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Judgment: approved by the Court for handing down
(subject to editorial corrections)

Delivered: **18/12/2014**

IN HER MAJESTY'S COURT OF APPEAL IN NOTHERN IRELAND

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THE QUEEN

-v-

MICHAEL SIMPSON

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Before: Coghlin LJ, Weatherup J and O'Hara J

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COGHLIN LJ (delivering the judgment of the court)

[1] This is an appeal with leave of the single judge against the making of a Sexual Offences Prevention Order ("SOPO") in accordance with the provisions of the Sexual Offences Act 2003 (the "2003 Act") imposed upon the appellant by His Honour Judge Grant at Downpatrick Crown Court on 27 November 2013. The appellant was also made the subject of a sentence of imprisonment which he has subsequently served. Mr Frank O'Donoghue QC and Mr M D Barlow appeared on behalf of the appellant while the Crown was represented by Ms Laura Ievers. The court is grateful to both sets of counsel for their carefully constructed and well-focused written and oral submissions.

Background facts

[2] On 10 January 2012 the police executed a warrant at the appellant's home address and seized computer equipment. When that equipment was examined a GF/9 VIO storage device was found to contain category 1 and 2 images of young girls aged between 8 and 12 who were either alone or posing together. In many of the images the children were posed with makeup and, in some, genitalia were exhibited. Computer towers GF/3 and GF/13 were seized and, while these were not found to contain any

images, it was clear that they had been cleaned using some form of computer software and searches on these revealed titles indicative of indecent child images. Chat log conversations were also discovered concerning young girls aged 8 to 12 including messages from another individual in which it was clear that the appellant was looking for material and that he had indicated an interest in spanking girls aged 8 to 12. A user name "strict cane" was employed.

[3] A total of some 840 images were recovered by the police of which 750 were category 1 and 97 were category 2. Categorisation of such images has been developed by the courts in England and Wales. Category 1 includes images depicting erotic posing with no sexual activity while category 2 generally depicts sexual activity between children or solo masturbation by a child – see R v Oliver and Others [2002] EWCA 2766. The courts in Northern Ireland have generally accepted these categories as appropriate to apply in this jurisdiction – see A-G Reference No. 8 [2008] NICA 52.

[4] The appellant was interviewed by the police on 10 January and 7 February 2013. On 15 October 2013 he entered pleas of guilty to the 16 counts on the indictment at first arraignment. On 27 November 2013 he was sentenced to four months imprisonment and a five year SOPO was also imposed.

The grounds of appeal

[5] The following grounds of appeal were relied upon before this court:

(*i*) That the learned trial judge erred in law in reaching the conclusion that the statutory test specified for the making of a SOPO contained in Section 104(1)(*d*) the 2003 Act had been met, namely, that it was necessary to make such an order for the purpose of protecting the public or any particular members of the public from serious sexual harm from the defendant.

(*ii*) In the event that the SOPO had been lawfully made, the terms thereof were oppressive.

(*iii*) In the event that the SOPO had been lawfully made, the terms thereof were disproportionate.

Submissions of the parties

[6] Mr O'Donoghue submitted that the learned trial judge had not specifically referred in the course of his sentencing remarks to the statutory test for the imposition of a SOPO. He submitted that there was no evidence that the appellant was anything but a "browser" of the images and that, in particular, there was nothing to suggest any progression to more direct contact forms of sexual offence. He emphasised the appellant's previous good character, stable family relationship and good work record. He noted that the appellant had not been assessed by the Probation Service as presenting a significant risk of serious harm.

[7] On behalf of the Crown Ms Ievers submitted that it was clear from the transcripts that the learned trial judge had been alerted to the need to consider the making of a SOPO at an early stage and that the matter had been raised with the legal representatives on both sides. She also referred to the view expressed in the pre-sentence report that the making of a SOPO would "... ensure that there is an external control to limit Mr Simpson's opportunity to re-offend." Ms Ievers drew the attention of the court to transcripts indicating that the specific terms of the proposed SOPO had been discussed by the judge with the appellant's then legal representative in some detail.

Discussion

[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?"

[9] All of the cases dealt with in Smith included offences of viewing child pornography and none included direct physical sexual contact. At paragraph [35] of the judgment, when referring to the appellant Hall, Hughes LJ remarked that:

> "He appeared oblivious to the fact that the victims of such offences were the children shown on the images, or that he had contributed to a market which encouraged their abuse."

[10] A series of earlier Court of Appeal decisions in England and Wales confirmed that the viewing of child pornography constituted serious psychological harm. In R v Beaney [2004] EWCA Crim 449 Keith J delivering the judgment of the court said at paragraphs [8] and [9]:

> "[8] It is plain that the particular members of the public who might be at risk of serious harm are the children who are forced to pose or, worse, to participate in sexual conduct, for the purpose of enabling these images to be produced and disseminated. They would undoubtedly be subject to a real risk (to use the language of Section 161(4) of the 2000 Act) of serious psychological injury. They would have been subjected to that risk by the persons responsible for producing and disseminating the images – the adults in the images with whom they are depicted as having sexual conduct, the photographers and the like. But would they have been subjected to that risk from people like the applicant who simply downloaded the images and viewed them? Would that risk, in other words, be occasioned by further offences by such people?
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> [9] We think they would. The serious psychological injury which they would be at

> risk of being subjected to arises not merely from what they are being forced to do, but also from their knowledge that what they are being forced to do would be viewed by others. It is not difficult to imagine the humiliation and lack of self-worth which they are likely to feel. It is not simply the fact that without a market for these images the trade would not flourish. If people like the applicant continue to download and view images of this kind, even when they have not had to pay for the images downloaded, the offences which they commit can properly be said to contribute to the psychological harm which the children in those images would suffer by virtue of the children's awareness that there were people out there getting a perverted thrill from watching them forced to pose and behave in this way."

[11] While the learned trial judge did not specifically refer to the requirements of Section 104(1) of the 2003 Act or the definition of "serious sexual harm" contained in Section 106(3), it is quite clear from his remarks that he had in mind the appropriate type of "serious sexual harm". As this court has previously observed the exigencies and realities of daily court life will sometimes require this court to make the assumption that a trial judge was well aware of which matters he should take into account, unless the contrary has been demonstrated. After recording that he had read the pre-sentence report and noting that it confirmed that the appellant had not been assessed as someone with a high or significant risk of further offending he went on to say:

> "The courts of Northern Ireland have made clear that the children portrayed in these images, particularly the more serious images, are very young, 8 to 12 years of age, are extremely vulnerable. In order to make these images somebody has abused them terribly or at a minimum corrupted them and robbed them of the innocence of their childhood. It is obvious that these vulnerable children have no control over their lives and what they have

> been made to do or participate in is something out-with their control and certainly not something that is done with their informed and active consent. They actually have no defence against the makers and distributors of this material.
>
> It goes without saying that these images would not be made and these children in turn would not have been exposed to this sort of depravity if you and others like you did not demand these images and take pleasure from them. Although it is clear that you did not create any of these images, your perversion and self-gratification and that of others like you, must carry some responsibility for the creation of these images and the abuse of these children. The abuse that is required for these images to be created and then distributed and circulated on the Internet. Simply because you were not present when they were created does not relieve you or others or anyone else who downloads or distributes this sort of material of a degree of responsibility. You are significantly to blame because it is your demand and your interest that creates these images in the first place. As I have already said, down the line, these children suffer because of that depravity and that disgusting interest on your part."

[12] The above remarks by the learned trial judge should also be considered in the context of the trial judge's attention having been specifically drawn to the case of Smith by the prosecution and the clear indication by the legal representative then acting on behalf of the appellant that there was no objection to either the making of the SOPO or the conditions contained therein. In such circumstances, we do not consider that there is any substance in the first ground of appeal relied upon by Mr O'Donoghue.

[13] Grounds 2 and 3 relied upon by Mr O'Donoghue relate to the specific conditions contained in the SOPO imposed by the learned trial

judge and, in particular, whether one or more were oppressive and/or whether, overall, the terms were 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.

[15] In the course of his helpful submissions to this court Mr O'Donoghue informed us that the main concern of the appellant was with term (3) which provides as follows:

> "(3) The defendant is prohibited from having access to or association with any child or children under the age of 18 years without the approval of Social Services save for that which is unforeseen and unavoidable in the course of daily life."

There are two quite distinct issues with this part of the order. One involves family members and the other involves other people under the age of 18. Those issues need to be separated and considered carefully in this case and, we suspect, in other cases also.

[16] Dealing first with family members, it is relevant that the appellant and his wife have an 8 year old son. In addition she has three teenage sons by a previous relationship. The present SOPO gives Social Services the power to prevent him seeing any of these people at all or of seeing them

only on terms which are imposed by Social Services as to frequency, duration, location etc. No detailed consideration seems to have been given as to how any such restrictions might be effectively challenged by the appellant. While judicial review might represent a potential route of challenge, there must be concerns as to whether that would represent an adequate forum for proper consideration of the circumstances of a family and the proportionate restraints which should be imposed in light of the appellant's criminal conduct. In our view the natural location for a dispute about contact with children of the family, such as the appellant's son, should be a family court such as the Family Proceedings Court or the Family Care Centre. The order which is under appeal may prevent that from happening. The learned Trial Judge does not appear to have received any detailed submissions relating to such a possibility. In this case, and in others which are comparable, we believe that some consideration should be given in the course of framing the order to the question of the best way to resolve any inter-familial disputes that are foreseeably likely to arise, including the option of recourse to the Family Proceedings Court, after consultation with Social Services. That court would seem to be in the best position to take account of the wishes and feelings of the child, the views of the parents and those of Social Services before reaching its decision as to what is in the child's/children's best interests.

[17] The second issue involves non family members. Mr O'Donoghue questioned the need for the term to specify the age of 18, which the learned trial Judge appears to have imposed on the basis that 18 is the age of consent in Northern Ireland. The age of consent in this jurisdiction is 16 and, indeed, 16 was the age originally put forward by the Crown in this case. Moreover the extension of the limit from 16 years to 18 years would prevent this appellant (and probably others in different cases) from having entirely legitimate and sometimes necessary contact with 16 and 17 year olds in the workplace e.g. trainees, apprentices etc. In some cases it may be appropriate to impose a restriction up to the age of 18 but the apparent mistake as to the relevant age of consent may have significantly inhibited any informed consideration as to whether 18 was necessary or proportionate in this case, given the facts of the appellant's criminal conduct.

[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.

Addendum

An issue having arisen as to the implementation of the judgment of the Court this addendum notes that the Court accepted the appellant's arguments advanced in support of grounds *(ii)* and *(iii)* above and concluded that the trial judge's decision as to the specific terms of the sexual offences prevention order was made without an adequate consideration of all the issues which should bear upon such a decision. The result was not to quash the SOPO, or those terms which were specifically impugned, but rather to provide that the matter be reconsidered by the trial Judge. To that end the appellant may lodge an application, before the trial Judge, pursuant to section 108 of the Sexual Offences Act 2003 seeking a variation of the terms of the SOPO, where the matter can be reconsidered in the light of this judgment.