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IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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THE KING

v

JACEK PACYNO

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REFERENCE UNDER SECTION 36 OF THE CRIMINAL JUSTICE ACT 1988 (AS AMENDED BY SECTION 41 OF THE JUSTICE (NORTHERN IRELAND) ACT 2002)

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Mr David McNeill (instructed by the PPS) for the Applicant
Mr Blaine Nugent (instructed by PA Duffy Solicitors) for the Respondent

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Before: Keegan LCJ, Treacy LJ and McFarland J

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KEEGAN LCJ (*delivering the judgment of the court*)

Introduction

[1] This is an application by the Director of the Public Prosecution Service ("the DPP") for leave to make a reference to the Court of Appeal under section 36 of the Criminal Justice Act 1988 as amended to review a three-year probation order imposed on the respondent on 19 September 2023 by Her Honour Judge McColgan KC ("the judge").

[2] The sentence was imposed following pleas of guilty in respect of seven counts of engaging in sexual activity in the presence of a child aged between 13 and 16 years, contrary to Article 18 of the Sexual Offences (NI) Order 2008 ("the 2008 Order), one count of causing or inciting a child aged between 13 and 16 years to engage in sexual activity, contrary to Article 17 of the 2008 Order, two counts of engaging in sexual activity in the presence of a child under 13 years old, contrary to Article 18 of the 2008 Order, 18 counts of making indecent photographs of children, contrary to Article 3(1)(a) of the Protection of Children (NI) Order 1978, three counts

of possession of a prohibited image of a child contrary to section 62(1) of the Coroners and Justice Act 2009 and six counts of possession of an extreme pornographic image contrary to section 63 of the Criminal Justice and Immigration Act 2008.

[3] The DPP now submits by way of a reference to this court that the sentence of three years' probation was unduly lenient in this case. Several ancillary orders were also imposed including a five-year Sexual Offences Prevention Order. No application is raised in relation to these orders.

Factual Background

[4] On 16 January 2019 police ("the PSNI") searched the respondent's home in Belfast and seized 13 devices. Seven devices were examined as part of a proportionate approach adopted by the PSNI. Six devices contained indecent images of children of all three classifications and nine live stream recordings of the respondent masturbating while female children watched on the live streams. The number of children on the live streams varies between one and three each time and there are a total of 17 children involved. In two of the live streams at least one of the children is very young.

[5] Counts 1–10 cover the offending on the live streams and are the primary focus of this reference. By virtue of counts 1, 2, 3, 4, 5, 8 and 9 the respondent was charged with engaging in sexual activity in the presence of a child between 13 and 16 years, contrary to Article 8 of the 2008 Order. This is a serious and specified offence under the legislation for which the maximum sentence is 10 years' imprisonment. By count 6 the respondent was charged with the offence of an adult causing or inciting a child aged between 13 and 16 years to engage in sexual activity, contrary to Article 17 of the 2008 Order. This is a serious and specified offence under the legislation for which the maximum sentence is 10 years' imprisonment. By virtue of counts 7 and 10 the respondent was charged with the offence of an adult engaging in sexual activity in the presence of a child aged under 13 years, contrary to Article 18 of the 2008 Order. This is a serious and specified offence under the legislation for which the maximum sentence is 14 years' imprisonment.

[6] The broad background of the above offending is a prolonged period of engagement with young children over livestream during which the respondent exposed himself and masturbated. Also, on one occasion the respondent typed something into his computer and a female child on the live stream responded by exposing her breasts. This recording has been classified as an indecent video of Category C and is the subject of count 6 – causing or inciting sexual activity with a child.

[7] In addition, the respondent was charged with the making and the possession of indecent images as follows. The number and classification of the indecent images of children found on the analysed devices is set out below:

Category A – 58 videos (counts 11-16, count 16 is a specimen count).

Category B – 26 videos (counts 17 – 22, count 22 is a specimen count).

Category C – 367 videos and 3 images (counts 23-28, count 28 is a specimen count).

(We have used the established categorisation of A – images involving penetrative sexual activity, sexual activity with an animal or sadism; B – images involving non-penetrative sexual activity; and C – indecent images not falling into categories A or B.)

Prohibited images – 3 images being copies of the same image found on three separate devices (counts 29–31).

Extreme pornography – 132 videos and 55 images (counts 32-37, count 37 is a specimen count).

[8] The offending concerned with indecent images was reflected in 18 counts of making indecent images of children under Article 3(1)(a) of the Protection of Children (NI) Order 1978. This is a serious and specified offence with a maximum sentence of 10 years' imprisonment. There were also three counts of possession of a prohibited image of a child pursuant to section 62(1) of the Coroners and Justice Act 2009 with a three-year maximum sentence and three counts of possession of an extreme pornographic image under section 63 of the Criminal Justice and Immigration act 2008 with a maximum sentence of two years.

[9] There are therefore two aspects to this offending, namely engaging in and inciting sexual activity with a child and possession of indecent and prohibited images. All of this offending took place over a period of between four and five years (October 2014 and January 2019). The respondent gave a no comment interview on 14 April 2022.

[10] The respondent was committed to Belfast Crown Court on 11 May 2023. He was arraigned on 15 June 2023 and pleaded guilty to all 37 counts on the Bill of Indictment. The case was adjourned for a pre-sentence report and on 19 September 2023 the respondent was sentenced by the judge to a three-year probation order as outlined above.

Judge's sentencing remarks

[11] Prior to sentencing the judge had the benefit of written submissions from prosecuting counsel Mr Russell and Mr Nugent for the defence. She also heard oral submissions from both counsel during which we can see that the question of a non-custodial option was debated.

[12] In arriving at her conclusion the judge found the aggravating factors in the case were the fact there were multiple victims; the offending was committed over a four and a half year period and there was recording and retention of the material. With regards to mitigation the judge accepted that the respondent pleaded guilty although held, as the prosecution had raised, that the court ought to view that as more of a neutral finding in cases of this type. The lack of criminal record was also viewed as a neutral finding.

[13] The respondent's culpability was found to be high in view of the number of offences committed over the period of time. Harm caused could not be fully assessed as none of the victims was ever identified. The judge referred to the case of *R v QD* [2019] NICA 23 in which at para [55] the court stated that:

> "Where the activities are in any way exploitative the offence is inherently harmful and therefore, the offender's culpability is high."

[14] The judge also had the benefit of a pre-sentence report ("PSR"). She referred to the PSR in her sentencing remarks, particularly that the respondent is an almost 60-year-old Polish national with no previous convictions. He has a military background and came to Northern Ireland in 2005 to seek employment as a care worker. He has a long-term partner and is currently in full time employment with a plastics moulding factory. There was evidence of minimising his offending within the report. The respondent was assessed as medium likelihood of reoffending and falling within the moderate category for supervision and intervention. He is not considered to pose a significant risk of serious harm.

[15] The judge found that the custody threshold in this case was very definitely passed particularly in relation to counts one to ten. However, the judge was persuaded that in the circumstances of the case and by virtue of the PSR that, "the intervention of probation could be of benefit to the accused and ultimately to society." Therefore, the respondent was sentenced to a three-year probation order.

Arguments now made upon the reference

[16] Mr McNeill characteristically focused his submissions on the core issues in this case as follows. First, he highlighted that the reference is pursued in relation to counts one to ten. The respondent's offending was also aggravated by the large number of indecent images of all classifications found on his devices, which by themselves would fall into the bracket of six to twelve months or twelve months to three years on the basis of paras [16] and [17] of *R v Oliver & Others* [2002] EWCA 2766 *(*adopted in *AG's Reference (No. 8 of 2009) (R v McCartney)* [2009] NICA 52 reaffirmed in *R v Maxwell* [2023] NICA 21*).*

[17] The applicant's core submission is that offending of this nature and seriousness calls for deterrent and condign punishment applying *AG's Reference*

(No.2 of 2002) [2002] NICA 40 para [15], *AG's Reference (No 4. of 2005)* (*Martin Kerr*) [2005] NICA 33 para [23] and *R v QD* [2019] NICA 23 in which these authorities were cited with approval.

[18] As regards to the remote element of these offences the applicant relies upon *R v Watson* [2022] NICA 71 in which this specific issue was recently addressed. This authority was not brought to the sentencing judge's attention. *Watson* was a case in which a group dedicated to exposing perpetrators of sexual exploitation of children posed as a 13-year-old girl and engaged in a remote internet conversation with the offender. The applicant argued that this was less serious than the index case and relied upon the fact that the court held that a custodial sentence was justified and rejected the submission that a community-based penalty would have been appropriate (see paras [12]–[14]). The 12-month sentence in that case was held to be severe but not manifestly excessive and clearly it was only suspended for 12 months due to the appellant's severe physical disabilities.

[19] The applicant also submitted that the fact that the identities of the child victims are not known is of marginal importance in light of *R v QD* and *R v GT and HT* [2020] NICA 51. This argument was made on the basis that it can properly be inferred that the children suffered real harm by virtue of having been engaged by the respondent and caused to watch him masturbating, and in the case of the child in count six, incited to engage in sexual activity herself by pulling up her top. In this sense it is argued that the offences are more akin to contact offences than they are to the viewing of indecent images of children.

[20] Although there was a significant passage of time in this case the applicant submitted that the sentencing judge accepted the explanations provided for this, namely the pandemic and the number of seized devices. Therefore, Mr McNeill maintained that it was appropriate not to make a finding of culpable delay.

[21] Mr Nugent who ably represented the respondent, rightly accepted that the index offending was sufficiently serious to warrant the imposition of an immediate custodial sentence. However, he submitted that the sentence imposed was not unduly lenient as it was an appropriate alternative. Mr Nugent argued that the judge referred to the correct tests and principles in her sentencing remarks and did impose a condign punishment, as a result of which the respondent will undergo an intensive programme of treatment that benefits the community at large as well as the offender.

[22] The respondent also relied upon the case of *R v QD* where the offence committed was of a more serious nature and the court imposed a three-year probation order with the defendant's consent. The respondent refuted that *Watson* is less serious than the index case as in that case the defendant sought to engage a child in sexual activity which would involve, if the plans came to fruition, physical sexual contact. In this case there was no suggestion that the respondent ever planned to have direct contact with any child.

[23] Mr Nugent placed a considerable emphasis on the delay in this case. He maintained that the delay in concluding this case against the respondent who is a man of previous good character and was left waiting almost five years to learn his fate is culpable. In this regard Mr Nugent relied upon *R v Kidd* [2022] NICA 75.

[24] Mr Nugent also accepted that personal circumstances can only be of limited effect but that is not to say that they can be of no effect to the sentence. The court is also asked to take into account the events since the date of sentence as a result of which the respondent has had to flee his home after his address was published by the media. He received a threat notice from the PSNI on 21 September 2023 and he and his partner were advised to leave their home. Prior to this their house was sprayed with graffiti and their car was vandalised. The respondent was forced to live in hostels and has now secured a room in a house share. The respondent also lost his job as a fabricator due to his involvement in the index offences. He has since, however, gained other employment working six days per week.

[25] Finally, the submission was made that even if it is decided that the sentence is unduly lenient the court has a discretion as to whether to quash it or not (see *AG's Reference (No.1 of 2006) (Gary McDonald & Others)* [2006] NICA 4 at para [37]). Double jeopardy should also be taken into account (see *AG's Reference (No.3 of 2004) (Hazlett)* [2004] NICA 20 para [22]).

Consideration

[26] As to the test for leave in a reference we repeat what this court recently said in *R v Sharyar Ali* [2023] NICA 20 as follows:

> "[3] The reference procedure does not provide the prosecution with a general right of appeal against sentence. *Taylor on Criminal Appeals* (3rd ed, 2022), helpfully summarises the applicable legal principles as follows:
>
> > '13.51 As to the nature of the test for granting leave in a reference application the approach of the Court of Appeal Criminal Division (CACD) can be summarized as follows:
> >
> > (l) The court may only increase a sentence that is unduly lenient and not merely because it is of the opinion that the original sentence is less than that court would have imposed, unless the disagreement results from a manifest error.

(2) Leave should only be granted in exceptional circumstances and not in borderline cases.

(3) Section 36 was not intended to confer a general right of appeal on the prosecution. The purpose of the regime has been stated as being to allay widespread public concern arising from what appears to be an unduly lenient sentence. A sentence will be unduly lenient where, in the absence of it being altered, it would affect public confidence or the public perception of the administration of justice.

(4) The procedure for referring cases ... is designed to deal with cases where judges have fallen into gross error, where errors of principle have been made and unduly lenient sentences have been imposed as a result.

(5) It has been held that a sentence is unduly lenient 'where it falls outside the range of sentences which the judge, applying his mind to all the relevant factors, could reasonably consider appropriate.'

(6) The CACD will ask: was the judge entitled, acting reasonably, to pass the sentence that they did? Did the judge give full reasons for doing so? Was the reasoning and conclusion open to the judge?

(7) The CACD will pay due deference to the advantage of the sentencing judge. The court has noted that sentencing is an art and not a science and that the trial judge is well placed to assess the weight to be given to various competing considerations.

(8) Leniency of itself is not a vice. The demands of justice may sometimes call for mercy.'

[4] It follows from the above that there is a high and exacting threshold for a reference to succeed. The Court of Appeal when considering a reference must first decide

> whether to grant leave. The court must also decide whether a sentence is unduly lenient, not simply lenient. Finally, even if a court decides that a sentence is unduly lenient the court retains a discretion whether to interfere with a sentence in the circumstances of a particular case and in some instances where double jeopardy is in play."

[27] On the facts of this case we consider that the leave threshold is met. That is because sexual offending against children calls for deterrent and condign punishment as set out in *AG's Reference (No.2 of 2002)* [2002] NICA 40, para [15] and *AG's Reference (No 4. of 2005) (Martin Kerr)* [2005] NICA 33 para [23] cited above. The guideline case of *R v Oliver* which relates to indecent images also points to a custodial sentence of between six and twelve months as generally being appropriate for possessing a small number of images in the higher categories and a custodial sentence between twelve months and three years for possessing a large quantity of material in these higher categories even if there was no showing or distribution of it to others. *R v Oliver* has been approved in *R v McCartney* and both cases have been reaffirmed recently in *R v Maxwell*. In addition to the charges relating to possession the respondent is charged with offences of engaging in sexual activity and causing and inciting a child to engage in sexual activity. The judge's sentencing remarks give us no indication that she also took this offending into account when deciding on the appropriate sentence. We therefore grant leave.

[28] Having granted leave, the next question for the court is if the sentence was unduly lenient taking into account the facts of the case and the guidance in this area as set out above. It is also important to note as the Court of Appeal recalled in *R v McCartney* at para [13] that a sentencing judge may step outside guidelines in exceptional circumstances:

> "In *Attorney General's Reference (No.1 of 1989)* [1989] NI 245 the court also recognised that there will be exceptional cases where because of very special circumstances the judge in passing sentence will be justified in departing from established guidelines and where the Court of Appeal would accordingly not take the view that the sentence was unduly lenient."

[29] In this case the sentencing judge held that the custody threshold, "is very definitely passed particularly in relation to counts one through to ten." The judge was, however, persuaded that:

> "… in the circumstances of the instant case and by virtue of the report provided to me that the intervention of probation could be of benefit to the accused and ultimately, to society.

> The probation board have assessed the defendant as posing a medium likelihood of re-offending and that he falls within the moderate category of STABLE 2007, for supervision and intervention and in all of the circumstances of the case, I am going to impose the full probation order for three years …"

[30] It would have been helpful if the sentencing judge had provided more by way of explanation as to the specific circumstances of the case to which she was referring to which justified this sentence in addition to the aspects of the PSR referred to. We say this particularly as the respondent minimised his responsibility to the probation officer by claiming that he thought he was speaking to adult females and denying he was attracted to children. Thereafter, he appeared to accept his guilt, but he did not demonstrate great insight into the effects of his offending. The PSR is not overly positive and so the applicant cannot be described as a strong candidate for probation supervision. He was assessed as a medium risk of reoffending. The PSR does refer to a benefit to society of offenders of probation in a general sense and we assume that is what swayed the judge. However, in the absence of explanation this sentence is not transparent.

[31] After hearing from Mr Nugent we also allowed leave for probation to update this court and an addendum report was received which contains the following information:

> "Mr Pacyno appeared before Belfast Crown Court on the 19 September 2023 for a number of sexual matters. He was sentenced to a three-year Probation Order and five-year Sexual Offences Prevention Order.
>
> Since that time Mr Pacyno has attended Probation appointments on a weekly basis. The majority of these appointments have been office based with some telephone contacts. There have been two joint appointments with his Police Visiting Officer and two appointments in the presence of an interpreter.
>
> The majority of these appointments to date have been with regards to supporting Mr Pacyno to adjust to and deal with the significant changes in his personal circumstances given some media attention around his case. This has predominately been around the loss of his accommodation …, the loss of his long-term relationship and employment and the resulting negative impact on his emotional and mental health.

> Since the 19th September 2023 Mr Pacyno has been actively taking steps to stabilise his situation including engaging with the Northern Ireland Housing Executive (NIHE), Jobs and Benefits Office, General Practitioner (GP) and in relation to his mental health. Mr Pacyno experienced a significant period where he had no fixed abode and was contacting NIHE on a daily basis seeking support or paying for Hostel accommodation at his own expense.
>
> More recently Mr Pacyno has successfully secured a full-time job (the details of which he has shared with his Solicitor and the Court) and has been offered an address also through this employment. He is reporting compliant with medication prescribed by his GP and is awaiting an initial appointment …
>
> Depending on the outcome of Court proceedings going forward PBNI will continue to offer appointments and Mr Pacyno will be required to engage in one-to-one offence focused work and be open and honest regarding any changes in his circumstances.
>
> With regard to risk assessments Mr Pacyno is assessed as a medium likelihood of general re-offending and assessed as not posing a significant risk of serious harm to others. The separate assessments specifically for individuals convicted of sexual offences have been completed and the composite assessment for recidivism places him in the moderate category for supervision and intervention."

[32] The above shows that the respondent is motivated and engaging with probation which is a positive in his case. In addition, we received confirmation of employment. We were told that the respondent has been subject to threats in his area, has lost his home and is living between shelters and that his relationship has now ended following recent events. We take account of all these matters which weigh in favour of the respondent.

[33] However, the core question must be, what is the appropriate starting point in a case which involves not just possession of indecent images, but also serious additional offending involving sexual activity with children on the part of the respondent and causing children to engage in sexual activity?

[34] In this jurisdiction there is clear guidance in relation to sentencing for indecent images. In *R v Maxwell* [2023] NICA 21 the Court of Appeal confirmed the

ongoing application of the guidelines found in *R v Oliver* for this type of offending as follows in para [12]:

> "[12] The case of *R v Oliver* refers to the sentencing guidelines in England & Wales and sets out some guidance for sentencers in this area. In the *McCartney* case, from paras [4]-[5] the Court of Appeal applied this as follows:
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> > '[4] This court has not issued guidelines setting out the appropriate range of sentence for offences of this nature but for some years now sentencers have relied upon the guidelines issued by the English Court of Appeal in *R v Oliver*. We agree with that court that the primary factors determinative of the seriousness of a particular offence are the nature of the indecent material and the extent of the offender's involvement with it. The well-established categorisation of indecent material set out in *Oliver* is now widely used by police forces in the United Kingdom and the categories 1-5 are set out which are now A, B and C."

The court went on at para [5] to state as follows:

> '[5] The downloading or possession of a large quantity of material at levels 4 or 5 is a serious offence and for an adult offender without previous convictions after a contested trial a custodial sentence of between 12 months and three years will generally be appropriate. The Sentencing Guidelines Council in England & Wales has now suggested a slightly lower range, but we see no reason to depart from the range set out in *Oliver*. The age of the children involved may be an aggravating feature and assaults on babies or very young children are particularly repugnant because of the fear or distress they may have induced in the victim. The manner in which the images are stored on the computer may indicate a high level of personal interest in the material. Distribution of material at any level will be a serious

> aggravating factor and distribution of images at levels 4 or 5 would justify sentences in excess of three years. Where the distribution is for commercial gain or by way of swapping substantially increased sentences are appropriate.'"

[35] In addition, the court reiterated that higher sentences would be imposed for distribution as follows:

> "At para [6] the court also said:
>
> > '[6] Those who distribute or make available pornographic images on the internet must expect severe sentences because the accessibility of this material has the potential to corrupt in particular the young.'"

[36] Each case of this nature is fact specific. Often where a sentence lies will depend on the nature and extent of the images and the time frame during which offences take place. At the lower end a judge may also consider community options in simple possession cases particularly on a first offence. At the higher end a custodial sentence is more likely particularly if any distribution is involved even on a first offence absent exceptional circumstances. The *R v Oliver* guidelines provide a range of 12 months to three years for possession of many indecent images in the highest category and where distribution is involved.

[37] The critical point to make is that this case is distinguishable from the possession cases we have discussed given the other serious sexual offending that occurred. Accordingly, we take this opportunity to emphasise that the guidance in *R v Maxwell* and *R v Oliver* refers to offences relating to the making (downloading as opposed to creating) and possession of indecent images with culpability often measured by the quantity and nature of the images.

[38] The offending in this case is clearly raised a level as it also involves sexual activity and causing a child to engage in sexual activity. There is no direct guidance on this type of offending that we have been referred to. However, in *R v Watson* the court when considering cases of sexual exploitation stated as follows:

> "[12] We consider that all offences which involve the sexual exploitation, or attempted sexual exploitation, of children are serious offences and must be met with appropriate sentences which will include elements of retribution and protection for the public, particular[ly] the younger members of the public.

> [13] The full circumstances of this offending clearly justify the imposition of a custodial sentence.
>
> [14] Given the seriousness of the offending, we reject the argument that a community-based penalty would have been appropriate. We note that, in any event, the appellant would not have been able to undertake such a penalty given his physical debility.

[39] We take this opportunity to provide guidance in cases of this nature going forward. Offences involving engaging in sexual activity with a child or causing or inciting a child to engage in sexual activity should in future attract an immediate custodial sentence. We agree with Mr McNeill that for a first offence the range is three to five years is appropriate on a contest (before any alteration for a guilty plea) and that the ultimate sentence will depend on the frequency, extent of the activity, age, and number of victims. In cases such as these personal mitigating circumstances will have minimal effect unless something exceptional is in play such as extreme family circumstance or severe disability.

[40] In this case having considered the aggravating and mitigating factors we consider that an immediate custodial sentence of three years was appropriate prior to alteration for delay and the guilty plea. Given the seriousness of this offending we do not consider that a non-custodial option was appropriate in the circumstances of this case. That is because this case involved not just possession of indecent images but engaging in sexual activity with a child and causing or inciting a child to engage in sexual activity.

[41] Consideration of a non-custodial option will properly arise if a sentence of 12 months or less is contemplated or if circumstances arise which persuade a judge that a non-custodial route is appropriate. In either circumstance a judge should fully explain by way of reasons why that option is preferred and should refer to the evidence upon which the decision is based.

[42] We take issue with Mr McNeill's submission that there was no culpable delay in this case. A case of this nature did not involve the complex forensic work that we see in other cases. Five years is simply too long for a prosecution in a case of this nature involving vulnerable victims. This to our mind breaches the reasonable time requirement for prosecution of these cases enshrined in domestic law and article 6(1) of the European Convention on Human Rights. Therefore, the respondent is entitled to a reduction in sentence for delay which we assess as six months. That brings the sentence down to one of two years and six months.

[43] This was also a case where the respondent provided a no comment interview. Although he pleaded guilty at arraignment to our mind the judge was generous in allowing maximum credit. However, we will not interfere with that exercise of discretion. The guilty plea was a factor to consider in the sentencing exercise and not

simply a neutral factor as the judge described it. Allowing for maximum credit for his plea of guilty, the sentence that should have been imposed was one of 20 months imprisonment.

[44] Implicitly it seems that the court may have been attracted to a non-custodial sentence as these were non-contact offences, conducted over the internet. We take this opportunity to state the view of this court that such offences committed over the internet are equally serious when a perpetrator actively engages as here in physical activity by way of masturbation on live streams and incites children to respond in a sexual manner. As Mr McNeill rightly stressed if the respondent had met the children in a local park over four to five years rather than over the internet a court would have had no hesitation in imposing an immediate custodial sentence. Accordingly, we consider that the sentence imposed was not simply lenient, it was unduly lenient.

[45] Having determined that this sentence was unduly lenient we turn to the disposal of this reference. We have an overarching discretion as to whether to quash the sentence. This discretion was discussed by the Court of Appeal in a reference of *R v Corr* [2019] NICA 64 when the court ultimately took the view that whilst the sentence was unduly lenient it would not be quashed applying double jeopardy. The court's rationale is found in the following paras of the judgment:

> "[60] We consider that the sentence was unduly lenient but that does not mean that it must be quashed. Rather even if it is decided that a sentence is unduly lenient there is discretion as to whether to quash the sentence – see *Attorney General's Reference (No: 1/2006) Gary McDonald and others* [2006] NICA 4 at paragraph 37.
>
> [61] The respondent has now served the custodial element of his 18-month sentence and accordingly if the sentence was quashed and this court imposed an increase in sentence that would involve him returning to prison. Ordinarily that is a factor to be taken into account by way of a reduction to the sentence to be passed under the principle of double jeopardy, see *R v Loughlin (Michael) (DPP Reference No 5 2018)* [2019] NICA 10 at [35]. However, on the unusual facts of this case we take it into account as a factor of some minor weight at this anterior stage in exercise of discretion as to whether to quash the sentence.
>
> [62] A feature of particular importance and a factor which has considerable weight in this case is that by this reference the prosecution is seeking to advance for the very first time an entirely new case. That is unfair to the

> respondent because it exposes him to the risk of a significantly greater sentence on an entirely new basis not advanced before the judge. It is also unfair to the judge who gave detailed consideration to the sentencing exercise as it was advanced before him. The prosecution have the obligation to place before the trial judge any arguments or material that is relevant to the issue upon which the judge is called upon to make a decision. We consider that on the facts of this case this amounted to conspicuous unfairness to the respondent.
>
> [63] We have taken into account the countervailing interest in an appropriate sentence being passed on the respondent. We note that by this judgment we have identified various matters that should assist in any future sentencing exercises. On the facts of this case and taking all those factors into account we consider that the feature which we have identified in the previous paragraph taken in combination with the fact that if the sentence was quashed and an increased sentence was passed then this would mean that the respondent would return to prison means that in the exercise of discretion that the sentence should not quashed."

[46] The distinction between *R v Corr* and this case is that the respondent has not served any custodial element, for what are a myriad of very serious offences against children. Against that he has started his probation work and is employed, and he has clearly suffered in the community because of publication of details of his offending.

[47] We have also considered the principle of double jeopardy. The Court of Appeal has considered this issue recently in *R v Ahamad* [2023] NICA 52 at para [19] as follows:

> "[19] ... The text *Blackstone's Criminal Practice* 2023 at paragraph D28.5 refers to the fact that when the Court of Appeal increases the sentence under the reference procedure its practice has often been to allow some discount on the sentence it would consider appropriate because of what is usually termed the double jeopardy of the offender having to wait before knowing if the sentence is to be increased. Where an offender has a substantial part of a long determinate sentence remaining this principle is of limited effect. However, where an offender is close to release or had a custodial sentence substituted for a non-custodial sentence a reduction

> should be applied. *Blackstone's* refers to a discount of 30% in such circumstances. We also refer to the case in this jurisdiction of *R v Corr* [2019] NICA 64. In this case we have considered the argument that the offender did not think that he was going to be subject to a period of imprisonment following his sentencing and so we will apply some reduction for double jeopardy, in the order of 10 months."

[48] We accept that the respondent did not think he would be subject to a custodial sentence at all and so the principle of double jeopardy may be applied. Against that the sentence imposed is out of step with the appropriate sentence in a case of this nature. We have already credited the respondent for the delays occasioned in his case and given him maximum credit for his plea of guilty which we have described as generous. We will reduce the sentence further to arrive at a final revised sentence of 18 months imprisonment.

Conclusion

[49] This case will serve as guidance for sentencers going forward in relation to offences conducted over the internet which involve engaging in sexual activity and causing or inciting children to engage in sexual activity. As we have said the fact that there is no direct physical contact does not alter the seriousness of such offending and the need for condign punishment. In addition, the fact that there are no identified victims does not mean that many children have not been exploited, corrupted, and degraded by this activity and that a deterrent sentence is required.

[50] We therefore allow the reference, quash the probation order originally imposed and impose an 18-month sentence of immediate imprisonment split equally between custody and licence.

[51] This court having now imposed a sentence of 18 months' imprisonment for offences against children and having determined that we are not satisfied that the respondent is unlikely to commit any further offence against a child, we now make a Disqualification Order under Article 23 of the Protection of Children and Vulnerable Adults (NI) Order 2003. We advise the defendant that his name will appear on the barred list for children and vulnerable adults under the Safeguarding Vulnerable Groups (Northern Ireland) Order 2007. The notification requirements under the Sexual Offences Act 2003 will now apply for 10 years, and not for five years as he was advised earlier.