SEXUAL OFFENDER PREVENTION ORDERS (SOPOs) AND SEXUAL HARM PREVENTION ORDERS (SHPOs): WHAT ARE THEY, WHEN ARE THEY IMPOSED AND THE EFFECT OF *ROWLETT*[1] UPON VARIATIONS

On the 18 December 2020, the Court of Appeal handed down the judgment in *R v Rowlett* [2020] EWCA Crim 1748. Unlike many judgments which come with fanfare, this important case was largely missed by many. The Appeal Court judges address the issues of the differing threshold test to be applied in sentencing an offender to a Sexual Offences Prevention Order ("SOPO") and a Sexual Harm Prevention Order ("SHPO"). The latter has become the updated version of the SOPO as brought into being by s. 113 of the Anti-Social Behaviour, Crime and Policing Act 2014 ("the 2014 Act"). This appeal addresses the correct procedure for when an offender who had a SOPO has this varied to an order, which is for all intents and purposes a SHPO.

With the introduction of the SHPO, lawyers, judges and academics were at loggerheads with the correct steps that needed to be taken where a SOPO needed varying: *Rowlett*[2] has addressed the confusion.

During this article, **Yasin Patel** and **Caroline Skeet** look at SOPOs and SHPOs, consider the case of *Rowlett* and the issues arising from it as well as implications for future cases where such Orders will be considered.

What is a Sexual Offences Prevention order ("SOPO")?

SOPOs were first implemented by the Sexual Offences Act 2003 ("the Act"). Put in place to protect the public from sexual offenders, they imposed prohibitive terms on an individual, preventing them from doing certain things. Section 104 of the Act provided the three-part test to be applied to create a SOPO, namely;

1) is it necessary

[1] *R v Rowlett* [2020] EWCA Crim 1748

2) to protect members of the public
3) from serious sexual harm

Under s.107 of the Act, SOPOs could be applied for a fixed period of no less than 5 years or until further order. This meant an offender could be sentenced to an order which would run indefinitely.

To vary, renew or discharge a SOPO s.108, of the Act allowed a person listed in s.108(2) to apply for such a change. The listed persons were;

(a) the defendant,
(b) the chief officer of police for the area in which the defendant resides;
(c) a chief officer of police who believes that the defendant is in, or is intending to come to, his police area;
(d) where the order was made on an application under s.104(5), the chief officer of police who made the application.

What is a Sexual Harm Prevention Order ("SHPO")?

On the 8 March 2015, SOPOs were replaced with SHPOs under the 2014 Act. Section 103(A) to (K) was inserted to the Act replacing the SOPO requirements with the SHPO requirements. In creating the new SHPO, whilst SOPOs still existed, there was to be a transitional period. Parliament, under s.114 of the 2014 Act created a power to allow for that transitional period between SOPO's and SHPO's, as well as s.108 of the Act allowing for any existing SOPOs to be amended during the interim.

An important element that the drafters of the legislation had missed in relation to s.108 as was highlighted in *Rowlett*[3],

"was not a power to vary such a SOPO so that it became a SHPO."[4]

In order for a court to order a SHPO they must be satisfied that:

[4] *R v Rowlett* [2020] EWCA Crim 1748 [1]

1) it is necessary
2) to protect members of the public
3) from sexual harm

The silent editing of one key word, "serious" changed the test dramatically. As a result, the SHPO threshold test, is lower than that of the original SOPO, requiring protection from sexual harm, and no longer needing it to be serious sexual harm.

The Overlap

Whether it is a SOPO or SHPO the Court would need to know details of the original offence in deciding whether or not to impose an order. Other considerations for the Court are the offender's previous convictions and the risk an offender presents to the public. In addition to this, a sentencing Court would want to consider the following questions:

1. Would an order minimise the risk of harm to the public or a particular section of the public?
2. Is it proportionate?
3. Can it be policed effectively?
4. Are the terms clear and understandable?
5. Does a term set the defendant up to fail and if so how can this be altered to be effective, without causing an accidental breach?

The SHPO may only include negative prohibitions, there is no power to impose positive obligations, any relevant positive obligations are often already required by notification requirements. The order may have effect for a fixed period of not less than five years or until further order.

Brief Background to the case of *Rowlett*

On the 4 October 2012, the appellant, *Rowlett*, was convicted of raping a 13-year old girl. On 12 December 2012, he was sentenced to 10 years' imprisonment and made subject to a SOPO until further order.

The original SOPO prohibited the appellant from:

> "*Being alone or in the company of any female child under the age of 16 without the supervision of an adult with parental responsibility for the said child."*[5]

On the 5 December 2017, an application was made by the Chief Constable of Hertfordshire Police before HHJ Bright QC for the SOPO to be varied to a SHPO under s.108 of the Act. The application was made as a result of concerns raised due to the behaviour of the appellant after his release from custody on 12 May 2017. His Supervising officer from the Public Protection Unit had raised concerns due to sexually explicit messages on Facebook.

It was then discovered that there were sexually explicit messages involving girls aged 12 and 14 and further that there was no internet history saved on these dates, leading his supervising officer to confiscate and download the phone. This revealed searches made for "rape scenes", "virgin school girls" and "schoolgirls in the bath" amongst other similar searches, and there being 7 in total. The Appellant admitted some of these but denied the 7th, which related to a named individual in the appellant's family. Irrespective of this the Court of Appeal indicated in their judgment that he had clearly taken steps to avoid his use of the Internet being detected.

HHJ Bright QC in his comments indicated that the existing SOPO from 2012:

> *"Did not cover or prohibit some of the activities in which it was believed the appellant had engaged or might engage in the future, with regard to underage girls. It was entirely appropriate for the SOPO to be replaced with a completely new order, a SHPO, to prevent the appellant from doing*

[5] R v Rowlett [2020] EWCA Crim 1748 [5]

various things that were not previously covered…. The Court was satisfied that the new order was necessary for the protection of underage girls as there was a significant risk unless the order was made."[6]

Rowlett's legal team appealed the new Order. The appeal did not relate to the original SOPO, which covered very narrow terms, but the new SHPO.

Issues in Rowlett

The Court of Appeal in its judgment addressed the following issues, which were raised in this case:

1. Whether it was lawful to alter the SOPO to the SHPO? The Jurisdiction issue.
2. If the SOPO had been varied, whether it was correct to do so? The Threshold test.
3. Whether the newly created SOPO which the Court of Appeal created could be active from the date that HHJ Bright QC had the opportunity to create it from, 5 December 2017 and as such retrospectively activate?

<u>1. The Jurisdiction Issue:</u>

Addressing each question in turn, the Court of Appeal identified that there was no power under the relevant legislation at the time to alter the SOPO to a SHPO and as such HHJ Bright QC had erred in unlawfully replacing the original SOPO to a SHPO.

The Application before HHJ Bright QC cited s. 103E of the Act, which came into force on 8 March 2015. These formed part of the provisions, which were implemented to vary the SOPO scheme to the SHPO scheme. This section of the Act indicated that a Court can vary, renew or discharge a SHPO upon application and s.103E(5) indicated that this was only if it is necessary to,

(a) protect members of the public from sexual harm from the defendant or

[6] R v Rowlett [2020] EWCA Crim 1748 [19]

(b) protect children or vulnerable adults from sexual harm from the defendant … outside the UK.

However, as the Court of Appeal found, s.103E only applies to the variation of SHPOs and not SOPOs and so could not be used in this case to vary the order.

The Court of Appeal therefore quashed the SHPO, which came into effect on 5 December 2017.

In discussing whether the Crown Court had the right to vary the order, it was identified that the power to vary a SOPO under the complex transitional provisions of s.114 of the 2014 Act allowed a variation of the existing SOPO to continue under s.108 of the Act.

Therefore, had the original application been made under s.108 of the Act, rather than the new s.103E there would have been no need to appeal.

The Court of Appeal considered the case of *Hamer*[7] to assist it in its analysis. In that case, an order made by the Crown Court had also been quashed due to its defective and unlawful creation. A second issue *Hamer* considered was whether the Court of Appeal could make an order correcting the Learned Judge's error.

The SOPO in *Hamer* had been implemented unlawfully as the application had not been made by anyone listed in s.108(2) of the Act. The Court had no power to impose a SHPO because breaching a SOPO was not a specified relevant offence for the creation of a SHPO. Had Parliament intended breaches to be included, they surely would have done so in s.103A(2) and Schedules 3 and 5 of the Act as amended: they had not. As a result, neither the Crown Court nor the Court of Appeal in *Hamer* had the jurisdiction to make an order correcting the Judge's error.

[7] *R v Hamer* [2017] EWCA Crim 192

Rowlett was different: the statutory conditions of s.108(2) of the Act had been complied with. The SHPO application in 2017 had been made by the Chief Officer of Police. Moreover, s.108(3)(a) gives procedural primacy to the Criminal Procedure Rules ("CPR"). The CPR part 31.11(b) outlines that the Court may allow a notice or application to be given in a different form, or presented orally. Therefore, the Court would have had the jurisdiction to allow the original application for a SHPO to be changed to a varying order of the SOPO had the error been recognised and the application made orally on 5 December 2017 in such terms. Given this reasoning the Court of Appeal indicated the following:

> *Had that happened, the Judge would have been acting in his jurisdiction to make a proper order on a defective application. It follows therefore that we have power to do likewise*[8].

The Court of Appeal indicated that this was in accordance with their decision in *R v Ashford*[9] in which they applied the accepted submission of *R v Ashton*[10] "*that the approach to such uses is to avoid determining cases on technicalities when they do not result in real prejudice and injustice and to ensure that they are decided fairly on their merits*".

The Court of Appeal allowed the appeal in *Rowlett* on this basis, quashing the SHPO order, which was imposed in 2017.

The Appeal Court judges made an order in similar terms to those of HHJ Bright QC, with two fairly small amendments, through the power to vary a SOPO under s.108 of the Act, and which through the transitional provisions of s.114 of the 2014 Act had become a SHPO in 2020.

This raised further questions on whether the correction of the variation of the original SOPO rather than the creation of a new SHPO had,

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[8] *R v Rowlett* [2020] EWCA Crim 1748 [37]
[9] [2020] EWCA Crim 673
[10] [2006] EWCA Crim 794

(a) effect from the 5 December 2017, when it was capable of being made, or,
(b) whether it existed only from 18 December 2020, the date of the Appeal.

2. The Threshold Test:

The application before HHJ Bright QC in 2017 went on to indicate that a variation in relation to the existing SOPO was necessary under s.104(1) of the Act as amended by s. 114 of the 2014 Act to *protect members of the public from sexual harm*, the lower threshold test of a SHPO, instead of the higher threshold test of the SOPO.

In considering the facts of this case in relation to the threshold test, the Court of Appeal had no concerns that whether protecting members of the public from '*serious sexual harm'* under the SOPO test or protecting them from '*sexual harm'* as in the SHPO test, the Judge would have found it necessary to vary the terms of the SOPO. In essence, this made no difference save for the impact of the two amendments (which are discussed later in this article).

As indicated above, what would be deemed necessary to *protect the public from serious sexual harm* would be fact specific on a case-by-case basis. Here, the Appellant had a conviction for rape of a 13-year old girl, and whilst subject to license, had been engaging in sexually explicit conversations with underage girls as well as making relevant Internet searches from which the Court of Appeal considered the Applicant had:

> *"behaved in a very worrying and compulsive fashion very soon after his release. Any judge would rapidly conclude that an order of the kind which was made was necessary for the protection of the public from serious sexual harm. Any other conclusion would be perverse, particularly because there was and is no material to contradict this outcome.*[11]*"*

The terms of the SHPO ordered on 5 December 2017 were:

[11] *R v Rowlett* [2020] EWCA Crim 1748 [29]

"*1. Not to have any unsupervised contact with any child under the age of 16 without the permission of the child's parent/guardian and children's services.*

2. Not to communicate via the internet or by mobile phone with any child you do not reasonably believe to be aged 16 or over.

3. Not to use or possess any device with the capability of connecting to the internet unless:

i. You obtain written permission from PPU to use/possess device

ii. Risk management software is installed by PPU where available

iii. You make any device capable of accessing the internet in your possession (within your property) available upon request save and except for within the workplace, with written permission from PPU.

4. Not to delete/block/change any internet history (this includes using 'private browsing') on any mobile phone, computer, tablet or games console you use.[12]"

The Court of Appeal agreed with the Applicant in that the application had been made on a false basis by incorrectly applying the law and the wrong test. However, that was the high point of the Appeal for the Appellant as it was inevitable that the Court would have been satisfied that it was necessary to vary the order to protect female young children from serious sexual harm, having regard to the higher threshold test as set out in s.108(5) of the Act. The amendments mentioned above become apparent in that the Court of Appeal recognised that the threshold test would only have been passed in relation to female children.

As a result, the first amendment to HHJ Bright QC's order was that it was not necessary to protect male children from serious sexual harm from the Appellant as there was no evidence before the Court to justify or indicate such a risk. The second alteration the Court of Appeal considered necessary was that the Appellant should

[12] *R v Rowlett* [2020] EWCA Crim 1748 [9]

have been exempt from inadvertent contact with children attracting criminal liability, a commonplace addition to most SOPOs and SHPOs as a result of the case of *R v Smith*[13].

3. Retrospective application of the newly created SOPO:

The final query for the Court of Appeal was whether or not the newly created SOPO could apply retrospectively. This required clarification as the Defendant faced breach proceedings in the Crown Court relevant to the SHPO, which had now been quashed by the Court of Appeal. If the SHPO was quashed and the newly created SOPO did not apply retrospectively, the breach proceedings would have to be dismissed.

The Court of Appeal recognised that there appeared to be a statutory gap in the appeal route due to the complexity and transitional changes of the law in this area. This maze had been created by the draftsmen. The original appeal route against granting or refusing an application to vary a SOPO under s.108 of the act, existed at s.110(3) of the Act. S.110 and was repealed on 8 March 2015 when s.103(A) to (K) were implemented. S. 103(H) which came into force on the same date provided for a similar route of appeal against the variation or refusal of an application under s.103(E) in relation to SHPOs. There no longer existed a method of appealing the SOPO within these Acts and the order in place as at 5 December 2017 in *Rowlett*'s case was a SOPO.

The Court of Appeal, having considered this indicated the following:

> "*Assuming that Parliament did not intend to remove a right of appeal in respect of applications to amend SOPOs which continued to exist as such pending their conversion into SHPOs by operation of law in 2020, it is necessary to seek that right in the Criminal Appeal Act 1968. S.11(3) of the Criminal Appeal Act 1968 governs the extent of the court's powers on appeal against sentence. Of course, Judge*

[13] *R v Smith* [2011] EWCA Crim 1772, Archbold 20-275, Compendium of Sentencing S7-13.

Bright's order was not made when sentencing the Appellant. However, s.50(1) of the 1968 Act defines "sentence" as including

"any order made by a court when dealing with an offender.[14]"

Under s.11(3) of the 1968 Act the Court of appeal are able to,

(a) quash any sentence or order which is subject to the appeal; and
(b) in place of it pass such sentence as they think appropriate for the case and as the court below had power to pass or make when dealing with him for the offence.

The Defence submitted that under s.29(4) of the 1968 Act, which deals with the effect of an appeal against sentence, the order should not be backdated because this provision only related to the term of a sentence, not of an order, and as such there was no statutory warrant for such an order.

The Court of Appeal rejected this argument and relied upon s.11(3) stating the following:

"The order we make is made "in place of" the Crown Court order and must be an order which the Crown Court had power to make. The "place" of the Crown Court order includes the time during which it is valid, and our order substitutes itself for the Crown Court order in respect of the time of its validity.[15]"

The Court of Appeal avowed there was no prejudice to the Appellant on the basis that he knew at all material times what he was prohibited from doing[16]. They recognised that he had been deprived of a technical defence to the breach proceedings; however, this was a defence he had been totally unaware of prior to the instruction of his current legal team. The Appellant prior to the current appeal was unaware that

[14] *R v Rowlett* [2020] EWCA Crim 1748 [44]
[15] *R v Rowlett* [2020] EWCA Crim 1748 [47]
[16] *R v Rowlett [2020]* EWCA Crim 1748 [48]

anything had been done incorrectly, having been previously represented by experienced Counsel. As a result, the Defendant was in essence in the same position he had been at the outcome of the amended order on 5 December 2017.

What are the implications for practitioners?

This case highlights how fraught this area of law is with pitfalls, both legislatively and through its complex application. In instances where a client has had a previous SOPO varied, the precedent has been set for any incorrect variations to be corrected, provided it does not result in real prejudice and injustice.

With the change of all existing SOPOs to SHPOs on 8 March 2020, this is an area of law which has in one sense become a great deal harder to appeal, given that the threshold test is now lower, requiring only that there be a risk of '*sexual harm'* for it to be necessary to implement a SHPO. This is something, which practitioners will need to consider in light of any offenders facing charges specified in s.103A, and schedules 3 and 5 of the Act as well as in any breach proceedings.

This case highlights the importance of each case being considered on its own facts and each condition being considered in light of the individual's particular circumstances, offending history and other relevant factors in order to be provided with the best legal challenge and outcome. With the continuous development of technology, the internet, and our use of it in almost all daily activities and job roles, practitioners will need to be ever vigilant and abreast of the conditions and orders sought as they continue to become more prescriptive.

A fine balance needs to be found between the protection of the public and an individual's rights as enshrined in our unwritten constitution. Lawyers will need to ensure that the terms of any Order are closely analysed and before they are agreed the 5 questions that were outlined earlier in this article are addressed.

If you seek assistance, advice or clarification on SHPOs or SOPOs or other sexual offences, you may contact Yasin Patel or Caroline Skeet at Church Court Chambers.