SHERIFFDOM OF LOTHIAN AND BORDERS AT EDINBURGH

[2017] SC EDIN 48

EDI-B1869-16

JUDGMENT OF SHERIFF T WELSH QC

In the Summary Application under Section 88G of the Sexual Offences Act 2003

RYAN NEIL O'DONNELL

Pursuer

Against

THE CHIEF CONSTABLE, POLICE SCOTLAND,
E Division, OMU, Fettes Avenue, Edinburgh

Defender

Pursuer: Collins; Collins & Co
Defender: McLean; Clyde & Co, Edinburgh

Edinburgh, 24 August 2017

The Issue

[1] This case called for a hearing with EDI-B1868-16 and raised similar issues The pursuer is a registered sex offender (RSO) who is subject to the notification requirements contained in Part 2 of the Sexual Offences Act 2003 (as amended) [the Act]. On 26 July 2004 (aged 17) he was convicted of 2 charges of lewd, indecent and libidinous practices and behaviour towards children which occurred when he was 15 years old. Under the Act these are Schedule 3 offences and as such, he became subject to the statutory notification requirements, initially only for 3 years, as he was not sentenced but placed on probation for that period. However, he breached his probation order and on 15 February 2006 he was sentenced to a 5 year extended sentence (following a successful appeal, 2 years of which, rather than 3 years, as originally fixed by the sheriff, was to be served in custody) and as

such he became subject to the notification requirements for an indefinite period. He was released on license on 14 February 2007 but was recalled to prison in October 2007 having been charged with but not subsequently prosecuted for analogous offending. He completed his extended sentence in custody and was released on 14 February 2011. On 20 October 2016 the defender reviewed the notification requirement and decided to continue it, for a fixed period, to a further review, 3 years hence, on 20 October 2019. The pursuer appeals against that decision which is called a Notification Continuation Order (NCO).

The Law

[2] As the appeal in this case developed and given the issues which emerged it became clear I would have to set out the scheme of the review process in some detail in this judgment to explain my decision in the case. The notification periods during which RSOs are obliged to comply with the notification requirements laid down by Part 2 of the Act, are set out in s82:

TABLE	
Description of relevant offender	*Notification period*
A person who, in respect of the offence, is or has been sentenced to imprisonment for life [, to imprisonment for public protection under section 225 of the Criminal Justice Act 2003 [, to an indeterminate custodial sentence under Article 13(4)(a) of the Criminal Justice (Northern Ireland) Order 2008] [2] or to imprisonment for] [1] a term of 30 months or more	An indefinite period beginning with the relevant date
A person who, in respect of the offence, has been made the subject of an order under section 210F(1) of the Criminal Procedure (Scotland) Act 1995 (order for lifelong restriction)	An indefinite period beginning with that date
A person who, in respect of the offence or finding, is or has been admitted to a hospital subject to a restriction order	An indefinite period beginning with that date
A person who, in respect of the offence, is or has been sentenced to imprisonment for a term of more than 6 months but less than 30 months	10 years beginning with that date
A person who, in respect of the offence, is or has been sentenced to imprisonment for a term of 6 months or less	7 years beginning with that date
A person who, in respect of the offence or finding, is or has been admitted to a hospital without being subject to a restriction order	7 years beginning with that date
A person within section 80(1)(d)	2 years beginning with that date
A person in whose case an order for conditional discharge or, in Scotland, [a community payback order imposing an offender supervision requirement] [3] , is made in respect of the offence	The period of conditional discharge or, in Scotland, the [the specified period for the offender supervision requirement] [4]
A person of any other description	5 years beginning with the relevant date

[3] In terms of s83(1), s83(5) and s84(1)(d) of the Act, initially, within 3 days of 'the relevant date' which will typically be the date of his conviction, excluding any period spent in custody and periodically thereafter, which will typically be annually until discharged from the requirement, a RSO must in terms of s87 of the Act attend personally at his local police station and orally notify the police of certain prescribed information and if applicable, changes thereto, which includes:

> "(a) the relevant offender's date of birth;
> (b) his national insurance number;
> (c) his name on the relevant date and, where he used one or more other names on that date, each of those names;
> (d) his home address on the relevant date;
> (e) his name on the date on which notification is given and, where he uses one or more other names on that date, each of those names;
> (f) his home address on the date on which notification is given;
> (g) the address of any other premises in the United Kingdom at which, at the time the notification is given, he regularly resides or stays;
> (h) whether he has any passports and, in relation to each passport he has, the details set out in subsection (5A);
> (i) such other information, about him or his personal affairs, as the Scottish Ministers may prescribe in regulations.
> (5A) The details are—
> (a) the issuing authority;
> (b) the number;
> (c) the dates of issue and expiry;
> (d) the name and date of birth given as being those of the passport holder."

In terms of s87(4) of the Act on these occasions various physical data or bodily samples may be taken by the police, such as photographs, fingerprints or samples of hair. The Sexual Offences Act 2003 (Notification Requirements) (Scotland) Regulations 2007 (SSI 2007/216), also require RSOs to notify the police, at the same time, of details of any bank accounts or credit cards operated by them.

[4] Additionally, in terms of s86 of the Act RSOs are further obliged to notify the police of details of any foreign travel outside of and back to the United Kingdom made by them:

> "(2) A notification under this subsection must disclose–
> (a) the date on which the offender will leave the United Kingdom;
> (b) the country (or, if there is more than one, the first country) to which he will travel and his point of arrival (determined in accordance with the regulations) in that country;
> (c) any other information prescribed by the regulations which the offender holds about his departure from or return to the United Kingdom or his movements while outside the United Kingdom.
> (3) A notification under this subsection must disclose any information prescribed by the regulations about the offender's return to the United Kingdom."

Failure to comply with the notification requirements without reasonable excuse is a criminal offence (s91(1)(a)) punishable by up to five years' imprisonment (s91(2)(b)).

[5] For the purposes of Part 2 of the Act, unless a NCO is made, a person subject to indefinite notification is discharged from the notification requirements, in terms of s88B(1) of the Act:

> "(a) where the relevant sex offender was aged 18 or over on the relevant date, the date falling 15 years after that date;
> (b) where the relevant sex offender was aged under 18 on the relevant date, the date falling 8 years after that date."

As indicated above the relevant date for the purpose of the present case is 26 July 2004, the date of conviction, on which date the pursuer was 17 years old.

[6] Potential discharge from or extension of the notification requirement is now subject to mandatory administrative review by the defender. S88C of the Act provides:

> "(1) The relevant chief constable must no later than the date of discharge—
> (a) make a notification continuation order in respect of the relevant sex offender; or
> (b) notify the relevant sex offender that the offender ceases to be subject to the notification requirements of this Part on the date of discharge.
> (2) A notification continuation order is an order making the relevant sex offender subject to the notification requirements of this Part for a fixed period of not more than 15 years from the date which would, but for the order, have been the date of discharge.
> (3) The relevant chief constable may make a notification continuation order only if satisfied, on the balance of probabilities, that the relevant sex offender poses a risk of sexual harm to the public, or any particular members of the public, in the United Kingdom."

[7] S88C sets out the mandatory procedure to be followed and the grounds which have to be considered by the defender before a NCO can be made:

> "(4) In deciding whether to make a notification continuation order, the relevant chief constable must take into account—
> (a) the seriousness of the offence (or offences)—
> (i) of which the relevant sex offender was convicted;
> (ii) of which the relevant sex offender was found not guilty by reason of insanity;
> (iii) in respect of which the relevant sex offender was found to be under a disability and to have done the act charged; or
> (iv) in respect of which the relevant sex offender was cautioned in England and Wales or Northern Ireland, which made the relevant sex offender subject to the notification requirements of this Part for an indefinite period;
> (b) the period of time which has elapsed since the relevant sex offender committed the offence (or offences);
> (c) where the relevant sex offender falls within section 88A(1)(b)(ii), whether the relevant sex offender committed any offence under section 3 of the Sex Offenders Act 1997;
> (d) whether the relevant sex offender has committed any offence under section 91 of this Act;
> (e) the age of the relevant sex offender at the time of the decision;
> (f) the age of the relevant sex offender at the time the offence (or offences) referred to in paragraph (a) was (or were) committed;
> (g) the age of any person who was a victim of any such offence (where applicable) and the difference in age between the victim and the relevant sex offender at the time the offence was committed;
> (h) any convictions or findings made by a court in respect of the relevant sex offender for any other offence listed in Schedule 3;
> (i) any caution which the relevant sex offender has received for an offence in England and Wales or Northern Ireland which is listed in Schedule 3;
> (j) whether any criminal proceedings for any offences listed in Schedule 3 have been instituted against the relevant sex offender but have not concluded;
> (k) any assessment of the risk posed by the relevant sex offender which has been made by the responsible authorities under the joint arrangements for managing and assessing risk established under section 10 of the Management of Offenders etc. (Scotland) Act 2005;
> (l) any other submission or evidence of the risk of sexual harm posed by the relevant sex offender to the public, or any particular members of the public, in the United Kingdom;
> (m) any submission or evidence presented by or on behalf of the relevant sex offender which demonstrates that the relevant sex offender does not pose a risk of sexual harm to the public, or any particular members of the public, in the United Kingdom; and
> (n) any other matter which the relevant chief constable considers to be appropriate.
> (5) A notification continuation order must state—

(a) the reasons why the order was made; and
(b) the reasons for the determination of the fixed period in the order.

(6) A notification continuation order must be notified to the relevant sex offender by—

(a) the relevant chief constable sending a copy of the order to the relevant sex offender by registered post or by the recorded delivery service (an acknowledgement or certificate of delivery of a copy so sent, issued by the Post Office, being sufficient evidence of the delivery of the copy on the day specified in the acknowledgement or certificate); or
(b) a constable serving a copy of the order on the relevant sex offender."

[8] In terms of s88E of the Act a NCO is also subject to further mandatory review and possible further extension in the same way as the initial notification requirement and may be further continued for a fixed period of not more than 15 years.

[9] The RSO has no right to demand periodic review of his order by the defender but should the defender for any reason fail to comply with the mandatory duty to review imposed upon him, relief is provided to the RSO in terms of s88F of the Act and he may apply to the sheriff for an order that he should no longer be subject to the notification requirements and be discharged. In the event such an application is made the defender has a right to be heard and can move the sheriff to make a judicial NCO.

[10] Quite separately from the right to make a summary application to the sheriff for review of the notification requirement following any administrative failure by the defender to comply with his statutory duty, the Act provides that the RSO has a separate right of appeal to the sheriff against a decision of the defender to make a NCO. It was the meaning of these provisions which caused difficulty during this appeal. Section 88G states:

"(1) The decision of the relevant chief constable—

(a) to make a notification continuation order under section 88C(1)(a) or 88E(1)(a) or under section 88D(3)(a) as it had effect before the coming into force of the Sexual Offences Act 2003 (Remedial) (Scotland) Order 2011; and
(b) setting the fixed period of the notification continuation order,
may be appealed by the relevant sex offender within 21 days after the date specified in subsection (3).

(2) An appeal under subsection (1) is to be made by summary application to the sheriff in whose sheriffdom the relevant sex offender resides.

(3) The date is—

(a) where the decision of the relevant chief constable was made on or after 28th January 2011, the date of the decision; or

(b) where the decision was made before 28th January 2011—

(i) the date of discharge, in the case of a decision under section 88C(1)(a);

(ii) the further date of discharge, in the case of a decision under section 88E(1)(a); and

(iii) the applicable date, in the case of a decision under section 88D(3).

(4) The decision of a sheriff—

(a) on an application made under section 88F(1);

(b) on appeal made under subsection (1); and

(c) in relation to the fixed period of the notification continuation order,

may be appealed by the relevant sex offender or the relevant chief constable to the sheriff principal within 21 days of the date of that decision.

(5) On an appeal under this section, the sheriff or the sheriff principal may—

(a) uphold or quash the decision of the relevant chief constable or, as the case may be, the sheriff;

(b) make a notification continuation order; or

(c) vary the fixed period in that order.

(6) Section 88C(3) to (5) apply in relation to the making of a notification continuation order under this section but a reference to the relevant chief constable is to be read as a reference to the sheriff or, as the case may be, sheriff principal.

(7) The relevant chief constable and the relevant sex offender may appear or be represented at any hearing in respect of an appeal under this section.

(8) Where an appeal under this section is finally determined, the sheriff clerk must send a copy of the interlocutor, and where made a copy of the notification continuation order, to the relevant sex offender."

(9) The copy of the interlocutor, and where made the copy of the notification continuation order, is sent in accordance with subsection (8) if—

(a) sent by registered post or by the recorded delivery service (an acknowledgement or certificate of delivery of a copy so sent, issued by the Post Office, being sufficient evidence of the delivery of the copy on the day specified in the acknowledgement or certificate); or

(b) given to the relevant sex offender.

(10) The relevant sex offender remains subject to the existing notification requirements of this Part until the matter is finally determined as mentioned in subsection (11).

(11) The matter is finally determined—

(a) where it is decided that a relevant sex offender should cease to be subject to the notification requirements of this Part, or the decision to make a notification continuation order is quashed, on the expiry of the period of 21 days referred to in subsection (4) without an appeal being taken;

> (b) where a notification continuation order is made, or a decision to make such an order is upheld on appeal, on the expiry of the period of 21 days referred to in subsection (1) or (4) without an appeal being taken; or
> (c) where an appeal is taken—
> (i) on the disposal of the appeal; or
> (ii) on its being abandoned."

The Hearing

Preliminary Issues

[11] At the hearing before me on 26 July 2017, Ms McLean moved me to adjourn the case or make arrangements for the evidence to be recorded so that it might be available for any appeal. Mr Collins opposed that motion but moved me to hear the appeal on the basis of the pleadings and documents lodged and refuse to hear any oral evidence. I was told the defender had one witness in attendance, D Supt L McLuckie from Police Scotland Offender Management Unit (OMU), Edinburgh.

[12] I asked why arrangements to preserve the evidence, if that was thought necessary, had not been made at a preliminary hearing of the case. No satisfactory answer was given to that question and neither agent cited any authority on this question. I was told there had been a debate about the competency of the appeal based on time bar. The interlocutors in the process confirmed there had been several earlier hearings.

[13] I refused all these motions. The sheriff has very wide judicial discretion under summary application procedure. Rule 2.31 of the Act of Sederunt (Summary Applications, Statutory Applications and Appeals Etc. Rules) 1999 provides:

> "The sheriff may make such order as he thinks fit for the progress of a summary application in so far as it is not inconsistent with section 50 of the Sheriff Courts (Scotland) Act 1907."

Section 50 of the 1907 Act provides:

> "In summary applications (where a hearing is necessary) the [sheriff] shall appoint the application to be heard at a diet to be fixed by him, and at that or any subsequent diet (without record of evidence unless the [sheriff] shall order a record) shall summarily dispose of the matter and give his judgment in writing."

This case called on 19 January 2017, 13 March 2017 (Debate), 18 April 2017 and 18 May 2017. No adjusted record exists in the process, none having been asked for or ordered. The pleadings are brief and for the most part irrelevant. I considered the defender's motion to adjourn for the reason stated, with a senior police officer sitting in the waiting room in attendance to give evidence in a case about a RSO, to be without merit. I refused the motion to adjourn. Mr Collins stated he had no evidence to lead and was content to address me on the documentation in process and pleadings. Ms McLean indicated she wished to lead the evidence of D Supt McLuckie who was the operational head of the OMU for Scotland. I was told she did not make the decision appealed. That was made by D Supt Gordon who has since retired. D Supt McLuckie now occupies his post and supports the decision appealed against. Mr Collins opposed the motion to call the witness on the basis the witness did not make the decision. I considered the evidence to be competent and potentially relevant. I considered the witness could speak to system and process and as such would be of assistance in enabling me to determine the merits of the appeal. The pursuer did not attend the hearing.

The Evidence

[14] D Supt L McLuckie (43) gave evidence. She has 20 years Police service. She stated she had worked in various posts within the police in Scotland including CID, the Female and Child Unit, Anti-Corruption, Reactive Policing Unit, Crime Management, Homicide and Public Protection and was now the operational head of the OMU based in Fettes Police

Station, Edinburgh. She ranks below a divisional commander. The OMU sits in the Public Protection sector of Police Scotland. The unit is comprised of herself, a Detective Chief Inspector (Public Protection), a Detective Inspector, 3 Detective Sergeants and 17 Detective Constables. Their responsibility is to monitor, assess and mitigate the risk of RSOs when they are in the community using Multi-Agency Public Protection Arrangements (MAPPA) which are set up in a co-ordinated way between Police Scotland, Local Authorities, Health Boards and the Scottish Prison Service. These agencies have access to the UK computer based Violent and Sexual Offender Register (ViSOR). The OMU monitors compliance of RSOs and investigates any further offending by RSOs. Each DC has responsibility for 23 offenders. D Supt McLuckie indicated she has a management role and fulfils a quasi-judicial role in making and signing off on NCO decisions. This is a delegated function from the defender. The decision in respect of each review of the notification requirements is independent because she has no actual involvement with the management of the offender concerned. Her task is to make the appropriate decision based on the OMU's file on the RSO, a manager's report and taking account of the MAPPA recommendation in respect of continuing risk of the offender to the public and any other relevant information. She explained the indefinite notification review process. RSOs who are over 18 years at the point of conviction, if sentenced to more than 30 months imprisonment, have their notification requirement reviewed after 15 years. RSOs under 18 years at the point of conviction if sentenced to more than 30 months imprisonment are reviewed after 8 years. All RSOs are regularly monitored for compliance and each one is managed by a DC. She was familiar with the file of the pursuer. Her predecessor in office had taken the decision to continue the notification requirement on 19 October 2016. She reviewed the case prior to this appeal and agreed with the decision taken for the reasons stated. She indicated that before the decision

was taken there had been a MAPPA meeting to review the case and the MAPPA recommendation was that notification continue for a further 3 years for a number of reasons. These were stated in the NCO. They are:

1. Insufficient time period of compliance and stability
2. Ongoing criminal behaviour
3. Charged with a sexual offence in 2008 with a 14 year old female (not convicted)
4. No positive influences
5. Substance abuse
6. Repeated periods on CJSW supervision

The 3 year period was necessary to allow time for the pursuer to be re-assessed. She explained that after the pursuer's initial release on probation he had concealed the birth of a child he had in a relationship. This was a breach of his probation conditions. He was returned to court and sentenced to a 5 year extended sentence, initially 3 years custody and 2 years in the community but this was reversed to 2 years custody and 3 years in the community, on appeal. When released from his extended sentence on 14 February 2007, within a year, he had a sexual relationship with a 14 year old girl he met online. He was recalled to prison in October 2007 to serve the full extension period in custody. He was charged with having sexual intercourse with a minor but not subsequently prosecuted for this offence. He was released from custody on 14 February 2011. The witness agreed with the view of D Supt Gordon that insufficient time had passed with the pursuer at large in the community to justify discharging him from the obligation to notify and cease monitoring his behaviour. He was convicted of Class A drug related offences on 9 April 2013 and 31 May 2016. He was the subject of an £8515 confiscation order. He was made subject to periods of supervision in 2013 and 2016 on a Community Payback Order. By the time of his review he had been out of prison for 5 years and 8 months. Although informed of his right to do so, he made no representations to the OMU before the NCO was made. The witness indicated that

on release the pursuer struggled to engage with statutory agencies but his attitude has improved recently. There were no known positive influences in his life. Prior to the NCO being made the MAPPA risk assessment placed him at medium risk of re-offending. The MAPPA recommendation had been for an extension of the notification requirements for a period of 3 years. The pursuer's manager in the OMU had recommended a 2 year extension. In the event, D Supt Gordon had decided the pursuer remained a risk of sexual harm to the public and decided to make a NCO for 3 years for the reasons stated in the NCO which the witness agreed with. The pursuer had only been in the community for 5 years post release and a further extension of 3 years would mean 8 years of monitoring and notification would have transpired before review which was the norm for someone convicted at the age the pursuer was. The witness herself did not carry out the risk assessment but she was familiar with the RM 2000 risk assessment tool used.

[15] The witness was cross examined by Mr Collins. It was put to her that 5 years 8 months in the community was sufficient time to make an assessment. The witness disagreed. Her view was that 8 years uninterrupted was a prudent period of time to amass enough data to make an informed decision. It was put to the witness the pursuer was complying with his management in the community. The witness referred again to the post release offending and the fact that the pursuer had been unco-operative on release but was now engaging better with his managers. It was put to the witness that because there was, in his case, more than one victim of sexual abuse the pursuer would always score as a moderate risk using RM 2000. The witness agreed.

The Submissions

[16] Mr Collins invited me to quash the NCO because the information before the defender did not justify the conclusion that the pursuer continued to represent a risk of sexual harm to the public. He asserted that the test to be applied was whether the pursuer was still a risk of sexual harm to the community and on the information before the defender that conclusion was not justified. During the course of the evidence Mr Collins objected to the questioning when the witness was giving evidence about the reason for the pursuer's breach of probation on the basis this was irrelevant. I allowed the line subject to competence and relevance. I am of the opinion the line was relevant to the background of the pursuer's offending and is relevant in this appeal as it was taken into account by the decision maker as part of the whole circumstances of the case.

[17] Ms McLean submitted that the test was the one stated in s88C(3) of the Act namely:

> "The relevant chief constable may make a notification continuation order only if satisfied, on the balance of probabilities, that the relevant sex offender poses a risk of sexual harm to the public, or any particular members of the public, in the United Kingdom."

She said that test applied to the sheriff as well because s88G(6) of the Act provided that:

> "Section 88C(3) to (5) apply in relation to the making of a notification continuation order under this section but a reference to the relevant chief constable is to be read as a reference to the sheriff or, as the case may be, sheriff principal."

She informed me that the legislation was complicated and difficult to understand but I had to perform a balancing exercise by taking account of the various factors listed in s88C(4)(a) to (n) [see para 7 above] to decide if the pursuer continued to be a risk of sexual harm to the public. She said the legislation was unclear. I was invited to find on balance, in all the circumstances, that the pursuer remains a risk and refuse the appeal. She initially invited me to make my own NCO but when pressed as to the basis for that given the evidence led and

the meaning of the legislation she stated she had no instructions from the defender to that effect. Instead she invited me to refuse the appeal. She did not refer in detail to authority. She stated there is no authority on an appeal such as the present and that this added to the difficulty in the case.

Discussion

[18] I was grateful to parties for their submissions. I agree with Ms McLean that the scheme set out in the Act is complex and difficult to navigate. However, I am not persuaded that the test to be applied in the determination of whether a NCO should be quashed is whether it was justified in the sense that Mr Collins expressed. The thrust of his argument was that the defender was wrong in respect of the judgement made about the need for further notification. I was invited by him to review the same facts as the defender did, disagree with the decision made and come to a different conclusion. I am not persuaded that in a statutory appeal such as this, the sheriff has the power to do that. Equally, I do not agree that in deciding whether to quash a NCO, I am, in the first instance, obliged by the legislation, as was suggested by Ms McLean, to put myself in the shoes of the defender, on her reading of the meaning of s88G(6). When I asked Ms McLean whether the test for making a NCO was the same as the test for quashing one she was unable to answer that question.

[19] In my opinion the tests are not the same. Parliament had laid down that, in the first instance, the person responsible for deciding whether to make a NCO and how long it will last, is the defender. A system of review of indefinite notification requirements was introduced by the Sexual Offences Act 2003 (Remedial) (Scotland) Order 2011 (SSI 2011/45) ('the 2011 Order') as a consequence of the declaration of incompatibility of indefinite

notification without review contained in *R (F (A Child)) v Secretary of State for the Home Department* [2010] UKSC 17; [2011] 1 AC 331. The review scheme was held ECHR compatible in *Main v Scottish Ministers* [2015] CSIH 41; 2015 SC 639.

[20] Under the amended legislation the pursuer has a right to appeal against the decision of the defender to make a NCO in terms of s88G(1) which provides:

> "The decision of the relevant chief constable—
> (a) to make a notification continuation order under section 88C(1)(a) or 88E(1)(a) or under section 88D(3)(a) as it had effect before the coming into force of the Sexual Offences Act 2003 (Remedial) (Scotland) Order 2011; and
> (b) setting the fixed period of the notification continuation order,
> may be appealed by the relevant sex offender within 21 days after the date specified in subsection (3)."

A NCO is defined in s88C(2) as:

> "…. an order making the relevant sex offender subject to the notification requirements of this Part for a fixed period of not more than 15 years from the date which would, but for the order, have been the date of discharge."

In my opinion, these subsections mean the pursuer can only appeal the defender's decision to make a NCO. The pursuer cannot appeal the length of a NCO to the sheriff. The use of the word 'and' between s88G (1)(a) and (b) is purely connective. In my opinion it does not create a right to appeal the decision and separately a right to appeal 'the period fixed' in the NCO. The phrase 'setting the fixed period' is purely descriptive of the NCO and does not indicate a Parliamentary intention to create a right to appeal 'the period fixed' by the defender. Accordingly, in my opinion what is appealable is only the question of whether the defender has exercised his discretion lawfully in reaching a decision that the pursuer poses or continues to pose a risk of sexual harm to the public. The management of the risk, which includes setting the fixed period of the order, is a matter entirely for the OMU subject only to judicial review on ECHR or other grounds. The legislation has been held to be ECHR compliant. A RSO may be able to judicially review the period set by the defender in a NCO

[which would be difficult standing the decision in *Main v Scottish Ministers*] or a subsequent NCO made under s88E but that is not a matter for me. His right of appeal to the sheriff is confined to the defender's decision to make a NCO, not its duration.

[21] On appeal the sheriff has a number of powers the meaning of which in the context of the scheme created by the Act, according to Ms McLean, are difficult to construe. I agree. They are contained in s88G(5) which provides:

> "On an appeal under this section, the sheriff or the sheriff principal may—
> (a) uphold or quash the decision of the relevant chief constable or, as the case may be, the sheriff;
> (b) make a notification continuation order; or
> (c) vary the fixed period in that order."

In my opinion, s88G(5)(a) stands alone and means the sheriff on appeal has a binary decision to make, whether to uphold or quash the decision of the defender to make a NCO. There is no power to uphold the decision to make a NCO but alter the duration of the NCO fixed by the defender. However, if the decision of the defender is quashed the sheriff does then have the power to make a new NCO, or vary the 15 year period, fixed by s88C(2) in that order. The power to vary referred to in s88G(5)(c) refers to the NCO mentioned in s88G(5)(b) and not the period fixed in the NCO appealed against. If a new NCO is made then in those circumstances the sheriff requires to comply with s88G(6) and follow the procedure contained in sections 88C(3) to (5) of the Act. But in deciding whether or not to quash a NCO, in my opinion, it is not necessary to follow that procedure and apply the test contained in s88C(3). The issue on appeal will be whether the defender has exercised his discretion lawfully, followed that procedure and applied the correct statutory test [see para 24 below].

[22] This means that even if the decision of the defender is quashed he can still move the court to grant a NCO, of new. In my opinion this reading of s88G is in keeping with the

purpose behind the amended legislation which is to enable the defender to manage the risk associated with convicted sex offenders in the community. In short, Parliament has given the defender a second opportunity, before the sheriff, to have a NCO made, even if his own decision to make a NCO is quashed on appeal. Convicted sex offenders are dangerous people and it must have been the intention of Parliament to ensure that they are not easily discharged of the obligation to notify and be monitored in the community even if a substantive error was made by the defender in reaching the decision to make a NCO.

[23] This reading of s88G(5) is also consistent with the purpose behind s88F of the Act which gives the RSO a right to apply to the sheriff for discharge of the obligation to notify in the event of an administrative failure on the part of the defender to fulfil his duty to review. Section 88F(3) provides:

> "On an application under subsection (1), the sheriff may—
> (a) make the order sought in the application; or
> (b) make a notification continuation order in respect of the relevant sex offender."

As with a NCO made under s88G(5)(b), after successful appeal to the sheriff, if the application is refused, s88C(3) to (5) of the Act must be followed by the sheriff before a NCO can be made under this section. The defender is entitled to be heard at such an application which indicates that even in the event of a breach of statutory duty by the public official charged with the serious task of managing RSOs, the defender again has a second opportunity to have a NCO made. Accordingly, I conclude that Parliament intended that the defender is not lightly to be denied the right to re-establish his obligation to manage a RSO in the community, even if it is established that he has failed in his statutory duty to review under the scheme set out in the Act.

Decision

[24] However, upon what basis would I be entitled to quash the decision of a public official such as the defender, exercising discretion in the context of performing an administrative and regulatory function? I consider the suggested test that the decision was not justified to be vague and imprecise. I agree there is no direct Scottish authority on appeals from decisions to make a NCO. Ms McLean informed me the procedures set down in England and Wales were materially different and of no assistance. I was not addressed on English authorities.

[25] Before I would interfere with the exercise of discretion by the defender to make a NCO, which gave rise to an appeal, I would have to be satisfied there had been an error of fact or law established which has resulted in injustice. This test or variants of it are typically used in administrative appeals from decisions of public authorities exercising a regulatory function. It is not necessary for me to refine the test beyond the level of basic principle for the purposes of this case. It can, as stated, encompass oppressive or arbitrary decisions, decisions which are plainly wrong or irrational, unlawful decisions, breaches of natural justice and more besides.

[26] In the present case the defender delegated the decision made to a senior officer who exercised a quasi-judicial function. The pursuer was notified of the review process and his right to make representations to the officer charged with the duty to make the decision but chose not to do so. The decision maker was independent in the sense he had no direct management responsibility for the pursuer. I accepted the evidence of D Supt McLuckie as credible and reliable. On the documents and evidence before me, I was satisfied the decision maker followed the procedure set down in s88C and took account of the relevant information available including the factual circumstances of the pursuer's offending, the

seriousness of the offending, his subsequent behaviour when at liberty, his age at the time of commission of the offences and when the notification requirement was made, the time which has elapsed, the victim's age, the previous convictions of the pursuer, a report from the pursuer's police managers and a MAPPA recommendation relating to the level of risk that the pursuer poses of re-offending. These factors were all placed in the balance when deciding whether to make a NCO. I was also satisfied that the correct test contained in s88C(3) was applied.

[27] In the circumstances of the appeal I could see no error in fact or law, nor was I referred to any, which would entitle me to interfere with the exercise of discretion by the defender that a NCO was, on balance, necessary to protect the public from the risk of sexual harm from the pursuer for the reasons stated in the NCO. Rather, I reached the conclusion that as the process invoked was conform to the Act and the reasons given for the NCO cogent and reasonable then the decision appealed against was unimpeachable. I will refuse the appeal to quash the decision of the defender and uphold it instead.

Expenses

[28] Both sides are publicly funded. As presently advised I am not inclined to make any award of expenses.