assessment of whether the psychological harm in a particular case can properly be described as severe, or serious (if a different guideline is being considered), the judge will act on the basis of evidence and will be required in the usual way to give reasons for his or her decision in the sentencing remarks. If the evidence was not such as could provide a sufficient foundation for the judge's assessment, the point can be raised on appeal.

22. Save where there is an obvious inference to be drawn from the nature and circumstances of the offence, a judge should not make assumptions as to the effect of the offence on the victim. The judge must act on evidence. But a judge will usually be able to make a proper assessment of the extent of psychological harm on the basis of factual evidence as to the actual effect of the crime on the victim. Such evidence may be given during the course of the trial, and the demeanour of the victim when giving evidence may be an important factor in the judge's assessment. The relevant evidence will, however, often come, and may exclusively come, from the VPS. The court is not prevented from acting on it merely because it comes from a VPS.

23. Whether in a given case the VPS does provide a sufficient basis for the judge to make a finding of severe psychological harm will depend on the circumstances of the case and the contents of the VPS. To take an obvious example, a VPS written by a mature adult setting out the effects of historic sexual abuse in his or her childhood may provide very clear evidence of the long-term and severe psychological harm which has been suffered; whereas a VPS written only a few weeks after the offence may provide clear evidence only as to the immediate consequences of it and be insufficient to enable the judge to make any safe finding as to the severity and likely duration of any psychological harm.

24. The judge is not being asked to make, and should not purport to make, a formal medical diagnosis. For example, it is not for the judge to say, in the absence of expert evidence, that the account given in a VPS and/or the demeanour of a victim when giving evidence shows that the victim is suffering from PTSD. If a judge feels that in the particular circumstances of a case a formal diagnosis is necessary for the purposes of sentencing, he or she must raise the matter with counsel and take steps to obtain any necessary expert evidence. We doubt, however, whether such a situation will frequently arise.

25. Before saying more about the VPS scheme, we must refer to a submission as to the meaning in this context of "severe" psychological harm. In this regard, Miss Goodwin helpfully invited our attention to paragraph [26] of the decision of this court in *R v Forbes* [2016] EWCA Crim 1388:

> "26. As is evident from many of the appeals, the effect on the victims can be devastating. Where the judge has heard evidence from the victims, then he will be well placed to make that assessment … However, it must be borne in mind, so that double counting is avoided, that the starting points and sentencing ranges provide for the effect on the victim which is the inevitable effect of this type of serious criminal behaviour. There has to be significantly more before harm is taken into account as a distinct and further aggravating factor and/or before a judge makes a finding of extremely severe psychological or physical harm so as to justify placing the offence in the top category of harm."

We accept Miss Goodwin's submission that in assessing whether the psychological harm in a particular sexual case is severe, a judge must keep in mind that the levels of sentence which the sexual offences guideline sets out already take into account the psychological harm which is inherent in the nature of the offence.

26. To return to the illustration which we have given by reference to the rape guideline, an offence of rape will inevitably cause at least some psychological harm. The sentence levels for category 3 harm reflect that baseline level of harm. Within the category range, a sentencer may move upwards from the starting point to reflect the fact that the psychological harm suffered in a particular case, though falling short of "severe", is significantly greater than would generally be seen in a case of rape.

27. Similarly, a judge must also keep in mind that a vulnerable victim is more likely to suffer greater harm than a victim who is not vulnerable. It should be noted, however, that in the

guideline for sexual offences against children aged under 13, the level of sentences already takes that matter into account.

28. We further accept Miss Goodwin's submission that when a judge is minded not to accept a defence submission – or, indeed, a joint submission by prosecution and defence – as to the categorisation of harm, the defence advocate should be given an opportunity to address the point.

29. The VPS scheme has now been in operation for over 20 years. It gives victims a voice in the criminal justice system and provides an effective way of ensuring that the sentencer considers, as section 143 of the 2003 Act requires, the harm caused. Important principles as to the operation of the scheme were set out by this court in *R v Perkins* [2013] 2 Cr App R(S) 72. Those principles are substantially reflected and expanded in Part VII F of the Criminal Practice Direction, which makes clear that if a victim chooses to make a VPS, the court will take it into account when determining sentence. It is not necessary for present purposes for us to recite the whole of Part VII F, but it is appropriate to refer to the following parts of paragraph F.3:

> "a) The VPS and any evidence in support should be considered and taken into account by the court, prior to passing sentence.
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> b) Evidence of the effects of an offence on the victim contained in the VPS or other statement, must be in proper form, that is a witness statement made under section 9 of the Criminal Justice Act 1967 or an expert's report; and served in good time upon the defendant's solicitor or the defendant, if he or she is not represented. Except where inferences can properly be drawn from the nature of or circumstances surrounding the offence, a sentencing court must not make assumptions unsupported by evidence about the effects of an offence on the victim. The maker of a VPS may be cross-examined on its contents.
>
> …
>
> d) In all cases it will be appropriate for a VPS to be referred to in

> the course of the sentencing hearing and/or in the sentencing remarks.
>
> e) The court must pass what it judges to be the appropriate sentence having regard to the circumstances of the offence and of the offender, taking into account, so far as the court considers it appropriate, the impact on the victim. The opinions of the victim or the victim's close relatives as to what the sentence should be are therefore not relevant, unlike the consequences of the offence on them. Victims should be advised of this. If, despite the advice, opinions as to sentence are included in the statement, the court should pay no attention to them."

30. We should add that where there is no VPS, the sentencer must not assume that the absence of a VPS indicates an absence of harm. Whether there is evidence of psychological harm and, if so, of its degree, will depend on the facts and circumstances of the case.

31. There are a number of practical features of the VPS scheme which call for comment in the light of the submissions made to us. First, it not infrequently happens, particularly in the case of victims of physical violence in non-sexual cases, that a VPS is made at an early stage of proceedings and is thereafter not re-visited before the sentencing hearing, which may be many months later. The consequence is that judges are sometimes provided with a VPS made when the injuries were fresh but have no information about the present state of the victim or about the extent to which the offence has given rise to continuing problems. For obvious reasons this is unsatisfactory, particularly if there is any issue between prosecution and defence as to the victim's present state of health. It is therefore important to emphasise that paragraph F.2 of the Practice Direction permits the serving of a further VPS, in proper witness statement form, at any time prior to the disposal of the case.

32. Secondly, the judge must keep in mind that the intensely personal nature of a VPS may sometimes call for caution as to whether the harm suffered by the victim may, unintentionally,

have been overstated. It is important that the VPS should express the victim's own experience, and it is entirely understandable that the expression will sometime be in very emotional terms. The judge must, nonetheless, make a dispassionate assessment. Whilst the defence are entitled to cross-examine the author of a VPS, we agree with counsel's submissions that it is a right which will only very rarely be exercised, for a number of obvious reasons, including the risk that the process of cross-examination may actually increase the psychological harm suffered.

33. Thirdly, we accept the submissions of counsel as to the importance of the content of a VPS complying with the Practice Direction and the consequent need for those involved in advising victims as to their entitlement to make a VPS to take care to ensure that the limitations set out in the Practice Direction are clearly communicated.

34. Fourthly, the requirement in the Practice Direction that a VPS be served "in good time" is one which, in the experience of this court, is not always observed as closely as it should be. In the light of a particular point raised in one of the cases before us, we should say that in this context "in good time" means in good time for the sentencing hearing. If, as sometimes happens, a VPS is prepared at an earlier stage, the question of whether the prosecution should disclose it for trial purposes is one which falls to be resolved in accordance with the ordinary principles relating to disclosure. We accept Mr Price's submissions that there may be compelling reasons why a VPS prepared at an early stage may contain content which the victim would prefer not to be disclosed until it became necessary to do so for sentencing purposes, and that there are compelling reasons why a VPS may not be prepared at all until after the offender has pleaded guilty or has been convicted at trial. We also recognise that even when the guilt of the offender has been established, the process of making a VPS may be a very difficult one for some victims, and it may only be at the eleventh hour that they feel able to do so. Such problems are understandable, and the court is sympathetic to the human reality of the position of

victims.

35. It is, however, important also to keep in mind the need for the defence to have timely disclosure of evidence which may prove critical to the court's decision as to sentence. As we have said, cross-examination of a victim on the contents of his or her VPS is a course which is rarely taken. A defendant must nonetheless have a reasonable opportunity to be advised as to the contents of a VPS and as to whether any steps need to be taken to challenge it or to obtain evidence seeking to counterbalance its effect. Moreover, the judge has a discretion as to whether a VPS is read aloud in whole or in part and, if so, by whom. The judge must, therefore, have a reasonable opportunity to consider the VPS in advance of the sentencing hearing in order to decide whether there is good reason not to follow the victim's preference as to how it should be presented. That opportunity may be lacking if the VPS is only provided to the court on the day of the hearing or late on the preceding day. We therefore emphasise the importance of compliance with the requirement that a VPS be served in good time. In doing so we echo what the court said some years ago in *Perkins*.

36. In summary, our views on the common issue raised in these cases are as follows:

1. Expert evidence is not an essential precondition of a finding that a victim has suffered severe psychological harm.

2. A judge may assess that such harm has been suffered on the basis of evidence from the victim, including evidence contained in a VPS, and may rely on his or her observation of the victim whilst giving evidence.

3. Whether a VPS provides evidence which is sufficient for a finding of severe

psychological harm depends on the circumstances of the particular case and the contents of the VPS.

4. A VPS must comply with the requirements of the Criminal Practice Direction and be served on the defence in sufficient time to enable them to consider its contents and decide how to address them. If late service gives rise to genuine problems for the defence, an application for an adjournment can be made.

37. We can now turn to the individual cases before the court. Each of the five tables prepared by the Criminal Appeal Office summarising the offences of which each defendant was convicted and the precise sentences imposed for each of those offences is to be found as an appendix at the end of this judgment.

Joginder Chall

38. The applicant, Joginder Chall (now aged 65), was convicted following a trial in the Crown Court at Wolverhampton of three offences of indecent assault, contrary section 14 of the Sexual Offences Act 1956. His victims were two girls, "MP" and "GK". The applicant had become friendly with the parents of each girl and had on occasions been invited into their family homes. When MP was aged 6 or 7, she woke one night to find the applicant sitting on her bed with his finger inside her knickers, rubbing her vagina. Similarly, on two occasions when GK was aged 5 or 6, the applicant touched her vagina when she was in bed. Each victim said that the applicant realised she had woken and told her not to tell anyone what he had done. In each case a younger sibling was asleep in the same bedroom at the time of the offences.

39. The applicant, who had no previous convictions, denied the offences but was convicted by the jury.

40. The offences under the 1956 Act carried a maximum sentence of five years' imprisonment. The judge, His Honour Judge Ward, correctly directed himself as to the approach to be taken when sentencing for historic offences in circumstances where the modern equivalent offence carries a higher maximum sentence.

41. Each of the victims, who by the time of the trial were aged 41 and 38 respectively, had made a VPS. The judge rejected a submission made by Miss Goodwin on behalf of the applicant that medical evidence should be obtained. He explained that "more than 30 years have passed since that happened and that allows me to understand that both of these women, as they now are, have suffered psychologically and to a severe extent, as I find it to be, from the effects of what you did". The judge considered the VPS prepared by each of the victims and summarised their contents in this way:

> "[MP] has suffered lifelong insecurity, inability to trust people, sleepless nights, bad dreams, working with children who have suffered abuse which has inevitably brought back awful memories and, as a result of the stress of all of this, she has decided not to have children herself because she did not believe that she would be able to protect them. That is life-changing. It is severe.
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> [GK] has suffered in similar respects. She has been terrified. She became pregnant and knew that she was going to give birth to a little girl. She feared that she would be unable to protect a little girl because she had been a little girl whom no one could protect, and it is a fear she still experiences as her daughter grows up. She, growing up, spent times wondering whether her life was worth living and she finds it difficult to look back at childhood photographs of herself because of the memories that that brings back. She should be able to look back happily at childhood photographs. It is because of you she cannot do that. This is not the sort of psychological harm that I would, if I could expect anything, have to say is inevitable if someone is indecently assaulted. This is, in my judgment, severe."

42. The judge identified the aggravating factors: that each of the victims was at the time asleep in her bedroom where she should have been able to feel safe; that a sibling was in the same room; and that the applicant was an invited guest in the family home. He decided, correctly, that the circumstances did not amount to a breach of trust for the purposes of the sentencing guideline.

43. The judge identified as mitigating factors the applicant's previous good character, the loss of his reputation and the effect on his own family of his offending.

44. On the basis that the offences had caused severe psychological harm, the judge concluded that in terms of the equivalent modern offence each case fell into category 1B, with a starting point of four years' custody and a range from three to seven years. Having regard to the lower maximum sentence under the 1956 Act, the judge imposed sentences of two years six months' imprisonment on each count, and ordered the sentence on count 2 (the first offence against GK) to run consecutively to the other sentences. Thus, the total sentence was five years' imprisonment.

45. The application for leave to appeal against those sentences has been referred to the full court by the Registrar of Criminal Appeals. The sentences are set out in a table contained in Annex I to this judgment.

46. In her grounds of appeal, Miss Goodwin submits that there should have been expert evidence on the definition of "severe"; that in the absence of such evidence the judge wrongly determined the category of the offences by applying his own non-expert medical view and wrongly placed the case into category 1; that he thus arrived at too high a starting point and

imposed a total sentence which was manifestly excessive in length.

47. For the reasons we have explained in the first part of this judgment, we see no merit in those grounds of appeal. This was a case in which the Victim Personal Statements were written 30 years and more after the relevant events. They provided clear evidence of decades of suffering. Each of the victim has been caused to alter what would otherwise have been her chosen lifestyle because of the psychological harm she has suffered. One has felt unable to have children because she felt the stress of trying to protect them would be too much. The other has had a child and has suffered constant anxiety and fear as to whether she will be able to protect her. Each has since childhood suffered and continues to suffer fear, anxiety, feelings of worthlessness, sleeplessness and nightmares. Each has had difficulty in trusting others. There is and could be no challenge to the veracity of the factual accounts given. For the reasons which he gave, the judge was entitled and, in our view, correct to assess the psychological harm suffered by each of the victims as severe. That being so, the grounds of challenge fall away. There is no other basis on which the total sentence could be criticised. The matters of mitigation could carry only limited weight.

48. It follows that there is no arguable basis on which the sentence could be said to be wrong in principle or manifestly excessive in length. Grateful as we are to Miss Goodwin, this application for leave to appeal against sentence fails and is refused.

Mark William Allen

49. On 4th October 2018, following a trial in the Crown Court at Leeds before Mr Recorder Singh and a jury, the applicant Mark Allen was convicted of 24 offences and was sentenced in total to a special custodial sentence of thirteen years, pursuant to section 236A of the Criminal Justice Act 2003, comprising twelve years' imprisonment and one year's extended licence.

50. His application for leave to appeal against sentence has been referred to the full court by the Registrar of Criminal Appeals. The details of the various sentences imposed for each of the 24 offences are shown in the table in Annex II to this judgment.

51. The offences reflect the sexual abuse of a girl aged between 11 and 13 over a period of about three years between 2004 and 2007. It started when the applicant was aged 17 and continued when he was 18 and 19. He is now 32.

52. The applicant was a friend of the victim's aunt. He was first introduced to the victim in around 1999, when she was about 6 years old. They would usually come across one another at her grandmother's house. The victim's father died when she was 9 years old and the applicant began to contact her via email to check on her.

53. The first physical contact began in around 2004, when the victim was aged 11 and the applicant was aged 17. The victim was staying the night at her grandmother's house. The applicant was also present. When they were alone in the living room, he kissed the complainant on the mouth. He thereafter continued to contact her via email and telephone. Their communications gradually became sexual.

54. The next incident occurred a short time after the first, again when the victim was visiting her grandmother. The applicant, who was also staying the night in the house, sent the victim a text message after she had gone to bed to check if she was still awake. He then entered her bedroom, kissed her and digitally penetrated her vagina (count 1).

55. After this incident sexual contact became regular, and continued for approximately three

years. It occurred at the house of the victim's grandmother. The applicant would either visit the victim's room at night, or vice versa, and sexual activity would take place. During the indictment period, the applicant fondled the victim's naked breasts (counts 5, 6, 13, 14, 21 and 22), digitally penetrated her (counts 2, 9, 10, 17 and 18), performed oral sex on her (counts 3, 4, 11, 12, 19 and 20), and required her to perform oral sex on him (counts 7, 8, 15, 16, 23 and 24). Full sexual intercourse did not take place.

56. The applicant brought this activity to an end in 2007, when he started a relationship with a woman of his own age.

57. The victim made a report to the police in 2014. In 2016 she gave a full account and was interviewed on video.

58. The applicant was arrested and interviewed. He denied that anything sexual had occurred between him and the victim when she was a child. He stated that she had pursued him but that he had rejected her advances. He maintained his denials at trial, during which he did not give evidence.

59. A VPS was taken from the victim and signed by her some ten years after the abuse had finished. It contains measured and cogent details of what on any view are serious psychological consequences comprising depression, severe anxiety, panic attacks, night terrors, flashbacks, suicidal thoughts and paranoia. She had a breakdown at university which prevented her from completing her degree and her mental health has caused her to take time off work. The VPS also demonstrated guilt at the trauma caused to her parents and grandparents, under whose supervision she was at the time, and her aunt who was a close friend of the applicant at the time.

60. After the jury had retired to consider their verdicts, defence counsel was provided with the VPS and a prosecution note for sentence. The jury returned with their verdicts later that day. The note for sentencing placed the offences into categories which did not indicate that severe psychological harm would be relied on as the basis for placing any of the offences into category 2 of the relevant guideline. However, in the course of the sentencing hearing, and before Mr Dunning mitigated on behalf of the defendant, the Recorder indicated that he was of the view that severe psychological harm had been suffered and the offences fell within category 2A for that reason.

61. In his sentencing remarks, the Recorder accepted that the relationship between the applicant and the complainant may have been innocent at the beginning, but that the applicant began to groom her in a concerted fashion, took advantage of her vulnerability and preyed upon her. The most serious counts were those charging assault by penetration of a child under the age of 13. He assessed the offences which involve vaginal penetration as falling within category 2A, involving severe psychological harm and grooming, for which the guideline gives a starting point of eleven years, with a range from seven to fifteen years. He identified the many serious aggravating features of the offending. They included: preying on what the applicant knew was the complainant's vulnerability following her father's death; the lengthy period over which the offences were committed; ejaculation over her face, body and in her mouth; his lack of remorse; later conversations with an undercover police officer in which he bragged about his behaviour; the effect upon the victim's parents, grandparents and aunt; and the applicant's convictions for taking indecent photographs of his nephew and niece and distributing them online, for which he had received a sentence of two years' imprisonment.

62. The Recorder determined that an appropriate custodial sentence to reflect all of the offending was twelve years' imprisonment. A special custodial sentence, with an additional

licence period of one year, was required by section 236A of the 2003 Act. That sentence was imposed (after a hearing at which an error was corrected) on counts 9, 10, 11 and 12, to run concurrently with each other. No separate penalty was imposed on the other counts.

63. The grounds of appeal are:

> (a) The VPS contained material from which the Recorder concluded that the victim suffered severe psychological harm without any supporting expert evidence; and
>
> (b) The VPS was served so late in the proceedings that it was impractical to mount an effective challenge to the material within it. Such a challenge would have included consideration of cross-examining the victim about photographs of her apparently happily sitting with and cuddling the applicant at a time which post-dated the offences when she was aged 19. In this respect Mr Dunning suggested that there was an "ambush", in breach of the applicant's rights under article 6 of the European Convention on Human Rights.

64. We have already addressed the first of those grounds of appeal in the first part of our judgment. Supporting expert evidence is not necessary. There is nothing in the circumstances of this case, or in the VPS of this victim, which required such evidence. The Recorder had had the benefit of seeing the victim giving evidence and being cross-examined, including as to the photographs to which we have referred, and was able to assess both her credibility and her reaction to the abuse. The VPS was full and cogent; it explained the relevant manifestations of the psychological harm. The Recorder was well-placed to reach the conclusion which he set out in his sentencing remarks that the victim's symptoms were genuine. His finding of severe

psychological harm was amply justified.

65. As to the second point, the late service of the VPS was regrettable, as prosecuting counsel frankly accepted, but it resulted in no unfairness to the applicant. The applicant was not deprived of an opportunity to challenge the VPS as a result of its late service. It is not a long or complicated document, and defence counsel had had time to read it before the sentencing process began. If he had needed some further time to consider it, he could have sought it and no doubt it would have been afforded. If counsel had thought that there should have been an opportunity to cross-examine the victim about the VPS, he could have sought an adjournment for that purpose. We very much doubt whether any such adjournment could have been justified. The only matters which are now said to have called for possible cross-examination are matters relating to the photographs of the applicant and the victim together when she was 19. These had already been the subject matter of cross-examination during the trial. In his sentencing remarks, the Recorder indicated that he accepted the evidence she had given about them, to the effect that she had not then yet realised that what was done to her was so wrong.

66. In conclusion, we observe that this was not in fact a case in which the correct categorisation depended solely upon the finding of severe psychological harm, although that finding was, as we have said, fully justified. The offending fell within at least one other criterion within category 2 of the relevant guideline because, as the Recorder found, the victim was particularly vulnerable as a result of the death of her father. Moreover, it must always be kept in mind that the sentencing guidelines are for a single offence and that multiple offending will almost inevitably result in a higher sentence.

67. In the light of the many aggravating features correctly identified by the Recorder, it cannot be said that this sentence was excessive, let alone manifestly so. This application accordingly fails and is refused.

Oliver Welsby

68. On 3rd December 2018, in the Crown Court at Oxford, the appellant Oliver Welsby pleaded guilty to an offence of wounding with intent, contrary to section 18 of the Offences against the Person Act 1861. On 18th January 2019, he was sentenced to an extended sentence of thirteen years, comprising a custodial term of eight years' detention in a young offender institution and an extended period of licence of five years. He appeals against that sentence by limited leave of the single judge. The table setting out the offence is to be found at Annex III to this judgment.

69. For present purposes the facts may be summarised as follows. At approximately 10.30am on 19th July 2018, the victim, Julie Faulkner, then 52 years of age, was walking her dog in a secluded area of a nature reserve in Abingdon in Oxfordshire. The appellant followed her into the woods. He put his left hand over her mouth and with his right hand he forcibly stabbed her in the stomach. She screamed for help and passers-by came to her aid. The police and emergency services were summoned and she was conveyed to hospital. Her wound was in the lower abdominal area; it was 1 to 2 centimetres in length with fatty tissue exposed. The wound had penetrated the abdomen but was superficial in nature and there was no injury to any of the major organs.

70. An extensive police search was launched in order to identify the culprit. Over six days the woods were searched for evidence. The appellant was thereafter arrested and was positively identified by a witness who had seen him running away.

71. In an initial interview the appellant claimed that he had been at home at the relevant time. He denied being the offender.

72. Victim Personal Statements were read to the court from Mrs Faulkner, her husband and a passer-by who had come to her rescue, Meg Knott. Mrs Faulkner described the attack as "having altered my whole life and the life of my husband and family". She was scared of being alone, struggled to sleep, suffered from panic attacks and flashbacks and was seeing a therapist. Her husband, in his VPS, echoed his wife's description of the impact on her and on the family. Ms Knott, in a lengthy VPS, described how she was now receiving treatment for depression and anxiety caused by witnessing the attack.

73. There was also available to the judge a pre-sentence report and a psychiatric report. The latter indicated that the appellant had some features of autism spectrum disorder, but that it was unlikely to be in the moderate or severe range. The author of the pre-sentence report assessed the appellant as posing a medium risk of serious harm to others.

74. In passing sentence, the judge noted that the appellant had committed the offence just three days before his eighteenth birthday. He had initially denied being responsible. He claimed that he had total amnesia for the period which covered the commission of the offence.

75. Subsequently, the appellant had admitted his guilt and had told a probation officer that he had wanted to seek and stab someone in order to vent his anger because he was angry at the world. The appellant had stated that he had stabbed the victim as she was the first person he had seen, but the judge very much doubted that. The evidence suggested that the appellant had chosen a victim who had been vulnerable as she was a lone female and perhaps less likely to put up a fight. It appeared that the appellant had either turned off the GPS system on his mobile

phone or had deleted the relevant data for the date of the offence. He had stabbed the victim and, for all he had known, she could have bled to death where she had fallen. Fortunately, others came to her aid.

76. The judge noted, as a chilling feature of the case, that throughout the subsequent investigation the appellant had acted in a sophisticated and calculated way which belied his years. He had given the appearance of an alibi by claiming that he had been at home in a hypoglycaemic state. Thereafter, the appellant had been checking Facebook in relation to the incident, perhaps even with a certain sense of triumph about the notoriety of the incident. He had taken a close interest in the investigation which had followed. The knife and the clothing which he had worn on the day of the offence had never been found.

77. In the judge's view, the appellant had been highly manipulative of the police who had questioned him, the psychiatrist who had prepared a report, and possibly the probation officer who prepared the pre-sentence report.

78. The judge considered the relevant definitive guideline. The defence had submitted that the case fell within category 2, but the judge, in agreement with the prosecution, concluded that it was a category 1 case. The judge found that there had been a serious psychological effect on the victim, that the victim had been vulnerable, and that the offence had been planned. There had been deliberate targeting of the victim, and the force used in the commission of the offence was intended to cause greater harm than in fact resulted. It was pure good fortune that the injury was not more serious. The offence had been carried out in a manner which had been particularly disturbing. There had been face-to-face contact and the appellant had placed his hand over the victim's mouth. After the commission of the offence, evidence had been disposed of.

79. Aggravating factors included the impact on the victim's husband and on Ms Knott who had come to her aid.

80. The mitigating factors included the appellant's age and the fact that he was of previous good character.

81. Having read the psychiatric report, the judge noted that there was no enduring mental disorder and no psychotic mental illness. The appellant was undoubtedly a troubled young man but the evidence of his mental state did not provide him with any mitigation.

82. The judge had been invited to consider remorse, given that the appellant had pleaded guilty, but said that in the circumstances the credit for that was limited.

83. The judge considered the question of dangerousness and the protection of the public. She concluded that the appellant was dangerous, as that term is defined for sentencing purposes. She noted that when the appellant was 15 years old, a doctor had been of the opinion that he presented a high risk of future violence to others.

84. The judge concluded that an adult offender, after a trial, could have expected to have received a sentence in the region of fifteen years' imprisonment for this offence. If the appellant had been convicted after trial, having regard to his age, he could have expected a sentence in the region of eleven to twelve years' custody. Allowing full credit for the guilty plea, the sentence imposed was one of eight years' detention in a young offender institution. The judge was of the view that a determinate sentence would not fully address the risk which the appellant posed and that it was necessary to impose an extended sentence in order to protect the public in the future. She therefore imposed an extended licence period of five years, which resulted in the total

sentence to which we have referred.

85. Leave to appeal was limited to the single ground that the judge erred in concluding that the impact on the victim, as described in the VPS, was such as to make this a case of "greater harm".

86. Mr Bright, in his submissions on behalf of the appellant, refers to the appellant's age and previous good character, the psychological and psychiatric history, and the fact that the appellant struck only a single blow. He submits that the sentence was manifestly excessive. He submits that, in the absence of any other evidence or expert's report, the judge placed undue reliance on the contents of the Victim Personal Statements. He submits that the judge's finding that the victim had suffered psychological harm did not justify her conclusion that, when coupled with the physical injury, the case was one of greater harm.

87. Mr Bright invited our attention to passages in the sentencing remarks where, he submits, the judge fell into the error of speculating as to aspects of the appellant's motivation and as to other aggravating features.

88. Mr Price, for the respondent, submits that the judge was perfectly entitled to look at both the psychological harm and the physical harm suffered by the victim and was correct to conclude that this was a category 1 case.

89. Whereas we are of the view that the judge could have expressed her sentencing remarks in more measured terms, we see no merit in the criticisms made of her finding as to psychological harm or aggravating features. We are satisfied that the judge was entitled to have regard to the psychological harm described in Mrs Faulkner's VPS, to conclude that there was greater harm, and therefore to place the case within category 1. She correctly identified several aggravating

factors which would have justified an increase in sentence above the guideline starting point. She also took into account the mitigation and then made a significant reduction to reflect the appellant's age. Further to this, she then allowed a full one-third reduction for the guilty plea, even though that plea had not been entered at the first reasonable opportunity.

90. Given the gravity of the circumstances of the offence and the aggravating features, whilst we recognise that the sentence was a severe one for a young offender, we are not persuaded that it was manifestly excessive. The appeal accordingly fails and is dismissed.

Nigel Brent Wilkinson

91. In December 2018, following a trial in the Crown Court at Bristol before His Honour Judge Patrick and a jury, the applicant Nigel Wilkinson was convicted of nine sexual offences. The nine offences involved six adult male victims, "OJ", "MF", "DW", "JD", "LT" and "AJ", between February 2014 and November 2015. Each of the victims was drugged with a view to sexual offending which occurred to all except one of them. The most serious offence was the anal rape of OJ, which was the subject matter of count 2.

92. The applicant was 45 years old when sentenced on 19th December 2018. The total sentence was an extended sentence of twenty and a half years, comprising a custodial term of sixteen and a half years and an extended licence period of four years. That sentence was imposed on count 2, with concurrent sentences on the other counts.

93. There was room for confusion in the way the sentences were expressed, because the judge spoke of periods of imprisonment on individual counts to run consecutively to each other. It is, however, common ground that his sentences were at the time understood to be as set out in the record and that his reference to consecutive sentences was simply to identify the approach by

which he had reached the final total sentence which he imposed on just one of the counts. As we have indicated, the details of the individual sentences are set out in the table to be found at Annex IV to this judgment.

94. The applicant's application for leave to appeal against that total sentence has been referred to the full court by the Registrar.

95. For present purposes we can summarise the facts very briefly. In 2013 the applicant set up a fitness photography business. He would contact young men on Instagram and offer to take professional photographs of them and to pay them for their time. However, this business was, in reality, a ruse engineered by the applicant so that he could have sexual intercourse with, and take naked photographs of, heterosexual men without their consent. The applicant would do so by drugging the complainants through surreptitiously spiking their drinks. In MF's case, he left before any sexual offence was committed. Each of the others woke in the morning, unable to recall the events since his drink was spiked, save that OJ had a flashback of being anally raped by the applicant in a bed. In the cases of the other victims, the only evidence of the sexual offences committed were naked photographs of them recovered from the applicant, which gave rise to the voyeurism charges.

96. The offences were carefully planned. The applicant gained the trust of his victims by, amongst other things, deceiving them as to his own sexuality and pretending to be a heterosexual male.

97. The offences came to light as a result of similar offending which led to the applicant's arrest in April 2016, for which he was sentenced in August 2016, again in the Crown Court at Bristol, to a total term of eleven and a half years' imprisonment. Those earlier offences involved the

administering of a drug, with intent to commit sexual offences, to three other men in circumstances similar to those of the present case. Two of those victims had been anally raped.

98. In relation to the present offences, when interviewed about the victim OJ, the applicant gave prepared statements to the effect that they had had consensual sex and that all the photographs taken of OJ were taken with his consent. When interviewed about the allegations made by the other victims, the applicant gave prepared statements to the effect that he had not administered any substances, that there was no sexual contact, and that any photographs taken by him were taken with full consent.

99. The judge had before him, when sentencing, Victim Personal Statements from four of the victims, OJ, AJ, JD and LT, all of which had been made in December 2018, and therefore some years after the offences. OJ said in his statement that he was currently undergoing counselling to try to come to terms with what had happened and was finding it very hard. He had nightmare after nightmare, and flashback after flashback of the night in question. He simply could not bear to go to Bristol and hated even the name of the place because of its association with his ordeal. He felt guilt that he had not come forward when it had happened, so as to stop so many other lives being affected. He said that he did not think he could ever live with himself because of that. He was already anxious and nervous about the applicant's release and concerned that the applicant would come and find him when he was released from prison.

100. JD said in his statement that he struggled to be open with loved ones and held back because he did not know what had happened. He had anger issues as a result of how scared he felt and as a result of his not having been in control of the situation on the night in question. He had compensated for his anger at not being in control by trying to control others, which had impacted on his marriage and led to its breakdown as he could no longer be open and

comfortable in his own body. The offending had caused him to quit his job.

101. LT said in his statement that he had trouble trusting people and therefore in holding down a relationship. He had panic attacks and felt anxious, to the extent that he had to phone his parents several times a day for support and reassurance. His anxiety and anger were such that his parents were so worried that they were considering returning from Malta to live in the United Kingdom. His personality had changed. He felt so much anger that it had changed his personality and that he no longer wanted to be around his brother and sister.

102. AJ said in his statement that he used to be confident, but that the confidence had been completely knocked out of him and he could not recover it. He felt worthless and broken, to the extent that he was struggling to find a reason to stay at work, where he was shaking and upset.

103. In his sentencing remarks the judge said that the applicant had a long-standing and entrenched sexual interest in heterosexual men, especially those who were sleeping or drugged. The offending was systematic and had lasted over a period of two years. Common features with the applicant's previous convictions for rape and administering drugs with intent to rape were that he contacted men on social media, invited them to his house for photoshoots and offered them money. The applicant had created an elaborate false persona and had charmed his victims to gain their trust and co-operation.

104. In relation to the rape of OJ, leaving aside the spiking of the drinks so as not to double-count, the judge concluded that the offence fell into category 2A, which provides for a starting point of ten years and a range from nine to thirteen years. He treated the harm as category 2 for two reasons. He concluded that OJ had suffered severe psychological harm, based not only on the VPS but also on what the judge had observed of the distress of OJ when giving evidence.

He also concluded that the rape was a prolonged incident on the basis that OJ had been rendered senseless for a considerable period, during which he was unable to resist what the applicant was doing. The judge observed that this was not a momentary offence. The offence fell into category A culpability because of the significant degree of planning over weeks and months. That planning involved the setting up of false social media sites, spinning long and elaborate lies about his personal life and sexual interests, acquisition of illegal and prescription drugs, luring men to his home and plying them with alcohol.

105. Count 2 attracted a starting point of ten years' custody. It was aggravated by the applicant's persistence in misleading OJ, being disinhibited by being drunk and the 2016 offences. Taking account of totality, the judge considered nine years' imprisonment to be the appropriate sentence for that count.

106. In relation to count 1, the judge treated the same factors of severe psychological harm and the fact that it was a prolonged incident as putting that offence into harm category 1, which therefore attracted a starting point of six years. Taking account of totality, he assessed a further four years' imprisonment as appropriate on that count.

107. On the other counts of administering substances, the judge likewise took a starting point of six years' custody and reduced it to an additional total of three years for totality. Those sentences were notionally consecutive to the other counts, but were concurrent *inter se*. The judge made reference to the Victim Personal Statements of JD, LT and AJ, and must have treated those (or some of them) as involving severe psychological harm or prolonged incidents in order to arrive at a starting point of six years for them when taken together.

108. On each of the voyeurism counts, the judge imposed sentences of six months'

imprisonment, again notionally consecutive to the sentences for other offences but concurrent *inter se*.

109. Thus, the judge arrived at the total custodial sentence of sixteen and a half years, which he imposed on count 2, by adding together nine years for the rape of OJ (count 2), four years for the drugging of OJ (count 1), three years for the drugging of MF, JD, LT and AJ, and six months for the taking of naked pictures of DW, LT and AJ. He found the applicant to be dangerous. That finding and the imposition of the four year extended licence are not challenged on this appeal. Nor is the imposition of a Sexual Harm Prevention Order.

110. In her submissions on behalf of the applicant, Miss Brunner QC advances the following grounds of appeal: first, that the judge was wrong to find that the appropriate starting point in relation to count 2 was ten years' imprisonment because the offending charged in that count did not result in severe psychological harm and did not involve prolonged detention or amount to a sustained incident; secondly, that the judge was wrong to find that the appropriate starting point in relation to count 2 was ten years' imprisonment because the use of a drug as an aggravating factor was already taken into account in count 1, for which a separate and notionally consecutive sentence was passed; thirdly, that the judge was wrong to find that the appropriate starting point in relation to counts 1, 5, 8 , 10 and 13 was six years' imprisonment, because none of the offending covered by those counts resulted in severe psychological harm, or involved prolonged detention, or was a sustained incident; and lastly, that the consecutive sentences on counts 1 and 2 show that the judge did not pay sufficient regard to totality.

111. Attractively though these grounds were advanced by Miss Brunner, we see no merit in them. The judge, in our view, was careful to avoid the risk of double counting by considering the features of the rape of OJ separately from the drugging in reaching his notional sentence on

count 2. He did not increase the ten year starting point by taking the drugging into account as an aggravating feature. The judge was entitled to find severe psychological damage to OJ, both on the basis of his VPS and because he had had the advantage of observing him in the witness box and had formed the view, as he said in his sentencing remarks, that the distress displayed by OJ was genuine.

112. In expressing his conclusion on this point, the judge said:

> "In my judgment, severe qualifies his personal reaction. It is not a measure against similar people in similar situations. His reaction is severe."

It is not entirely clear what he meant by this, but it seems to us that he was saying no more than that he had formed a view on the psychological impact on this victim, not by reference to how another victim might have been affected. That would be a correct approach. In any event, it is clear from the judge's remarks as a whole that he was focused, correctly, on the particular effect on OJ, which was such as to entitle the judge to find severe psychological harm.

113. The judge was also correct to treat the rape as involving prolonged detention. The relevant criterion in the guideline applies not simply to the duration of the act of rape itself, but to a period of detention for the purpose of the rape being committed. If there is prolonged physical detention surrounding a short sexual act of rape, the rape can properly be regarded as involving prolonged detention. In this case, the incapacitation of the victim overnight by administering drugs is equivalent to physical detention for that period.

114. Miss Brunner submitted that the treating of such a period as relevant to the rape involved double counting, because it was also taken into account in the categorisation of the drugging

offence which gave rise to a notional consecutive sentence. We do not accept that any double counting was involved. The prolonged detention was relevant to the category of harm in applying the guideline for the offence of rape. It was relevant to the assessment of culpability for the purposes of applying the guideline in respect of the drugging offence. In any event, a total sentence of thirteen years for both the drugging and the rape of OJ is not outside the range which is appropriate for the totality of the offending in relation to him.

115. As to the drugging of the other victims, again there was prolonged detention, which is sufficient to bring those offences within the higher category. The judge was also entitled to treat the effect on at least some of the victims as amounting to severe psychological harm; and since the sentences were notionally concurrent *inter se*, severe psychological harm to only one would be sufficient to take a starting point of six years when calculating a sentence applicable to all concurrently.

116. The judge, in our view, then made adequate reductions from his individual sentences for totality. Indeed, it might be said that the applicant was the recipient of an overgenerous adjustment for totality, for this reason. The total sentence imposed for these offences was not ordered to run consecutively to the sentence of eleven and a half years which the applicant was then serving for the 2016 offences. At the date of sentencing, he had served a little under two years and eight months of those sentences. The effect of the current extended sentence of twenty and a half years is that he has, effectively, received a reduction for totality in relation to the entirety of his offending of over eight and a half years, by virtue of the fact that the current sentence was not ordered to run consecutively.

117. Looking at both sets of offences in the round, this was what could properly be described as a campaign of rape, for which the guideline indicates that sentences in excess of twenty years'

custody may be appropriate. The effect of the sentences which were in fact passed on separate occasions is no greater than would have been justified had the sentencing for all of them taken place at the same time.

118. In conclusion, whether the current sentence is looked at on its own or together with the sentencing for the 2016 offences, the sentence, in our judgment, is not excessive, let alone manifestly so. The application for leave to appeal is accordingly refused.

Gerson Deiss-Dias

119. We turn, finally, to the application for leave to appeal against sentence which has been renewed to the full court following refusal by the single judge by Gerson Deiss-Dias.

120. In June 2013, following a trial in the Crown Court at Croydon before His Honour Judge Gower and a jury, he was convicted of rape of a child under 13 (count 1), causing a child aged under 13 to engage in sexual activity (count 3), causing a child to watch a sexual act (count 4), and offences of making an indecent photograph of a child (counts 5 to 10).

121. On 4th September 2018, for the rape charged in count 1, he was sentenced to an extended sentence under section 226A of the Criminal Justice Act 2003 of eighteen years, comprising a custodial term of thirteen years and an extension period of five years. Concurrent determinate sentences were imposed on the other counts as shown in the table to be found at Annex V to this judgment.

122. The applicant applies for an extension of time (approximately 49 days) in which to renew his application for leave to appeal against sentence, following refusal by the single judge. He also applies for bail.

123. The facts, in brief summary, were these. Between January and August 2017, the applicant was a friend of the family of two boys, L and V, aged 7 and 13. The applicant, then aged in his early thirties, attended the same church as the family. The boys' parents knew him well and he would often visit them at the family home. He appeared to get on well with the boys and slept over at the house on a couple of occasions.

124. In December 2017, L disclosed to his mother that the applicant "sucked my dick" (count 3). L later told a police officer that seven months earlier the applicant had pulled down his (L's) trousers and put his penis inside L's "bum" (count 1). The applicant had also shown L imagery on his phone of a woman sucking a man's penis.

125. Later, in March 2018, L's older brother V told the police of an occasion when the applicant had stayed over at their house and, whilst alone with V in the living room, had shown him pornography on his phone. V said that the imagery showed a woman being penetrated by a man. The applicant had shown it to him for about five minutes.

126. The applicant was arrested. When his bedroom was searched there were found, amongst other things, two laptop computers and two pairs of boys' trousers. When the laptops were analysed, indecent images of children were recovered from both. There were two category A moving images, two category B moving images, and two category C still images. One of the category A films depicted an adult male raping a boy aged about 6 to 8.

127. The applicant was further interviewed after this material had been found, but made no comment.

128. At the time of sentencing, the applicant was aged 33. He had no previous convictions, but in 2012 he received a formal police caution for being in possession of indecent images of children.

129. A VPS from the mother of the two boys was read to the court. It described the impact which the offending had had on the whole family, but in particular the traumatic effect it had had on L. Following L's disclosure of the sexual abuse, he began a follow-up with psychologists and social workers. The VPS recorded that L had been diagnosed as suffering from a post-traumatic stress disorder.

130. There was a pre-sentence report before the court. The author reported that the applicant and his parents had told her that the applicant had learning difficulties as a child and had been diagnosed with autism. It was the view of the probation officer that the combination of learning difficulties, autism characterised by an inability to make social relationships with adults and compelling evidence of paedophile orientation were key to assessing the high risk of serious harm to children.

131. The judge stated that in terms of the relevant sentencing guideline, the offences against L involved category A culpability and category 2 harm. As a 7 year old boy, L was extremely vulnerable. The judge was satisfied that the offending was the culmination of planning or grooming behaviour over an extended period of time. It involved the abuse of the trust which both the boys and the parents had put in the applicant. The psychological harm caused to L, as detailed in his mother's statement was profound.

132. As to the offence against V, the judge found the offence to be category 2 because the sexual activity involved penetration. He placed it in the higher category of culpability, having

regard to the disparity in age between the applicant and V and the features of grooming and breach of trust, to which we have referred.

133. Given the nature of the offences, the escalation in the seriousness of the offending, the effect the events had had on L and his family, the evidence to which the court had referred, and the contents of the pre-sentence report, the judge concluded that the applicant was a dangerous offender. He went on to conclude that, although the offences did not justify a sentence of life imprisonment, the only way the public could adequately be protected was by the imposition of an extended sentence.

134. The judge adjusted the sentencing to reflect totality and proportionality. For that reason, the sentences were ordered to run concurrently.

135. The grounds of appeal against the total sentence may be summarised as follows: that the judge was in error in passing an extended sentence of eighteen years, which was too high; that he sentenced within the wrong category on count 1; that he wrongly took into account or relied too heavily on the applicant's possession of the boys' trousers when reaching his conclusion as to dangerousness; that he wrongly found the applicant to have acted in abuse of trust; that he wrongly concluded that there was planning or grooming behaviour over an extended period of time; that he placed undue reliance on the VPS of the boys' mother when assessing psychological harm; that he wrongly found psychological harm without any medical evidence; that he wrongly found the applicant to be dangerous; and that he placed too much reliance on the pre-sentence report, which itself adopted a flawed approach to the question of dangerousness.

136. We have considered these grounds of appeal, as of course did the single judge when refusing leave. The account given by L's mother of L having been diagnosed as suffering from

post-traumatic stress disorder was not challenged. There was no reason to question her description of his distress and his ongoing reaction to the sexual abuse which he had suffered. The judge was entitled to rely on the mother's account to support the finding that L had suffered severe psychological harm. That is a factor which placed the offence within category 2 of the definitive guideline for the offence of rape of a child aged under 13.

137. We accept that the judge was in error in appearing to find that L, aged 7, was particularly vulnerable due to extreme youth. But, as we have indicated, the offence was, in any event, correctly categorised.

138. Turning to culpability, we accept that there was no evidence that the applicant was in a position of trust in relation to the children. There was, however, evidence of grooming, in that the applicant had shown the boys pornographic images, had befriended them and had played with them. This finding by the judge justified the conclusion that the offending involved level A culpability.

139. The starting point for a category 2A offence is thirteen years' custody, with a range from eleven to seventeen years. That, of course, is for a single offence of rape.

140. There was mitigation arising from the applicant's learning difficulties and autism, which might result in a sentence being imposed somewhat lower in the range than the starting point.

141. However, the judge also had to sentence the applicant for a number of offences against two children. He was entitled to treat the sentence on count 1 as the lead offence and to impose a custodial term which reflected all of the offending. He imposed concurrent sentences in relation to the other offences.

142. Having regard to the totality of the overall offending, we are not persuaded that the sentence was even arguably manifestly excessive.

143. On the issue of dangerousness, the facts of the present offending, the applicant's previous caution for possession of indecent images of children and the contents of the pre-sentence report entitled the judge to conclude that the applicant did pose a significant risk of serious harm to children by the commission of further specified offences.

144. We see no merit in the criticisms made of the pre-sentence report. It was for the judge to decide what weight to give to the risk assessment contained in that report. Nor do we see any merit in the suggestion that the judge attached undue weight to the fact that the adult applicant was found in possession of pairs of boys' trousers.

145. In those circumstances, and for those reasons, the renewed applications fail and are refused.

APPENDIX I

(Joginder Chall)

Count	Offence	Pleaded guilty or	Sentence	Consecutive or	Maximum

		convicted		**Concurrent**	
1	Indecent assault, contrary to section 14(1) of the Sexual Offences Act 1956.	Convicted	30 months' imprisonment		5 years' imprisonment
2	Indecent assault, contrary to section 14(1) of the Sexual Offences Act 1956.	Convicted	30 months' imprisonment	Consecutive	5 years' imprisonment
3	Indecent assault, contrary to section 14(1) of the Sexual Offences Act 1956.	Convicted	30 months' imprisonment	Concurrent	5 years' imprisonment
Total Sentence:		5 years' imprisonment			
Other relevant orders:		£6,400 towards the costs of the prosecution.			

APPENDIX II

(Mark William Allen)

Counts	Offence	Pleaded guilty or convicted	Sentence	Consecutive or Concurrent	Maximum
1-4	Assault of a child under 13 by penetration, contrary to section 6(1) of the Sexual Offences Act 2003.	Convicted.	No separate penalty	N/A	Life imprisonment
5-6	Sexual assault of a child under 13, contrary to section 7(1) of the Sexual Offences Act 2003.	Convicted.	No separate penalty	N/A	14 years' imprisonment
7-8	Causing or inciting a child under 13 to engage in sexual activity (with penetration), contrary to section 8(1) of the Sexual Offences Act 2003.	Convicted.	No separate penalty	N/A	Life imprisonment
9-12	Assault of a child under 13 by penetration, contrary to section 6(1) of the Sexual Offences Act 2003.	Convicted.	Special custodial sentence of 13 years' imprisonment	Concurrent inter se.	Life imprisonment
13-14	Sexual assault of a child under 13, contrary to section 7(1) of the Sexual Offences Act 2003.	Convicted.	No separate penalty	N/A	14 years' imprisonment
15-16	Causing or inciting a child under 13 to engage in sexual activity (with penetration), contrary to section 8(1) of the Sexual Offences Act 2003.	Convicted.	No separate penalty	N/A	Life imprisonment
17-22	Sexual activity with a child, contrary to section 9(1) of the Sexual Offences Act 2003.	Convicted.	No separate penalty	N/A	14 years' imprisonment

23-24	Causing or inciting a child to engage in sexual activity, contrary to section 10(1) of the Sexual Offences Act 2003.	Convicted.	No separate penalty	N/A	14 years' imprisonment
Total Sentence:		A special custodial sentence of 13 years for an offender of particular concern under section 236A of the Criminal Justice Act 2003, comprising 12 years' imprisonment and 1 year's extended licence			
Other relevant orders: Restraining Order (indefinite)					

APPENDIX III

(Oliver Welsby)

Count on indictment	Offence	Pleaded guilty or convicted	Sentence	Consecutive or Concurrent	Maximum
1	Wounding with intent (contrary to section 18 of the Offences Against the Person Act 1861)	Pleaded guilty	An extended sentence of 13 years comprising of a custodial term of 8 years detention in a Young Offender Institution and an extended period of licence of 5 years		
Total Sentence:		**An Extended Sentence of 13 years pursuant to section 226a of the Criminal Justice Act 2003 (comprising of a custodial term of 8 years detention in a Young Offender Institution and an extended period of licence of 5 years)**			
Victim Surcharge Order:		£30			

APPENDIX IV

(Nigel Brent Wilkinson)

Count	Offence	Pleaded guilty or convicted	Sentence	Consecutive or Concurrent	Maximum
1	Administering a substance with intent, contrary to section 61(1) of the Sexual Offences Act 2003	Convicted	4 years' imprisonment	Concurrent.	10 years' imprisonment
2	Rape, contrary to section 1(1) of the Sexual Offences Act 2003	Convicted	Extended determinate sentence of 20 ½ years (16 ½ + 4)		Life imprisonment
5	Administering a substance with intent, contrary to section 61(1) of the Sexual Offences Act 2003	Convicted	3 years' imprisonment		10 years' imprisonment
7	Voyeurism, contrary to section 67(3) of the Sexual Offences Act 2003	Convicted	6 months' imprisonment		2 years' imprisonment
8	Administering a substance with intent, contrary to section 61(1) of the Sexual Offences Act 2003	Convicted	3 years' imprisonment		10 years' imprisonment
10	Administering a substance with intent, contrary to section 61(1) of the Sexual Offences Act 2003	Convicted	3 years' imprisonment		10 years' imprisonment
11	Voyeurism, contrary to section 67(3) of the Sexual Offences Act 2003	Convicted	6 months' imprisonment		2 years' imprisonment
12	Voyeurism, contrary to section 67(3) of the	Convicted	6 months' imprisonment		2 years' imprisonment

	Sexual Offences Act 2003				
13	Administering a substance with intent, contrary to section 61(1) of the Sexual Offences Act 2003	Convicted	3 years' imprisonment		10 years' imprisonment
Total Sentence		An extended determinate sentence of 20 ½ years, comprising a custodial term of 16 ½ years' imprisonment, and a 4 year extended licence period.			
Other relevant orders		A Sexual Harm Prevention Order was imposed, along with a Victim Surcharge Order.			

APPENDIX V

(Gerson Deiss-Dias)

Count on indictment	**Offence**	**Pleaded guilty or convicted**	**Sentence**	**Consecutive or Concurrent**	**Maximum**
1	Rape of a Child under 13 contrary to section 5(1) of the Sexual Offences Act 2003	Convicted	18 year extended sentence: 13 years custodial element, 5 years extended licence		Life
3	Causing a Child under 13 to Engage in Sexual Activity contrary to section 8(1) and (2)(d) of the Sexual Offences Act 2003	Convicted	8 years' imprisonment	Concurrent	Life *(penetration)*
4	Causing a Child to Watch a Sexual Act contrary to section 12(1) of the Sexual Offences Act 2003	Convicted	2 years' imprisonment	Concurrent	10 years
5 & 6	Making an Indecent Photograph of a Child contrary to section 1(1)(a) of the Protection of Children Act 1978	Convicted	6 months' imprisonment	Concurrent	10 years
7 & 9	Making an Indecent Photograph of a Child contrary to section 1(1)(a) of the Protection of Children Act 1978	Convicted	4 months' imprisonment	Concurrent	10 years
8 & 10	Making an Indecent Photograph of a Child contrary to section 1(1)(a) of the Protection of Children Act 1978	Convicted	1 year's imprisonment	Concurrent	10 years
Total Sentence:		An extended sentence under s.226A Criminal Justice Act 2003 of 18 years, comprising a custodial term of 13 years and an extension period of 5 years.			
Minimum Term if applicable:		N/A			
Time ordered to count towards sentence		N/A			

under s.240A Criminal Justice Act 2003	
Victim Surcharge Order	**£170**
Other relevant orders: The applicant was made subject to a Sexual Harm Prevention Order under s.103 of the Sexual Offences Act 2003 until further order.	

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

Lower Ground, 18-22 Furnival Street, London EC4A 1JS

Tel No: 020 7404 1400

Email: rcj@epiqglobal.co.uk

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