Neutral Citation Number: [2021] EWCA Crim 1535

Case No: 202102273 A1

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT KINGSTON
His Honour Judge Lodder, Q.C.
T20200495

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/10/2021

Before :

LORD JUSTICE EDIS
MR JUSTICE TURNER
and
MRS JUSTICE COCKERILL

- -

Between :

THE QUEEN
- and -
MICHAEL NUGENT **Respondent**

APPLICATION BY HER MAJESTY'S SOLICITOR GENERAL FOR LEAVE TO REFER A SENTENCE UNDER SECTION 36 OF THE CRIMINAL JUSTICE ACT 1988

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Paul Jarvis for the **Attorney General**
Liam Walker assigned by the Registrar for the **Respondent**

Hearing date: 8 October 2021

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Approved Judgment

Lord Justice Edis :

Introduction

1. On 13 May 2021 Michael Nugent pleaded guilty to all 18 counts on an indictment. Counts 1-5 alleged offences of dissemination of terrorist publications, contrary to section 2(1) of the Terrorism Act 2006 ("the section 2 offences"). Counts 6-18 alleged offences of possession of information likely to be useful to the preparation of an act of terrorism, contrary to section 58(1)(b) of the Terrorism Act 2000 ("the section 58 offences"). The earliest offending charged relates to September 2019. The section 58 offences relate to digital documents found on his devices, and are dated to April 2020 (count 18 contains a misprint, giving the year as 2017). The Guideline on terrorism offences is effective from 27 April 2018. With effect from 12 April 2019 the maximum penalty for the section 2 offences was increased from 7 years to 15 years, and the maximum penalty for the section 58 offences from 10 years to 15 years. The Guideline has not been revised to reflect this increase. The trial judge, His Honour Judge Lodder QC, was therefore in the position of having to sentence in this case without a guideline which reflects the sentencing powers available to him and there is no guidance from this court on how the change on the maximum penalty affects the sentencing levels for these offences. The Solicitor General contends that he failed to make a sufficient increase to the Guideline levels to reflect Parliament's purpose when increasing the maximum penalty. We pay tribute to the careful way in which the judge approached this difficult case. We would also like to record the considerable assistance he received from Ms. Kate Wilkinson and Mr. Liam Walker, counsel who appeared before him, and the assistance we have had from Mr. Paul Jarvis and Mr. Walker. We shall have to deal with one error which crept into the analysis at the sentencing hearing, but this does not negate these observations.

2. We gave leave to refer this case at the hearing on 8 October and reserved our decision.

The sentences

3. The sentencing took place on 23 June 2021 in the Crown Court at Kingston upon Thames. The judge gave Nugent full credit for his pleas of guilty, and no complaint is made about that before us. He did not find that he was a dangerous offender for the purposes of sections 266 and 279 of the Sentencing Code, and this also is not challenged on this Reference. In identifying the custodial term of the special custodial sentence (sections 265 and 278 of the Code) which was required because he did not find that Nugent was dangerous and impose an extended sentence within that regime, the judge identified a sentence of 6 years for the section 2 offences and 5 years for the section 58 offences. After credit for the plea these were reduced to 48 months and 40 months respectively. A further deduction for personal mitigation reduced them to 42 months and 36 months. In this case it makes no difference in what order those reductions are made. All sentences were ordered to run concurrently, and 1 year extended licence period was imposed as was required. The sentences were correctly expressed and the result was a special custodial sentence of 54 months comprising a custodial term of 42 months and an extended licence period of 1 year. The necessary consequential orders were all properly made and it is unnecessary to set those out here, except that some confusion has arisen at some stage about the correct amount of the statutory Surcharge Order. For the avoidance of doubt, the correct sum for that order os £170 and the record should reflect that fact.

The Guidelines

4. We have referred already to the Guideline for these offences. It includes a specific warning to sentencers that it has not been revised since the increase in the maximum penalties by section 7 of the Counter-Terrorism and Border Security Act 2019.

5. The guideline for section 2 offences gives three categories of culpability. Category A includes offences where the offender intended to encourage or assist others to engage in terrorist activity. It is not disputed that these factors were abundantly present in this case. It was a category A case. The error which arose at the hearing concerns the assessment of harm. There was no evidence in this case that the offender had succeeded in his intention of encouraging or assisting anyone to commit an act of terrorism, and the question was whether he had disseminated statements or publications which provided "instruction for specific terrorist activity endangering life", which would be harm category 1, or "non-specific content encouraging support for terrorist activity endangering life", which would be harm category 2. The starting point in the existing guideline for a case in A1 is 5 years, with a range of 4-6 years. For a case in A2 the starting point is 4 years with a range of 3-5 years.

6. The section 58 guideline also categorises offences according to whether the information was possessed for use in a specific terrorist act. That would place an offence in culpability category A. If not, then category B for culpability would be engaged because, in the present case, the offender had terrorist connections or motivations and repeatedly accessed extremist material. So far as harm is concerned, this is assessed according to the nature of the instruction given by the material. In this type of case, the material provides instruction for specific terrorist activity (bomb making, shooting, stabbing and many other specific ways of committing acts of terrorism). The choice is between:-

Category 1

Material provides instruction for specific terrorist activity endangering life and harm is very likely to be caused.

Category 2

Material provides instruction for specific terrorist activity endangering life and harm is not very likely to be caused.

7. The judge said:-

> "The dissemination offences are category A1 and the guidelines under the former maximum of seven years set a four-year starting point with a range of three to five years. The record offences are category B2, and under their former 10-year maximum, a starting point of four with a range of three to five."

8. As appears above at [5], the starting point and range identified by the judge for the section 2 offences is that which applies to category A2 offences, and not A1as the judge said. This error appears to have originated with Ms. Wilkinson whose sentencing note said:-

> "Dissemination
>
> Culpability – 'A' – intended to provide encouragement and/or assistance to others to engage in terrorist activity
>
> Harm – '1' – the publications concerned provided instruction about activity which would endanger life but it was non-specific in terms of what terrorist event should take place.
>
> This leads to a starting point of 4 years' imprisonment with a range of 3 to 5 years under the former maximum of 7 years."

9. This would be substantially correct (it is worth recalling that this offending is not limited to the provision of instruction but also includes encouragement) if the number "2" had appeared after "Harm" instead of "1". This typographical error went uncorrected in the hearing and fed into the judge's sentencing remarks. He did, in our judgment, apply the correct starting point and range, because Ms. Wilkinson was right to say that the encouragement or assistance provided was for acts of terrorism generally, rather than for any particular act of terrorism which was under contemplation. This means that the offender's conduct was somewhat more remote from any act of terrorism that would otherwise be the case and is relevant to the assessment of the harm he has done.

10. The other guideline which was relevant to this case was *Sentencing offenders with mental disorders, developmental disorders or neurological impairments*. Medical evidence was placed before the court on this subject and there was also evidence from members of the offender's family who described his mental state and its deterioration during the pandemic.

The facts

11. The judge set out the relevant facts very succinctly and we will adopt his words from the sentencing remarks. The conduct fell into two parts:-

    i) The collection and retention of a very large quantity of material containing viable instructions for making deadly weapons, capable of causing death on a wide scale. This was accompanied by "mindset material" which shows that this offender has held extreme right wing opinions for a long time. He holds white supremacist opinions, venerates the Nazis and Adolf Hitler in particular, and seeks the expulsion or death of the Jewish and non-white residents of the United Kingdom. These beliefs predate the pandemic, and any deterioration in his mental state it may have caused. His violent hatred of very large numbers of people who have done him no harm is based on a world view which is quite widespread, and which has led to acts of terrorism in the United Kingdom and beyond. This conduct gave rise to the section 58 offences.

    ii) The use of encrypted social media to incite others of a like mind to take action to bring about his desired destruction of large numbers of people who live in the United Kingdom. This involved distribution of the material at (i) above (which is more serious than simply having it), but also encouragement of terrorism by distributing ideological materials and contributing his own views to online

> channels and groups. These people formed secretive online groups in which they encouraged each other in their murderous aspirations. Most were more careful about what they say than this offender, believing that their forums, groups and chatrooms are under surveillance. This behaviour gave rise to the section 2 offences, including count 4 which relates to conversations with an undercover police officer who engaged privately with the offender and to whom he supplied three of his terrorist manuals in April 2020, namely "Homemade C-4[1] a recipe for survival", "Ragnar's Homemade Detonators How to Make Em How to Salvage Em", and "Homemade guns and Homemade ammo". Counts 1-3 and 5 relate to the use of Telegram Channels. In counts 1-3 that was the "Assault Division" channel, and to his transmission on it of a video called "Monkey dancing Christchurch attack", "The Great Replacement – A Final Manifesto", and "21 Techniques of Silent Killing" respectively. Count 5 concerns a different Telegram channel which the offender set up as a supergroup called "Bua Sneatcha". This is Gaelic for "Grab Victory". A supergroup is one which can be accessed by 200,000 people. The offender set it up in September 2019 for the purpose of sharing extremist and racist publications. As with all the section 2 offences, he carried out these acts intending an effect of his conduct to be a direct or indirect encouragement to the commission, preparation or instigation of acts of terrorism.

12. Counts 1 and 2 concern material relating to the mass murder of Muslims at mosques in Christchurch, New Zealand, in March 2019. On the first anniversary a video clip taken by the murderer while he was killing people was circulated, after it had been modified by the addition of a cartoon of dancing gorillas and a soundtrack of a "Happy Anniversary" song. The offender did not modify it himself, but he did publish it on the "Assault Division" Telegram channel (count 1) together with the manifesto of the murderer intending that they would inspire others to emulate his action (count 2).

13. Each of counts 8-18 refers to a specific pdf publication. It is unnecessary to list them. They are instruction manuals of the kind which are frequently found in the possession of terrorist of all kinds, and which can be used to make bombs and guns and explain methods of killing people in a large variety of ways.

14. We extract this quotation from what the judge said this to the offender when sentencing him:-

> "You knowingly encouraged right-wing terrorism and have pleaded guilty to five counts of dissemination of terrorist material and 11 counts of possessing a record of use to a terrorist. You did not work, but you spent all of your time at home in your parents' house where from your bedroom you developed your online extremist persona. You posted toxic, offensive material to websites and administered groups which were dedicated to violent, racist, antisemitic and neo-Nazi ideology. Fortunately, and despite your efforts to remain undetected, you were discovered by the police. On 19 August 2020, your bedroom was searched and your electronic devices were seized and

[1] Composition *C-4* is a common variety of the plastic explosive family known as Composition *C*, which uses RDX as its explosive agent.

analysed. Your own handwritten diary notes show that you held these views from 2018. In particular, you made approving comments on 15 March 2019 about the massacre that had taken place that day in the Mosque in Christchurch. You expressed similar views online in the comments and postings you shared with likeminded people in a virtual group and on the neo-Nazi Assault Division channel which was available to anyone.

"Indications are that many thousands of people accessed these posts. They included a posting from the Christchurch Mosque attack at 14.44 on the day of the massacre. Your online identity was Thodin88. The number is a reference to the Nazi numerical code using the eighth letter of the alphabet and used to represent Heil Hitler. As the administrator of both the adult Assault Division Telegram group and the Assault Division Telegram channel, you could post for anyone who opened the channel to see the content, and you could and did forward content from other channels and groups. I have seen deeply offensive posts referring to coal burners, a derogatory term for white women who sleep with black men. SS insignia, references to the Nationalist Socialist Border Force and other virulent racist and antisemitic comments and postings. They include Hitler images, Holocaust denial content, conspiracy theory, pro-nationalist socialist comment and white supremacy. Your comments display the clearest hatred for Jews and black people.

"On 25 September 2019, you converted one telegram channel into a supergroup and called it Bua Sneatcha meaning 'Grab Victory'. That provided public access for up to 200,000 users. You posted images of weapons and conducted exchanges which spoke of Paki-bashing, killing niggers and taking Jews out in a boat and pushing them off. You spoke approvingly of lynching. You used your channel as a safe haven to post messages expressing and encouraging extreme racial hatred and violence towards black people, and in setting up this channel you provided others with access to terrorist publications and encouraged terrorist acts. On 15 March 2020, the first anniversary of the Christchurch attack, you posted a video of an extract taken from the livestream of Brenton Tarrant as he shot and killed 51 Muslims in the Mosque, onto which dancing gorillas are superimposed as 'Happy Anniversary' is played. The full video was also found on your device. This sick video encouraged terrorist acts.

"The same day you uploaded Tarrant's manifesto, '*The Great Replacement*, which encouraged readers to take action. Further commentary speaks of mass shooting. You say at one stage, 'Terrorism works'. You discuss firearms and consider other terror attacks. You speak in honour of those who committed outrages such as Tarrant and Anders Breivik in Norway. Again

> that same day, you uploaded *21 Techniques of Silent Killing* with instructions on how to inflict lethal injuries without attracting attention or causing disturbance, such as stabbing someone in the neck from behind as they sit on a park bench. As before, you posted to a channel for likeminded individuals and encouraged terrorist acts. An undercover police officer posing as an extremist infiltrated the Assault Division Telegram group. He noted your messages. You offered to distribute firearms manuals. You provided that officer with terrorist publications with detailed instructions on how to make viable bombs and weapons at home.
>
> "It is plain you had a wealth of extremist material which you were willing to provide widely to the group or directly upon request. Eleven examples are on this indictment. They include *CIA Explosives for Sabotage* manual, *Kitchen Improved Fertilizer Explosives* book, *9mm bullet holes, practical Scrap Metal Small Arms* and *The Anarchist Cookbook*."

The offender's mental state

15. Mr. Walker supplied the court with a helpful note in which he summarises the material on which he relies concerning this issue:-

> "3. The offender has a significant history of mental illness. Prior to the offence the offender had not been taking medication, had not been leaving his home and had suffered increased levels of stress due to COVID isolation, which had exacerbated the deterioration of his mental health.
>
> "4. The offender's medical records were provided to and summarised for the Court during mitigation. The following pertinent entries in those records were highlighted:
>
> a) The offender had been medicated since 2015;
>
> b) The offender had experienced '*depressive episodes'* since the age of 18;
>
> c) *'History of sexual abuse as a child;'*
>
> d) *'Patient tried to hang himself earlier today (2015);'*
>
> e) *'He stays inside and does not go out;'*
>
> f) *'He described symptoms of PTSD where he has been hyper vigilant, easily startled, constantly alert and unable to sleep.*'
>
> "5. Patient records reveal that the offender's last 'medication review' was in 2017. The offender had been sent a text message and a letter, which appear not to have elicited any response from the offender prior to his offending.

"6. In interview the offender was afforded an appropriate adult because of concerns around his mental health. At the beginning of the first interview the offender's solicitor explained that he had advised the offender to answer no comment on account of his mental health conditions.

"7. During the interview process the offender was offered and required numerous breaks. The breaks were required due to concerns over the offender's mental health.

"8. The offender was assessed by both a psychiatrist and a clinical neuropsychologist prior to arraignment.

"9. In his report on the offender, consultant clinical neuropsychologist Dr Watts observed:

> a) At para 27: 'Mr Nugent said that he first had contact with mental health services at the age of 32. However, he said that he tried to commit suicide at age 19. He explained that *'I tried to hang myself from the stairs with a dog leash…dad cut me down.'* He said that his father was concerned about the stigma of mental health and as a result he was discouraged from contacting mental health services.'
>
> b) At para 59: Mr Nugent obtained a Full-Scale IQ (FSIQ) of 89 (between 85 and 93 with 95% confidence) which falls in the *Low Average* range and ranks him at the 23rd percentile.
>
> c) At para 81: 'he presents as a rather introverted individual with *a poor ability to respond appropriately to stress*. It is possible that at times he has suffered some paranoid ideation congruent with a depressed and anxious mood state but there is less evidence that this reflects an underlying psychotic disorder. That said, his mental state should remain under review in terms of his depressive condition, risk of suicide and the presence of psychotic phenomena. As noted, he continues to be managed on anti-depressant medication.'

"10. In his report on the offender, psychiatrist Dr Singh concluded:

> 'In my opinion he is currently displaying features of a psychotic illness, the true nature of which is currently difficult to establish. This is on the background of a long history of mental health issues in the form of Anxiety, Depression, Suicidal attempts with concomitant use of illicit drugs*.'*

"11. Prior to sentence letters, from the defendant's family, addressing the offender's mental health were provided to the Court.

"12. The offender's father, John Nugent, observed:

> *'Michael has struggled with his mental health for a number of years. When the pandemic started his anxiety magnified and he felt unsafe. He has a habit of catastrophising when in a panicked state. We are used to him and help him rationalise the things which are racing through his mind.'*

"13. The offender's mother, Jeanette Nugent, observed:

> *'When the pandemic began, Michaels mental health began to deteriorate. All of the family were home a lot more and Michael would retreat to his room more.*
>
> *Media reports regarding the virus, immigration and very often irrelevant news reports disturbed him, feeling they may have a direct impact on him and/or his family.*
>
> *The pandemic significantly impacted Michaels quality of life with the constant reminder on the news, further complicated by the real threat of family members falling ill (health issues).*
>
> *As a family we tried to help him rationalise his fears.*
>
> *Michael would say that he felt his medication wasn't right but was too anxious to go to the GP for reviews.'"*

16. In the course of argument, the judge referred to a further medical report from Dr. Lock, Consultant Psychiatrist, which had been served by the Crown Prosecution Service. The judge observed that the medical evidence was not all one way. Dr. Lock concluded that the offender had features of an emotionally unstable personality disorder, with chronic dysphoria, which is low-grade depression of mood. He thought it possible that there had been discrete episodes of depression against that background. He did not think that the offender has ever suffered from a psychotic illness and was of the opinion that at the time of his assessment the offender was not suffering from any psychiatric condition. He thought that he had grossly exaggerated parts of his history and malingered some symptoms. This was on the basis of inconsistent accounts given by the offender and because some of what he said was inconsistent with medical records.

17. Dr. Singh reported that he felt that the offender was suffering from a major mental illness "the true nature of which is currently not clear". He felt that the psychotic symptoms were genuine and might result from a number of different conditions. His report concerned fitness to plead, and did not explore the extent to which the offender's extreme right wing views and genocidal aspirations were connected with any mental disorder. There was, in fact, no evidence at all that this was the case. The closest to it is a suggestion from the offender himself, recorded by Dr. Singh, that his anxiety, depression and paranoia causes him to feel isolated and to seek:-

> "Social contacts and as a result he joined the social media platform where he came into contact with people with extreme

> right-wing ideology, with whom he would relate as he also had similar opinion and ideology."

18. No doubt many lonely people use social media for company. His choice to use encrypted Telegram channels to incite and assist extremists in promoting a death cult was his own and not, so far as the medical evidence reveals, the product of his mental state.

19. The judge's conclusion about this was briefly expressed. He did not hear from the psychiatrists to decide which of them he preferred. He said:-

> "Whatever your mental health at the time, no one who has examined you concludes that you were not aware of what you were doing. The material shows your consciousness of who was joining, of checking the identifications, of moving to that supergroup all indicating you were very aware of what you were doing. You are 38 years old. I accept that your actions may have been influenced by the deterioration of your mental health. In prison, you have been treated. Although it is fair to note that Dr Singh who examined you whilst you were in prison concluded at the time of your examination, you were psychotic. It is said on your behalf that you are in a different category from other offenders and that your mental illness is inextricably linked to your offending. I accept that the pandemic exacerbated your anxiety and stress levels and that the care you have received since being in prison was not available before. It is of course significant that now you are receiving adequate medication."

20. As we set out above, the judge assessed the sentence for the section 2 offences as 6 years, from which he deducted 6 months for personal mitigation and one third for the guilty pleas. It seems to us that whether he applied the guideline on *Sentencing offenders with mental disorders* by considering the mental disorder at Step 1 (because the offending was connected with the mental disorder), or when assessing personal mitigation at Step 2 (because it was not linked to the offences) he gave it only limited weight. We consider that this course was properly open to him because the evidence of any real causal link between the offender's rather elusive diagnosis and his offending was very limited, or even perhaps absent. The judge described him as being on the "borderline" of being a dangerous offender and decided that the special custodial sentence was adequate for public protection. The danger he presents does not arise from a psychiatric condition which could be treated. There was little or no evidence to suggest that this was the case.

The relevance of the increased maximum sentences: the law

21. The Explanatory Notes to the Counter-Terrorism and Border Security Act 2019, at paragraph 1 of the Overview, explained that the measures in the Act itself, including section 7, were intended to-

> "Strengthen the sentencing framework for terrorism-related offences and the powers for managing terrorist offenders following their release from custody, including by increasing

> the maximum penalty for certain offences, to ensure that the punishment better reflects the crime and to better prevent re-offending".

22. The Court of Appeal in *Attorney General's Reference (R v Chowdhury)* [2020] EWCA Crim 1421; [2021] 1 Cr. App. R. (S.) 60 at [50] referred to *Thornley* [2011] 2 Cr. App. R.(S.) 62, at [13] for the "well-established principle that judges should reflect the will of Parliament in the determination of the overall seriousness of an offence type", but added that this did not remove the sentencing judge's responsibility to consider the facts of each case. Even though the maximum sentence for the offence in that case had doubled since the Definitive Guideline was introduced, the Court of Appeal granted leave but declined to interfere with the sentence passed on account of the exceptional nature of the mitigation (at [51]).

23. In *R v Richardson & Others* [2006] EWCA Crim3186; [2007] 2 Cr App R (S) 36, considering the impact of the then recent increase in the maximum sentence for causing death by dangerous driving, the Lord Chief Justice said this at [13]:

> "Consistently with our own analysis, the principle to be derived from them is that the primary object of the increase in the maximum sentence was to address cases of the most serious gravity, so as to permit the sentence to be greater than before, and in an appropriate case to be as long as or longer than the previous maximum. However, even in such cases it was not intended that the increase in sentence should reflect the consequences of the increase from ten years to fourteen years in a strictly mathematical proportion. It has long been recognised that mathematics does not provide the appropriate answer to a sentencing decision. That said, appropriate proportionality between the huge variety of offences which come within the ambit of these crimes leads to the conclusion that if the level of sentence in cases of the utmost gravity is significantly increased (as it should be) there should be some corresponding increase in sentences immediately below this level of gravity, continuing down the scale to the cases where there are no aggravating features at all."

24. In the pre-guideline era that was enough to address the effect of the increase in maximum sentences on the previous practice of the courts. In the modern era sentencing has become a much more structured process and it will be for the Sentencing Council in due course to consider what if any increases should be made to sentence ranges and starting points within the relevant guideline. It is enough for our purposes to say that we accept that where, as here, a maximum sentence has been very substantially changed and the guideline has yet to be updated, the sentencing court should reflect that fact, where necessary, by departing from the guideline in the interests of justice and imposing a sentence in the more serious cases which reflects that change. This will involve applying the structured process of the guideline and considering in particular the factors referred to in it. It will not, however, involve being constrained by the sentence ranges or starting points established under the previous maximum penalty.

25. One of the purposes of the range of offences created by the Terrorism Acts is to enable the criminal justice system to disrupt terrorist activity at a preliminary stage and to prevent it developing into a fully-fledged terrorist plot or a completed terrorist act. We interpret Parliament's decision to increase the maximum penalties for some of this class of offences as reflecting its assessment that terrorism is an increasing hazard to public safety, and that time actually spent in custody should be increased in order to protect the public. Support for this view may be found in the passing of the Counter-Terrorism and Sentencing Act 2021**.**

26. Moreover, we reiterate the sentencing principle that there is no distinction to be made between different terrorist groups. There is no reason to suppose that right-wing terror groups are any less dangerous than any other kind of terrorists. Recent figures available in the *Report of the Independent Reviewer of the Terrorism legislation on the operation of the Terrorism Acts 2000 and 2006*, published March 2021, suggest that right-wing terrorism is a growing problem:-

> "7.18 At the end of 2019, 231 individuals were in prison for terrorism-related offences (up from 222 in the previous year).
>
> 7.19. Of these, 177 were Islamist extremists (up from 176 in the previous year), 41 were identified as adhering to extreme right-wing ideologies (up from 28 the previous year, and up from only 5 in 2015), and 13 were classified as "other" (a category which includes prisoners not classified as holding a specific ideology)."

27. It is not possible to dismiss those who set up and use Telegram channels to spread hatred and to share terrorist techniques and manuals to give effect to that hatred as harmless cranks. This activity is designed to bring about acts of terror in the real world and, from time to time, it does so. When the section 2 offence was enacted there was considerable debate about its potential effect on freedom of thought and speech. Experience across the world since then has shown repeatedly how effective online radicalisation is and how it can be used to promote and perpetuate active terrorist groups.

Discussion and conclusion

28. We consider that the proper classification for guideline purposes was, as we have said, A2 for the section 2 offences, and B2 for the section 58 offences. The judge's approach was to make all sentences concurrent, which is correct in principle, but means that the sentences on the section 2 offences had to reflect the number of those offences (5), and the commission of the 12 section 58 offences as well. In addition, we consider that there were some features which justify the conclusion that this offending was serious.

29. The criminality in setting up the Bua Sneatcha channel in September 2019 was very serious because of its potential size. The other section 2 offences followed in March and April 2020, and thus this offending extended over a significant period of time. The section 58 offences were continuing offences, being examples drawn from a large library. At least in theory the guideline range and starting points relate to a single offence, although it is in the nature of section 2 offences that they are rarely committed as isolated offences as opposed to a course of conduct.

30. It is essential to bear in mind that the section 2 offences in this case involved an admitted intention that this activity would encourage or assist others to perpetrate an act of terrorism. The acts of dissemination were such that this intention might easily have actually been successfully achieved. The undercover police officer was supplied with viable terrorist manuals in the hope that he would use them to further the cause of white supremacism or antisemitism. This offender was trying to get people killed.

31. We further consider that the use of encrypted groups and channels to share this kind of material where it is likely to achieve the greatest effect, while being hard to detect, is a significant aggravating feature. Handing a document out at a public meeting means that it only reaches those who are present and is relatively overt. Those seeking to further terrorist causes therefore now use other means, and act with far greater sophistication. The consequence is that very large groups can be organised quite easily, which is a potential cause of very serious harm. "Deliberate use of encrypted communications or similar technologies to facilitate the commission of the offence and/or avoid or impeded detection" is an aggravating feature in the guideline at step 2 for both section 2 and section 58 offences, and this is a significant feature of this case.

32. In addition, further aggravating features identified in the guideline were present: the offender used multiple social media platforms to reach a wider audience and disseminated a significant volume of terrorist publications. By this means he communicated with known extremists, and he also hid behind an online alias as 'Thodin 88' which includes the reference to the Nazi numerical code '88' meaning 'Heil Hitler (HH)' as H is the 8th letter of the alphabet.

33. In this identity and another called 'Conquest' he was the administrator of both the Assault Division Telegram group, which allows users to share content and message each other, and the Assault Division Telegram channel. One of the more popular features of Telegram is the ability to create "channels". A Telegram channel is a one way means of disseminating material to the followers of the channel. A single or several assigned administrators for a Telegram channel can independently post within the channel for anyone who opens the channel to see the content. In addition to channels Telegram allows users to create and join groups. Users can join groups and chat with other members freely, posting their own content for others to see and discuss. Telegram also enables users to forward content from other channels and groups and other single users across into channels where they are administrators, groups they are members of, and other users they are chatting with privately.

34. The offender was an administrator member of at least Assault Division Channel and Group and Bua Sneatcha Channel. The theme of both Assault Division and Bua Sneatcha is to present a racist and white supremacist viewpoint throughout the posts. On occasion, there are pictures and memes to help present these views. Subject areas on which Thodin 88 contributed include Hitler/Nazi images, Holocaust denial, anti-semitic content, conspiracy theories, pro-Nationalist Socialist comment, and white supremacy. He comments regularly in group debates and frequently expresses a hatred for Jews and black people. His interest in these matters is confirmed by diary entries which showed the offender to have a long held far right extremist mindset. Diary entries dated in 2018 and 2019 show him to be in favour of "killing"and "sterilizing" "all non-whites and Jews" and supporting "terrorism" as "the only way out of this".

35. For these reasons, we consider that this offending is serious of its kind. The existing guideline ranges for section 2 A1 and A2 offences are quite close to each other and overlap substantially, reflecting the fact that all offences within those ranges are serious. They are therefore in the group of offences where the increase of the maximum penalty should make a significant difference.

36. The judge increased his sentence before deductions for personal mitigation and plea from 4 to 6 years, which is the top of the existing range for section A1 offences, and very close to the old maximum sentence. The question for us is whether that increase ought to have been greater. For the reasons we have given we think it should have been. In our view, a proper sentence for all of this offending would have been 8 years, from which we would deduct the 6 months which the judge allowed for personal mitigation and the one third deduction for the guilty pleas.

37. This results in a sentence of 6 years' imprisonment under section 278 of the Sentencing Code on counts 1-5 concurrently, comprising a custodial term of 5 years plus a 1 year extended licence as before. We do not interfere with the concurrent sentences on counts 6-18 which have been taken into account in assessing the section 2 sentences and which relate to less serious offences. This is because disseminating the material, in particular the terror instruction manuals to the undercover officer, was more serious than simply collecting or possessing it.

Result

38. We therefore quash the sentences on counts 1-5 and substitute in their place concurrent special custodial sentences of 6 years comprising a custodial term of 5 years and a 1 year extended licence.