Neutral Citation No: [2018] NIMag 1 ***Judgment: approved by the Court for handing down (subject to editorial corrections)****	***Ref:*** **2018NIMAG1** ***Delivered:*** **26/11/18**

IN THE MAGISTRATES' COURT

CHIEF CONSTABLE

POLICE SERVICE OF NORTHERN IRELAND

Complainant

and

JOHN McNICHOLL

Defendant

District Judge (MC) McNally

[1] The Complainant has, by summons, made application to the Court for a Violent Offences Prevention Order ('VOPO') in respect of the Defendant under section 55 of the Justice Act (Northern Ireland) 2015. An interim order was made by the Court on 17th August 2018. The application came before me for hearing on 29th October 2018 and was opposed by the Defendant.

[2] By way of background, Part 8 of the Justice Act (Northern Ireland) 2015 (sections 55 to 76) provided for the making of VOPOs and commenced on 1st December 2016.Section 55 of the Act defines a VOPO as an order of the court which provides prohibitions or requirements which the Court considers as necessary for the purposes of "protecting the public from the risk of serious violent harm" caused by the offender. It provides that the Order can be made for a period of two to five years, unless it is renewed or discharged, with the duration term specified in the order. 'Protecting the public from the risk of serious violent harm' is defined as "protecting the public; or any particular members of the public, from the current risk of serious physical or psychological harm caused by the offender committing one or more specified offences".

A 'specified offence' is defined in section 55(3) as an offence listed in Part 1 of Schedule 2 to the Criminal Justice (Northern Ireland) Order 2008 (violent offences). Section 56(4) makes it clear that the provisions apply to specified offences committed before the date of commencement as well as after.

Whilst a VOPO can be made by the Court on conviction under section 56 this is an application made by the Chief Constable under section 57. Such applications are made by complaint to the magistrates' court in circumstances where the offender is resident in NI, or believed by the police to be in, or intending to come to NI. The police must evidence to the Court that the qualifying offender has, since the appropriate date, acted in such a way as to give reasonable cause to believe that a VOPO should be made. Section 57(4) defines 'appropriate date' as the date of the person's conviction.

[3] The Complainant asserts that the Defendant is a qualifying offender by reason of the fact that he was convicted at the Youth Court sitting in Londonderry on 4th October 2006 of having committed the offence of grievous bodily harm with intent contrary to section 18 of the Offences Against the Person Act 1861 on 27th June 2006 whereby he repeatedly stabbed his partner with a knife.

The Complainant goes on to allege that the Defendant since that date has acted in such a way as to give reasonable cause to believe that a VOPO is necessary to protect the public from the risk of serious violent harm by reason of the following matters:

> (a) he was convicted at the Crown Court sitting in Londonderry on 12th June 2008 of having committed the offence of grievous bodily harm contrary to section 20 of the Offences Against the Person Act 1861 on 16th October 2007, whereby he stabbed a male to the chest and legs.
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> (b) he was convicted at the Crown Court sitting in Londonderry on 12th June 2008 of having committed the offence of assault occasioning actual bodily harm contrary to section 47 of the Offences against the Person Act 1861 on 17th October, 2007.
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> (c) he was convicted at the Crown Court sitting in Londonderry on 20th September 2010 of having committed the offence of grievous bodily harm contrary to section 20 of the Offences Against the Person Act 1861 on 7th March 2009.
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> (d) he was convicted at Londonderry Magistrates' Court on 13th November 2017 of assault on police contrary to Article 66(1) of the Police Act (NI) 1998 and possession of an offensive weapon contrary to Article

22(1) of the Public Order (Northern Ireland) Order 1987, both committed on 11th November 2017.

(e) on 23rd March 2018 he attended at Limavady PSNI station reporting that someone was trying to electrocute him in his home and that at the time he had in his possession a pair of scissors for his own protection.

(f) on 5th May 2018 he threatened his partner SM with a kitchen knife and repeatedly stabbed the mattress upon which she was sleeping.

[4] At the commencement of the proceedings, Ms Keenan B.L. on behalf of the Defendant, accepted that the Defendant was a qualifying offender based upon his conviction at the Youth Court on the 4th October 2006.

However, she raised an issue as to the time within which any civil complaint must be made to the court, relying on Article 78(1) of the Magistrates' Courts (Northern Ireland) Order 1981 which states;

> "Subject to this Article and Article 98(1) and to Article 35 of the Domestic Proceedings (Northern Ireland) Order 1980 and without prejudice to the provisions of any other enactment as to the time within which proceedings may be commenced, a court of summary jurisdiction shall not have jurisdiction to hear and determine a complaint in a civil matter unless the complaint is made WITHIN SIX MONTHS FROM THE TIME WHEN THE CAUSE OF COMPLAINT AROSE, OR, WHERE THE CAUSE OF COMPLAINT IS A CONTINUING ONE, FROM THE TIME SUCH CAUSE LAST CEASED TO CONTINUE".

She submitted that, in complying with section 57(3)(b) of the Act to set out the recent behaviour which gives rise to the application, this behaviour must be positioned no further than six months prior to the date of the complaint in order to comply with Article 78 of the 1981 Order. In a nutshell, she argued that only the last two listed incidents of 23rd March 2018 and 5th May 2018 fell within the statutory framework and that only these two incidents could be taken into consideration by me in deciding whether to make the order sought.

Mr Hindley B.L. countered that in section 57(1) of the Act referring to his "behaviour since the appropriate date" it was clear that the cause of complaint was a continuing one and if this were not the case the Court would be prevented from considering all the behaviour since the appropriate date and would instead be restricted to only considering behaviour during a distinct six month period.

[5] In Chief Constable of Cleveland Police v Haggas [2011] 1 WLR the issue of the time limit in the context of an application for a sexual offences prevention order was considered by the court but not determined. Collins J stated -

> "I do not need to decide that issue, and I have not heard argument in sufficient depth upon it. I simply make the point that since this is essentially to protect vulnerable people from the actions of a sexual predator, of one sort or another, it would be unfortunate if the mere fact that there had been a delay in making a complaint could shut out the complaint being brought before the justices."

Similar sentiments could be expressed in the context of consistent violent offenders.

In the Haggas case the qualifying offence was in 1996. The application for the SOPO was based on two incidents in 2001 and 2007. The Crown Court whose decision to refuse the application was being case stated had decided that there was insufficient evidence to establish that the Defendant in that case had acted in the manner which had been alleged in 2007. Collins J stated at paragraph 14 -

> "But what it does mean….is that if the police only had the 2001 matters, they would not have been able to make this complaint because they would undoubtedly have been out of time. That is clearly material, because if the Recorder was wrong in law to have decided that the 2007 matters could not be relied on, then there would be nothing left which could be properly relied on in order to justify the making of the order in the circumstances of this case"

Collins J did not go on to say whether he would have taken into account the 2001 incident if the 2007 incident had been proved to the satisfaction of the court.

It appears to me that once a court accepts that it has jurisdiction by the event giving rise to the complaint having occurred within six months of the complaint being laid the court can consider all the relevant behaviour between that date and the qualifying offence. Section 57(3)(b) directs the court to consider the actions of a person from the time of the appropriate date which in this case is 2006. In my view, a court would have more difficulty in determining whether it is necessary for a violent offences prevention order to be made and whether a person is likely to be violent in the future without considering the entirety of his history. It does not appear to me to be correct that a court, in coming to such a determination in this case could only consider the qualifying incident in 2006 and the two incidents in 2018. The defendant in this case has continued to commit violent offences, as evidenced by his convictions, and I conclude that the cause of complaint is a continuing one.

In the event that I am wrong in this conclusion I intend to adopt a two tier approach in considering the Defendant's acts by deciding whether the order should be made (a) taking into consideration the entirety of the matters alleged and (b) taking into account only the two matters in 2018.

It is interesting to note that shortly after the Haggas case, section 22 of the Policing and Crime Act 2009 amended the Sexual Offences Act 2003 by disapplying the time limits for complaints. I am not aware of any similar provision or amendment to the 2015 Act but it should be considered as a matter of urgency as these applications are now coming before the courts on a more regular basis.

[6] Constable Connery gave evidence by adopting her statement of 16th July 2018. This provided details of the incidents set out at paragraphs 3(a) to 3(f) above. The incidents at 3(a) to (d) resulted in convictions and speak for themselves. The log report of the incident on 23rd March 2018 indicates that the Defendant walked into the enquiry office of Limavady police station seeking help with his mental health. He had a pair of scissors in his pocket which he stated were used for cutting up items at home and he had forgotten they were in his pocket. It should be noted that the assertion in the application that he reported the scissors were for his own protection is unsupported by the evidence. The Defendant was noted to be calm and compliant though clearly paranoid. He reported that people were trying to electrocute him in his home.

In relation to the incident on 5th May 2018, I considered the transcript of a 999 call and viewed the body worn footage taken by Constable Maguire at the home of the Defendant's partner when he called at her home following the 999 call. Essentially, she alleged that the Defendant had entered her bedroom, put her out of bed and stabbed the mattress she was lying on repeatedly with a large black and white kitchen knife. The Defendant was arrested and charged on 7th May 2018. He was granted bail on condition that he should not have contact with SM. He went to her house on 8th May in breach of that condition and was remanded in custody.

SM subsequently made a statement on 29th May 2018 stating that the Defendant had not done anything and that what she had reported on the 999 call was not true. Due to ongoing concerns about his mental health the Defendant was transferred on 15th June 2018 to Shannon clinic under the Mental Health (Northern Ireland) Order 1986. Subsequent to this the charges against him were withdrawn.

Constable Connery confirmed the Defendant was a Category 3 offender. On being furnished with his criminal record I noted that he had been convicted at Limavady Magistrates' Court on 13th September 2017 of possession of an offensive weapon in a public place and assault on police and sentenced to four months' imprisonment. I

expressed surprise that this had not been included in the application and was told that the case was under appeal. Upon enquiry from me it was confirmed that the appeal was against sentence only. The appeal had been deferred on 27th November 2017 for six months but had still not been resolved. It is important to note that his conviction for these offences is not in dispute and it appears to me that I should take them into consideration in deciding upon the application.

[7] Ms Keenan submitted that even if I took into account all the incidents there were only six spanning a period of eleven years. Of these incidents there were just four of physical violent harm spanning over eleven years involving just one person on each occasion. She submitted that I should discount the incident of 23rd March 2018 as the Defendant did not display any violent tendencies when he appeared at the police station. The incident on 5th May 2018 should also be discounted as the charges had been withdrawn against the Defendant and that there were discrepancies between the accounts given by SM in the 999 call and the body worn footage. In short, she argued that the statutory requirements to impose a VOPO had not been met and that the terms of the order sought were neither necessary nor proportionate.

[8] The first matter that has to be established is that the Defendant is a qualifying offender. That is not in issue in this application and it is accepted by the Defendant that he is a qualifying offender.

Consideration then has to be given to section 57(3)(b) to establish whether the person has, since the appropriate date, acted in such a way as to give reasonable cause to believe that it is necessary for such an order to be made. There are two elements in that, firstly it has to be established that he acted in a particular fashion; and secondly, a judgment has to be exercised as to whether those actions are such that create a reasonable cause to believe that it is necessary for such an order to be made.

[9] Upon deciding whether the actions took place, the only incident in dispute is that of 5th May 2018. The incidents at paragraphs 3 (a) to (d) are proved by convictions as is the possession of an offensive weapon and assault on police on the 10th November 2017. The incident on the 23rd March is not disputed by the Defendant. He does, however, take issue with the incident on 5th May 2018. I, therefore, have to decide if the Defendant did behave in the manner as alleged in the application.

[10] In doing so I have to consider the relevant burden of proof, particularly in circumstances where this is a civil application.

Mr Hindley submitted that the burden of proof was the balance of probabilities citing B v Chief Constable of the Avon and Somerset Constabulary [2001] 1 All ER 562 as his authority. Whilst the court confirmed that the civil standard was the

appropriate standard of proof, it emphasised that the civil standard was flexible depending upon the seriousness of the allegations made against an individual Defendant. It stated that in a case involving serious allegations the difference between the civil and criminal standard would be barely discernible.

This was approved in the Haggas case by Collins J when he said -

> " But what is required, in my view, and I think it is made clear by a combination of B v Chief Constable of Avon and Somerset Constabulary is that the facts on which the judgment whether it was necessary to make an order is based must be established to the criminal standard. I say that because, although it is theoretically the civil standard, it, to all intents and purposes, would be criminal. As the House of Lords indicated in the McCann case, it is a matter of practicality and a pragmatic approach and so that justices are not left in any doubt, nor indeed is the chief officer of police left in any doubt, as to what the test is going to be, but that is the standard which has to be applied."

[11] In applying this standard to ascertain the facts, I have considered the transcript of the 999 call made by SM to the police on 5th May at 07.19 hrs, the body worn footage taken by Constable Maguire upon his arrival at the home of SM at 07.25hrs, the statements of Constable Maguire and Constable Kavanagh and the statement of withdrawal made by SM on 29th May 2018.

Whilst I was critical of the fact that no one seems to have investigated whether there was any damage to the mattress I am firmly of the view that the accounts given by SM in the 999 call and the body worn footage were statements made by her at a time when she was so emotionally overpowered by the event that the possibility of concoction or distortion can be disregarded and that they fall well within the 'res gestae' principle. She had made the call when she was in the Defendant's flat and the call was recorded at 07.19 hrs. The body worn footage had been recorded at her own home some 6 minutes later.

There are bound to be differences in an account in traumatic circumstances such as these between what is said in a 999 call and a more detailed discussion with a police officer in a situation where the danger has passed and the alleged offender is no longer present. Having viewed on a number of occasions the body worn footage I am satisfied that the account given therein by SM is a truthful account. She gave a detailed description of the knife and the stabbing of the mattress when the Defendant was shouting "You bastard, you bastard get out of the bed". She stated "He has the flat completely wrecked" and that "John needs serious help". In

particular, when she was asked if she was scared she replied that she did what she was told to do "leave the flat just in case".

I have also taken into account the body worn footage taken of the Defendant's flat depicting the state of disarray it was in and that this corroborates the account of SM.

I have also taken into account the description of the Defendant appearing in an aggressive and agitated state, that he was confrontational with the police and that he was behaving in a threatening manner. He was further described as being in an "emotionally disturbed state".

It is not without significance that, in a similar fashion to the incident on 5th May 2018, SM made a withdrawal statement following her complaint of the qualifying offence on 27th June 2006. She phoned the station to say that the Defendant had not stabbed her but that her wound was self-inflicted.

I am satisfied that, in accordance with the burden of proof set out above that the Defendant did behave in the manner alleged by SM on the body worn footage in that he did present with a knife and stabbed the mattress of the bed in which she had been lying.

[12] Having established that the Defendant committed the acts as set out at paras 3(a) to 3(f) and was convicted of being in possession of an offensive weapon on 13th November 2017, I now have to consider whether it is necessary to make a VOPO for the purpose of protecting the public from the risk of serious violent harm.

This comprises a two part test:

> (a) Is there a risk of serious violent harm?
>
> (b) If so, is it necessary to make an order for the purpose of protecting the public from such risk?

[13] Whilst there is no specific definition of "serious violent harm" in the Act section 55(2) sets out that -

> "any reference to protecting the public from the risk of serious violent harm caused by a person is a reference to protecting
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> (a) the public, or
>
> (b) any particular members of the public,
>
> from a current risk of serious physical or psychological harm caused by that person committing one or more specified offences".

A "specified offence" means an offence listed in Part 1 of Schedule 2 to the Criminal Justice (Northern Ireland) Order 2008.

[14] As VOPOs are a relatively recent concept, there is no case law giving guidance as to the appropriate test to be adopted by the court. Guidance, however, can be obtained from the case law surrounding section 104(1) of the Sexual Offences Act 2003. The terms of this Act are exactly similar to the terms of the 2015 Act.

In R v Hancox and Another [2010] EWCA Crim 102, Hughes LJ stated that when considering making a SOPO the court is concerned with future risk -

> " There must be a real, or significant, risk (not a bare possibility) that the defendant will commit further serious offences…."

In Probation Board for NI v Jones [2011] NICA 62, Morgan LCJ reviewed the leading case of R v Samuel Shannon and noted -

> " The test to be applied involves an assessment
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> (1) of the level of risk of recurrence; and
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> (2) of the level of risk of harm if there be recurrence.
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> The latter involves assessing how much harm is likely to be done and whether it can properly be called serious or not. If it were the case that only a small number of people would be likely to suffer such harm that would be a relevant factor in assessing the risk. "

[15] On 27th June 2006 the Defendant stabbed SM in the leg. Subsequent to that date he was convicted of serious violent offences on 16th October 2007, 17th October 2007 and 7th March 2009.

Whilst there was a gap in his offending thereafter he continued up until 10th November 2017 to have a history of poly substance abuse and mental health difficulties.

On 10th November 2017 he attacked a police officer with a needle type object.

On 23rd March 2018 he presented at Limavady police station in a paranoid state and was in possession of a pair of scissors.

On 8th May 2018 he was in possession of a knife with which he stabbed the mattress of the bed in which SM had been lying, being under the delusion that another man was in bed with her.

The first and last incidents bear remarkable similarities, other than that no injury was caused to SM.

In my view, the situation is best summed up by SM when she stated in her 999 call

> "something needs to be done with him before he does, before he does, before he does somebody really a lot of danger."

In all the circumstances, I am satisfied that there is a real and significant risk that the Defendant will commit further serious offences and that it is necessary to make an order to protect the public from such risk.

I should add that I would have come to a similar conclusion had I only taken into consideration the incidents at (3)(a), 3(e) and 3(f).

[16] Having decided that an order is appropriate the terms of the order must of necessity be proportionate. In The Queen v Michael Simpson [2014] NICA 83 Coghlin LJ adopted the questions used when considering the making of a SOPO in R v Mortimer namely -

> "(1) Is the making of an order necessary to protect from serious sexual harm through the commission of scheduled offences?
>
> (2) If some sort of order is necessary, are the terms proposed nevertheless oppressive?
>
> (3) Overall are the terms proportionate?"

Further assistance can be found in the Hancox case when Hughes LJ stated:

> "Much of what this court said in Boness [2005] EWCA Crim 2395 on the topic of another form of preventive order, the Anti Social Behaviour Order, will apply equally to SOPOs. In particular, that decision examines the application of the test of proportionality, and emphasises the importance of the order being practicable and enforceable and satisfying the test of precision and certainty. Preventive orders of this kind in effect create for the defendant upon whom they are imposed a new criminal offence punishable with imprisonment up to five years. They must be expressed in terms from which he, and any policeman contemplating arrest or other means of enforcement, can readily know what he may and may not do "

[17] Based on the above I shall hear further representations on 26th November 2018 on which prohibitions and positive requirements are both necessary and proportionate.