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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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THE QUEEN

-v-

CZ

_____

Before: Stephens LJ, Maguire J, McAlinden J

_____

MAGUIRE J

Introduction

[1] The applicant/appellant (hereinafter "the applicant") in this appeal is CZ. He is a man currently aged 51.

[2] On 9 December 2010 the applicant was convicted at Newry Crown Court of a number of serious sexual offences the victims of which have a familial connection to him for which reason he is anonymised in this judgment to protect their identities. As a result, on 10 March 2011, he was sentenced by His Honour Judge Lockie to a term of 14 years imprisonment. A number of ancillary orders were made, including a sexual offences prevention order ("SOPO").

[3] The appeal before the court relates to this SOPO. The order made at the time of sentencing was for the SOPO to last for a period of five years beginning on the date of the applicant's release from custody. That date was 7 December 2017. Accordingly, the applicant has been subject to this order for some 12 months as at the date of writing.

[4] While the applicant appealed against his conviction and sentence at the time, the SOPO was not the subject of an appeal. However, subsequent to the applicant's release, the applicant applied to the Crown Court to have it discharged.

[5] As part of the court process for dealing with the applicant's application aforesaid, the Police Service of Northern Ireland ("PSNI") were put on notice so that they could respond to it.

[6] In the PSNI's response, they adopted the position of not only opposing the discharge of the order but of making an application of their own to add two further prohibitions/requirements to it.

[7] When the matter came before His Honour Judge Ramsey QC ("the Judge") at Newry Crown Court on 11 January 2018 he had before him two applications: one from the applicant to discharge the existing SOPO and one from the PSNI to add additional prohibitions to it.

[8] In the result, the Judge refused the applicant's application to discharge it but acceded to the PSNI's application to add further prohibitions to it.

[9] The applicant has now appealed the above decisions to this court and contests both of the Judge's rulings.

[10] The Judge's ruling in respect of adding further prohibitions to the SOPO will be dealt with later in this judgment. However, in what follows, the court will concentrate on the applicant's appeal seeking discharge of the SOPO.

[11] The Single Judge declined to grant leave for that part of the appeal which challenges the Judge's refusal to discharge the SOPO, but he did grant leave in respect of the applicant's appeal against the Judge's decision to accede to the PSNI's application to add additional prohibitions to the SOPO.

The trial of the applicant which led to the imposition of the SOPO

[12] The trial of the applicant took place in November/December 2011. It is important to note that what was before the court were two separate and unrelated episodes of offending. The first episode related to the period 1 January 1980 to 31 January 1982. The offences of which the applicant was convicted were six fold. All involved a boy under 16. In fact he appears to have been 7 or 8 years old at the time of the offences. At that time the offender himself was aged between 12-15 years old. The offences included buggery, indecent assault and gross indecency.

[13] The second episode of offending occurred between 1 July 1994 and 31 December 1994. The offences of which the applicant was convicted included six offences against a female child. These involved indecent assaults, unlawful sexual intercourse and rape. At the time, the victim was aged between 13/14 whereas the applicant at that time was aged between 26-27 years. There, therefore, was some 14 years or so between the episodes of offending.

[14] In addition to the above convictions the applicant was also convicted at his trial of a series of threats to persons issued by him in December 2008 in respect of matters related to disclosure of information connected to the subject offending described above.

Pre-sentence report

[15] The court has considered the pre-sentence report prepared in 2011 in respect of the sentencing hearing before His Honour Judge Lockie on 10 March 2011.

[16] At the time of conviction the applicant was 42 years of age. In the view of the author of the report, the applicant was "at medium likelihood of general re-offending" but, in addition, he was viewed as posing a risk of serious harm.

[17] There was a concern about him being attracted to both pre-pubescent males and pubescent females.

[18] It is plain from the report that, despite his convictions, the applicant continued to deny his offending. Accordingly, the author cast some doubt about whether the applicant would be able to address his offending behaviour while in prison or advance his rehabilitation.

[19] Among the matters raised in the report was the imposition of a SOPO.

The SOPO prohibitions

[20] The SOPO made by His Honour Judge Lockie contained six prohibitions. These were:

(a) Not to have contact with any young person under the age of 16 years without the prior approval of the designated risk manager, save for inadvertent or unavoidable contact with a child under 16 years, from which he must disengage at the earliest possible opportunity.

(b) Not to engage in any employment, paid or otherwise, without the approval of the designated risk manager.

(c) Not to engage in any employment involving young children.

(d) Not to have any young female under 16 years of age in his vehicle, except with the permission of the designated risk manager.

(e) Not to enter any relationship, casual or intimate, without prior disclosure to the designated risk manager.

(f) Not to reside at an address without the prior approval of the designated risk manager.

Change of circumstances

[21] As already indicated, His Honour Judge Lockie decided on 10 March 2011 to impose a SOPO on the applicant. In the course of doing so, he chose that it should endure for a period of five years. However, its starting point was to be at the end of the applicant's custodial term, which, as events turned out, was reached on 7 December 2017.

[22] It has, therefore, been the case that in the period from the date of the imposition of the sentence to the end of the applicant's custodial period he has been in prison.

[23] It is not in dispute in this case that throughout that period the applicant has at all times maintained his innocence of the offences for which he was found guilty. Consistently with this stance, he has refused all forms of treatment/rehabilitation offered to him and there has been no change to the risk of harm he represents from the beginning to the end of the sentence.

[24] In short, as was frankly conceded at the hearing before the court by Mr O'Donoghue QC, his counsel, apart from the efflux of time, there has been no material change in his circumstances over the period of his incarceration and the period of it has been fallow in terms of advancing the goals of protection of the public from the risk of harm he represents, or reducing the risk of him committing further offences, after his release.

The Judge's rulings

[25] The Judge gave his ruling on 11 January 2018.

[26] It is quite evident from the ruling that he viewed the absence of progress in the applicant's case, in terms of advancing the goals referred to above, as an important factor. He noted that the applicant continued to steadfastly deny his guilt and he further noted that he was hostile towards the requirements of his SOPO.

[27] In the Judge's opinion, the applicant's case for discharge of the order was not made out. On the contrary, the SOPO remained necessary and proportionate in the absence of any material change since the date when it was imposed. There simply had been no headway towards rehabilitation or risk reduction with the outcome that the SOPO should remain.

[28] In relation to the PSNI's application to add further prohibitions, the Judge was willing to add in further prohibitions/requirements. He took this step because of the factors which have been summarised above (basing himself on the evidence of Constable O'Neill who was the applicant's designated risk manager and who gave evidence at the hearing). The Judge stated that he viewed the imposition of these further stipulations as necessary.

The relevant legal provisions

[29] The legal provisions relating to the imposition of SOPOs are found at Part II of the Sexual Offences Act 2003.

[30] The power to make an offender subject to a SOPO is vested in a case like this in the Crown Court. The making of such an order forms part of the sentencing exercise and will therefore be dealt with as part of the sentencing process. The statutory provision dealing with the making of a SOPO is section 104 of the 2003 Act.

[31] The purpose behind the making of an order is the protection of the public or any particular members of the public from serious sexual harm at the hands of the defendant. The statutory meaning of the phrase just quoted is provided at section 106(3) of the 2003 Act. This notes that:

> "Protecting the public or any particular members of the public from serious sexual harm from the defendant means protecting the public in the United Kingdom or any particular members of that public from serious physical or psychological harm, caused by the defendant committing one or more offences listed in Schedule 3."

[32] Section 107 of the 2003 Act deals with the effect of SOPOs. Sub-section (1) of that section indicates that:

> "(1) A sexual offences prevention order—
>
> (a) prohibits the defendant from doing anything described in the order or requires the defendant to do anything described in the order (or both), and
>
> (b) has effect for a fixed period (not less than 5 years) specified in the order or until further order."

[33] Sub-section 2 of section 107 goes on to state that:

> "The only prohibitions or requirements that may be included in the order are those necessary for the purpose of protecting the public or any particular members of the public from serious sexual harm from the defendant."

[34] An important provision for the purpose of this judgment is section 108 of the 2003 Act. This deals with variations, renewals and discharges. It provides:

> "(1) A person within subsection (2) may apply to the appropriate court for an order varying, renewing or discharging a sexual offences prevention order.
>
> (2) The persons are—
>
> (a) The defendant;
>
> (b) The chief officer of police for the area in which the defendant resides;
>
> (c) A chief officer of police who believes that the defendant is in, or is intending to come to, his police area;
>
> (d) Where the order was made on an application under section 104(5), the chief officer of police who made the application.
>
> (3) An application under subsection (1) may be made—
>
> (a) Where the appropriate court is the Crown Court, in accordance with rules of court;
>
> …"

[35] Section 110(3) deals with appeals against the making of an order under section 108 or the refusal to make such an order. In particular, it provides that where the application for such an order was made to the Crown Court the appeal lies to the Court of Appeal.

[36] Section 113 of the 2003 Act makes it clear that a person commits an offence if, without reasonable excuse, he does anything which he is prohibited from doing by a sexual offences prevention order. Likewise sub-section 1(A) provides that a person commits an offence if without reasonable excuse he fails to do anything which he is required to do by a sexual offences prevention order. Notably on conviction on indictment in respect of the above provisions a person found guilty may be liable to imprisonment for a term not exceeding five years.

[37] It is clear and was not in dispute at the hearing before the court that a defendant in the applicant's position may appeal against the making of a SOPO at

the time it is ordered as if the order was a sentence passed on him for an offence or offences. Where the order is made by the Crown Court, such an appeal, in the usual way, is to the Court of Appeal.

Legal principles

[38] It is not necessary in this case to provide a lengthy description of the broad legal principles which surround the making of a SOPO. It will suffice to say that, in essence, the position may be summarised as follows:

- The court has to be satisfied before it makes a SOPO that the defendant's behaviour makes it necessary to make such an order.

- The purpose behind the making of an order is 'the protection of the public or any particular members of the public from serious sexual harm from the defendant'.

- The case law indicates that the court, when asked to make such an order should assess:

  (i) The level of risk of occurrence.

  (ii) The level of risk of harm if there be recurrence.

- The terms of the order should be both necessary and proportionate.

[39] The central tests are well summed up by Coghlin LJ in Simpson [2014] NICA 83. The following paragraphs are helpful in describing the position:

> "[8] In R v Smith and Others [2011] EWCA Crim 1772 Hughes LJ delivering the judgment of the court recorded that it was well understood that the expression 'serious sexual harm' in section 104(1) differed from the concept of 'serious harm' as used for the purposes of indefinite or extended sentences. He referred to the statutory definition as 'serious physical or psychological harm' caused by the defendant committing one of the specified offences. Hughes LJ then repeated the succession of questions identified by the Court of Appeal in England and Wales in R v Mortimer [2010] EWCA Crim 1303 which must be addressed when considering the making of a SOPO, namely:

(i) Is the making of an order necessary to protect from serious sexual harm through the commission of scheduled offences?

(ii) If some order is necessary, are the terms proposed nevertheless oppressive?

(iii) Overall are the terms proportionate?

…

[14] We remind ourselves of the words of Hughes LJ in the Smith case who noted that, while a SOPO may be a valuable tool in the control of sexual offending and is properly to be regarded as part of the total protective sentencing package, each of the prohibitions contained in such orders creates for the appellant a new and personal criminal offence carrying up to five years imprisonment for breach and may apply across a wide range of the ordinary activities of life. In this case, as we have indicated above, a copy of the proposed SOPO drafted on behalf of the PSNI had been served upon the appellant and his legal representative well in advance of sentencing. However, no detailed consideration of the terms and their likely impact upon the particular circumstances of the appellant appears to have occurred, apart from a somewhat desultory debate on 15 October 2013 about the extent/impact of term (1) relating to the use of any computer, iphone or mobile device. On 20 November 2013 the appellant's then legal representative, who had enjoyed a full opportunity to consider the proposed document, confirmed to the learned trial judge that no objection was taken to any of the conditions contained in the draft SOPO.

…

[18] We have listened carefully to the well analysed submissions advanced on behalf of the appellant and the Crown and we have read the transcripts of the pre-sentence and sentencing hearings. Having done so, we are left with a real concern that, in a highly fact specific case, inadequate attention was directed to the obligation to ensure proportionality and the need to

> avoid oppression. We also have a real concern that the learned trial judge was entitled to receive significantly greater assistance with regard to those obligations and the relevant authorities. Accordingly, we propose to allow the appeal in respect of the specific terms of the SOPO. In the circumstances the case will be remitted back to the learned trial judge for further consideration."

[40] Of particular importance for this case there are a number of important authorities which deal with the interaction between the ability of an applicant to appeal directly to the Court of Appeal against the making of a SOPO as an aspect of the sentencing process and the ability of a defendant to utilise the terms of section 108 for the purpose of seeking from the Crown Court a variation, renewal or discharge of a SOPO.

[41] In respect of this matter, Simon J indicated in R v Hoath; R v Standage [2011] EWCA Crim 274 at paragraph [9] that:

> "Objections in principle to the terms of a SOPO imposed by the Crown Court should be raised by an appeal to the Court of Appeal and not by subsequent applications to vary to the Crown Court."

[42] He went on at paragraph [10] and [11]:

> "[10] Although minor but necessary adjustments to the order may be required, in which case an application should be made to the Crown Court to vary the order, in circumstances where a defendant has not appealed to the Court of Appeal, we should not expect the Crown Court to make other than minor adjustments to the term of the order, at least in the short term.
>
> [11] Usually the defendant will need to rely on a change of circumstances. In such a case, the Crown Court will need to be satisfied that the order in its original form is no longer necessary for the statutory purpose of protecting the public (or particular members of the public) from serious sexual harm from the defendant, or that those objectives can properly and sufficiently be secured by the proposed variation."

[43] Simon J continued:

> "Section 108(4) makes clear by the use of the word 'may' that the Crown Court exercises a discretion. In general, this court will only allow an appeal from an order of the Crown Court refusing to vary a SOPO if the judge has reached a view which is unreasonable or is outwith what is a broad discretion."

[44] Later in the Court of Appeal's judgment, dealing with the particular case of Standage, Simon J applied the above *dicta*. In that case the Crown Court had imposed a SOPO. While there was an appeal to the Court of Appeal in respect of other matters relating to the sentence, there was no appeal against the SOPO itself. Instead, the defendant applied at a later date to vary the SOPO, an application which failed in the Crown Court. There was then an appeal against that refusal to the Court of Appeal.

[45] In dealing with the appeal, the Court of Appeal noted that the Crown Court judge had "doubted whether he had the power to vary this SOPO where the complaint was as to its breadth, since that was a matter for the Court of Appeal. In his view the powers under section 108(3) should be exercised where there was a change of circumstances".

[46] The court explicitly agreed with the Crown Court judge's approach: see paragraph [33]. At paragraph [35] the court stated:

> "In our view the application as it is now put before the court is not an application for a variation at all. It is an appeal (substantially out of time) as to the ambit of the original order, when no such objection was made on the previous hearing before the Court of Appeal. …".

[47] In these, as well as other circumstances which it is unnecessary for this court to go into, the appeal was dismissed by the Court of Appeal.

[48] The above approach to the demarcation between appeal to the Court of Appeal (as part of the sentence) and applications to vary SOPOs was cited with apparent approval in a later judgment in the Court of Appeal in England and Wales: see R v McLellan; R v Bingley [2017] EWCA Crim 1464 at [51]-[57]. In an interesting observation in that case, Gross LJ noted, when discussing section 108(4) of the 2003 Act, that it was "important to appreciate that 'discharge' in the context of an application to the Crown Court does not entail a consideration of whether the SOPO should have been made *ab initio*". He went on:

> "A question of that nature would fall outside the Crown Court's jurisdiction and could only be pursued, if at all, by way of appeal to this court."

[49] Finally the court will refer to a further judgment of Gross LJ in the case of R v Parsons; R v Morgan [2017] EWCA Crim 2163. In this judgment at paragraph [5] there is a helpful reference to what are described as "general considerations". The following considerations were referred to:

> "(i) First, as with SOPOs, no order should be made by way of SHPO[1] 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) Secondly and equally, 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) Thirdly, … none of the SHPO terms must be oppressive and, overall, the terms must be proportionate.
>
> (iv) Fourthly, any SHPO must be tailored to the facts. There is no one size that fits all factual circumstances."

[50] The court sees no reason why these considerations would not apply equally to a SOPO.

The hearing before this court

[51] The court is grateful to Mr O'Donoghue QC and Mr Forde BL and to Mr Henry BL for their helpful written and oral arguments.

[52] It is not necessary to set out in detail the approaches taken by them. However, the court will record that the essential points made on behalf of the applicant amounted to a claim that the SOPO was not necessary at the time when it was imposed and is not necessary now. The criticisms made on behalf of the

[1] Sexual Harm Prevention Orders: the successor Order to a SOPO in England and Wales.

applicant in relation to the order go to its core and culminate in him seeking its wholesale removal.

[53] Notably, as far as the issue of the interaction between the ability of an applicant to appeal directly to the Court of Appeal against the making a SOPO as an aspect of the sentencing process and the ability of a defendant to utilise the terms of section 108 for the purpose of seeking from the Crown Court a variation, renewal or discharge of a SOPO, counsel for the applicant argued that the court should not follow the line taken by the authorities in England and Wales which has been set out *supra*.

The issues

[54] It seems to the court that there are three primary issues in this appeal. The first relates to whether the Judge should have entertained the application placed before him by the applicant *viz* the applicant's case in respect of discharge of the order. The second relates to whether, if he was entitled to deal with the applicant's application, he erred in his decision in respect of it. A third issue relates to the new prohibitions which the Judge agreed to add to the existing SOPO. The question for the court will be whether these should be sustained.

The first issue

[55] The court considers that it should follow the approach which has been adopted by the Court of Appeal in England and Wales in respect of the issue of what may be viewed as the demarcation line which has been drawn between the role of this court, as the appellate court in respect of aspects of sentencing in the Crown Court, and the role of the Crown Court dealing with applications under section 108 of the 2003 Act.

[56] In doing so, the court rejects Mr O'Donoghue's argument that it should not follow the authorities which the court has already outlined above. In short, the court considers that it is correct in principle that a distinction should be drawn between the different roles as otherwise the integrity of the normal appellate process in a sentencing appeal from the Crown Court will be breached in favour of a backdoor form of 'appeal' under the guise of variation, renewal and discharge applications, which themselves should normally be linked to a relevant change of circumstances. This court will ordinarily give a high level of respect to decisions of the Court of Appeal in England and Wales and this case is no exception.

[57] In this court's view where, as here, a SOPO is imposed by the Crown Court as part of its sentencing function, any challenge to it, unless peripheral, should normally be made by appeal to this court in the usual way. Such an application will be subject to the statutorily defined time limits.

[58] In this case, the point is of importance as there was no appeal to this court against the making of His Honour Judge Lockie's SOPO. Consequently the SOPO has stood unchallenged since it was made in 2011.

[59] The challenge now made to the SOPO, under the banner of an application under section 108 of the 2003 Act, in our opinion, was one which, on any view, went to the core of the order and amounted to a plea that the order should never have been made. Nothing new had occurred in the meantime, as Mr O'Donoghue properly conceded, save for the efflux of time.

[60] In these circumstances, we consider that the Judge should not have heard the application and should have dismissed it as being an application which far exceeded his role as a judge hearing a section 108 application. He should have ruled against the application on the basis that if the applicant wished to raise the matters he plainly wished to raise, he should raise these in an out of time appeal to this court.

[61] For this reason, we consider that the appeal to this court from the Crown Court's decision of January 2018 is fatally flawed and this court, accordingly, will reject it.

[62] This court accepts the approach which has been taken by the Court of Appeal in England and Wales in R v Hoath; R v Standage and will endorse it.

Second issue

[63] On the view of the case which the court has adopted, the question of the correctness of the Judge's decision on the merits of the applicant's application before him, for reasons already given, does not arise. However, as there may be a lack of clarity on the point of what test this court should apply when dealing with an appeal against a Crown Court judge's decision in respect of a section 108 application, as the statute is silent in respect of this, we consider it may be of assistance for the court to state that our provisional view is that the test referred to at paragraph [12] of Hoath *viz* a test of whether the Crown Court judge has acted unreasonably or outside the limits of his broad discretionary powers should be that which ordinarily should apply.

[64] When that approach is applied on the facts of a case like the present, it is difficult to see how the Judge could be said to have erred, even if this court was wrong to hold, as the court has, in respect of the first issue in the way in which we have.

The third issue

[65] The court has left the third issue to the last because this issue is about the Judge's decision to add additional prohibitions/requirements to the existing SOPO.

[66] The terms of the Judge's order made after the hearing in January 2018 were as follows:

> "It is ordered that the Sexual Offences Prevention Order be varied in that two further prohibitions [be] added:
>
> Prohibited from failing to engage with professionals tasked with his risk management.
>
> Prohibited from failing to actively participate in any risk management plan created or adapted for him.
>
> All other conditions remain the same."

[67] In the court's opinion, this matter can be dealt with swiftly. The way in which prohibitions or requirements in a SOPO are formulated is of great importance. This is because a breach of the conditions of a SOPO, as indicated above, may give rise to the party in breach being made subject to criminal proceedings which could give rise to a sentence on indictment of up to five years imprisonment.

[68] As recorded in R v Parsons; R v Morgan (*supra*) any prohibition or requirement imposed must be clear and realistic and must be capable of ready understanding and enforcement.

[69] In the court's view, the terms in which the new requirements have been formulated in this instance fall well below the standard which is required in a context where breach could give rise to the risk of prosecution of the applicant. It is vital for the prohibitions to be written in a reasonably comprehensible way which informs the person subject to the order exactly, or at least as clearly as can reasonably be expected, what he or she is being prohibited from doing. The matter cannot be left in a state of avoidable uncertainly and it must be remembered that prohibitions and requirements which offend against these principles will be likely to be incapable of enforcement, even by a court willing to adopt a broad approach to what the language used means.

[70] The two new prohibitions added in this case, in the court's view, leave much too much up in the air and contain insufficient definition to enable them to be easily enforced. The court is left to ask what is involved in the notion of 'failing to engage'; who are the professionals tasked with his risk management; what is meant by 'failing to actively participate'; and who is to judge it and by what standard. In short, there is an absence of sufficient certainly about what the ingredients of the 'personal' criminal offences being established are and the standards which are being set.

[71] In these circumstances the court is of the opinion that they cannot stand and quashes them.

Conclusion

[72] On the day of the hearing of this appeal the court stated that it had decided to dismiss the appeal but that it would provide its reasons later. The reasons given above are the reasons for its previously announced decision.