WARNING: Reporting restrictions apply to the contents of this judgment, as stated in paragraphs 2 and 3 of the judgment, because the cases concern sexual offending, including offences against children. Reporting restrictions prohibit the publication of the applicable information to the public or any section of the public, in writing, in a broadcast or by means of the internet, including social media. Anyone who receives a copy of this transcript is responsible in law for making sure that applicable restrictions are not breached. A person who breaches a reporting restriction is liable to a fine and/or imprisonment. For guidance on whether reporting restrictions apply, and to what information, ask at the court office or take legal advice.

Neutral Citation Number: [2022] EWCA Crim 1271

Case No: 2021 03483 A3 etc

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM the Crown Court at: Kingston-upon-Hull; Nottingham; Portsmouth; Bradford; and Birmingham
HHJ Kelson KC; HHJ Coupland; HHJ Ashworth; Rec Sandiford KC; and HHJ Buckingham
T2020 7282 etc; T2020 7194; T2020 7135; T2020 7229; T2021 04078 and T2020 7573 etc

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30 September 2022

Before:

LORD JUSTICE HOLROYDE, VICE-PRESIDENT OF THE COURT OF APPEAL, CRIMINAL DIVISION
MR JUSTICE GOSS
and
MRS JUSTICE MCGOWAN

- -

Between:

AYO **BKL** **MARK ASHLEY BURGESS** **BCJ** **ABDUL HASIB ELAHI** **AVJ**	**Appellants/ Applicants**
- and -	
THE KING	**Respondent**

- -

Richard Wright KC for **AYO**; **Andrew Wesley** for **BKL**; **Daniel Wright** for **Burgess**; **Stephen Robinson** for **BCJ**; **Suzanne Francis** for **AVJ**; **Graham Arnold** for **Elahi**
(all advocates assigned by the **Registrar of Criminal Appeals**)
Duncan Atkinson KC & Kate Wilkinson (instructed by **CPS Appeals & Review Unit**) for the **Respondent**

Hearing dates: 7 July 2022

- -

Approved Judgment

Lord Justice Holroyde:

1. Each of these cases is an appeal against a very long extended determinate sentence, or special custodial sentence for an offender of particular concern, imposed for grave sexual offending. They raise a number of common issues in relation to such sentences. For that reason, although otherwise unconnected, they were listed for hearing together.

2. All of the victims of the offences are entitled to the protection of the provisions of the Sexual Offences (Amendment) Act 1992. Accordingly, during their respective lifetimes, no matter may be included in any publication if it is likely to lead members of the public to identify any of them as a victim of the offending. The names of some of the appellants will accordingly be anonymised by the use of randomly-chosen letters of the alphabet.

3. In addition, the victim referred to as C4 in the case of Elahi is the subject of an order made in the Crown Court under s45A of the Youth Justice and Criminal Evidence Act 1999, which during C4's lifetime prohibits the inclusion in any publication of any matter likely to lead members of the public to identify him or her as being a person concerned in these proceedings, including his or her name, address, school or place of work, or any picture of him/her. That order remains in force. It covers the proceedings before this court.

4. For convenience, and intending no disrespect, we shall refer to the other two offenders by their surnames alone. Burgess and BCJ appeal by leave of the single judge. In each of the other cases, the Registrar has referred the application for leave to appeal against sentence to the Full Court. Again for convenience, we shall refer to them all as appellants.

5. We record at the outset our thanks to all counsel. Mr Richard Wright KC made general submissions on behalf of all appellants in relation to matters of principle and practice. He, Mr Wesley, Mr Daniel Wright, Mr Robinson, Mr Arnold and Ms Francis then made submissions specific to the individual appellants. Mr Atkinson KC, assisted by Ms Wilkinson, responded. We have been greatly assisted by their well-focused written and oral submissions.

The legal framework:

6. The relevant statutory provisions are now contained in Part 10 of the Sentencing Code introduced by the Sentencing Act 2020. For convenience, we shall refer to those provisions merely by their section numbers.

Extended sentences:

7. Where an adult offender is convicted of a specified violent, sexual or terrorism offence, an extended sentence of imprisonment may be imposed if the criteria in ss279-281 are satisfied (ss254-256 and 266-268 contain the corresponding criteria for imposing an extended sentence of detention in a young offender institution where the offender is aged under 18, or at least 18 but under 21, when convicted). "Specified sexual offences" are those listed in Part 2 of Schedule 1: see s306(2).

8. So far as is material for present purposes, ss279-281 provide as follows:

"279 Extended sentence of imprisonment for certain violent, sexual or terrorism offences: persons 21 or over

An extended sentence of imprisonment is a sentence of imprisonment the term of which is equal to the aggregate of

(a) the appropriate custodial term (see section 281), and

(b) a further period ('the extension period') for which the offender is to be subject to a licence.

280 Extended sentence of imprisonment: availability

(1) An extended sentence of imprisonment is available in respect of an offence where

(a) the offence is a specified offence (see section 306(1)),

(b) the offender is aged 21 or over when convicted of the offence,

(c) the court is of the opinion that there is a significant risk to members of the public of serious harm occasioned by the commission by the offender of further specified offences (see section 308),

(d) the court is not required by section 283, 285 or 285A to impose a sentence of imprisonment for life … and

(e) the earlier offence condition or the 4 year term condition is met.

(2) The pre-sentence report requirements (see section 30) apply to the court in forming the opinion mentioned in subsection (1)(c).

(3) The earlier offence condition is that, when the offence was committed, the offender had been convicted of an offence listed in Part 1, 2 or 3 of Schedule 14. …

(4) The 4 year term condition is that, if the court were to impose an extended sentence of imprisonment, the term that it would specify as the appropriate custodial term (see section 281) would be at least 4 years.

281 Term of extended sentence of imprisonment

(1) This section applies where the court dealing with an offender for an offence imposes, or is considering whether to impose, an extended sentence of imprisonment under section 279.

(2) The appropriate custodial term is the term of imprisonment that would be imposed in respect of the offence in compliance

with section 231(2) (length of discretionary custodial sentences: general provision) if the court did not impose an extended sentence of imprisonment.

(3) The extension period must be a period of such length as the court considers necessary for the purpose of protecting members of the public from serious harm occasioned by the commission by the offender of further specified offences.

This is subject to subsections (4) and (5).

(4) The extension period must –

(a) be at least 1 year, and

(b) not exceed - …

(ii) 8 years in the case of a specified sexual offence …

(5) The term of the extended sentence of imprisonment must not exceed the maximum term of imprisonment with which the offence is punishable. … ”

“Dangerousness”:

9. So far as is material for present purposes, s308 provides –

“**308 The assessment of dangerousness**

(1) This section applies where it falls to a court to assess under any of the following provisions (which apply where an offender has committed a specified offence, however described) whether there is a significant risk to members of the public of serious harm occasioned by the commission by the offender of further specified offences –

(a) section … 280 (extended sentence for certain … sexual … offences); …

(2) In making that assessment, the court –

(a) must take into account all the information that is available to it about the nature and circumstances of the offence,

(b) may take into account all the information that is available to it about the nature and circumstances of any other offence of which the offender has been convicted by a court anywhere in the world,

(c) may take into account any information which is before it about any pattern of behaviour of which any of the offences mentioned in paragraph (a) or (b) forms part, and

> (d) may take into account any information about the offender which is before it. …"

10. "Serious harm" is defined by s306(2) as meaning "death or serious personal injury, whether physical or psychological".

11. The meaning of "significant risk" under the corresponding provisions of the Criminal Justice Act 2003 ("CJA 2003") was the subject of detailed guidance in *R v Lang* [2005] EWCA Crim 2864, [2006] 2 Cr App R (S) 3 at [17]. That guidance is equally applicable to s308.

12. In *R v Smith (Nicholas)* [2011] UKSC 37, [2012] 1 Cr App R (S) 83 the Supreme Court held that the assessment of risk must be made as at the date of sentencing (and not at some future date, such as the anticipated date of release), and on the premise that the offender is not in custody. That binding authority has been followed by this court in cases including *R v MJ* [2012] EWCA Crim 132, [2012] 2 Cr App R (S) 73 and *R v Baker; Richards* [2020] EWCA Crim 176, [2020] 2 Cr App R (S) 23. In *MJ*, at [29], Lord Judge CJ said that, apart from disregarding the fact that the offender is in custody at the date of sentence, sentencers may take account of all relevant evidence or material which may bear on the predictive decision, and can consider -

> "…. questions about the likely impact on a young offender of the process of maturation."

13. An offender's young age (and consequent prospect of maturation), or old age and/or ill health (and consequent reduction in the opportunities for offending), may therefore be considerations which lead a sentencer to conclude that there is no significant risk to members of the public of serious harm occasioned by the commission by the offender of further specified offences. If the assessment is that there is such a risk, the fact that a long custodial sentence will inevitably have to be imposed may lead the sentencer to conclude that the public will sufficiently be protected by that sentence and that an extended sentence is not necessary or appropriate. The prospect of maturation may be particularly important where a young sexual offender has been exposed to corrupting influences during his childhood, and has a good prospect of rehabilitation whilst in custody.

14. We would emphasise that satisfaction of the criteria in s280 only makes an extended sentence "available": even though an offender has been found to be dangerous in accordance with s308, it remains open to the sentencer to impose a standard determinate sentence (or, where required, a special custodial sentence under s278).

15. In deciding whether to impose an extended sentence or a standard determinate sentence, the court may take into account the early release and licence provisions in relation to the two forms of sentence. In general, the court is not concerned with such provisions, and they must be left out of account in determining the appropriate length of the custodial term and in deciding on the structure of concurrent or consecutive sentences: see *R v Round and Dunn* [2009] EWCA Crim 2667 at [44] and [49]; *Attorney General's Reference no 27 of 2013, Burinskas* [2014] EWCA Crim 334, [2014] 2 Cr App R (S) 45 at [38-39]; and *R v Patel and others* [2021] EWCA Crim 231, [2021] 1 WLR 2997 at [24]. However, where the court has found an offender to be dangerous, and is considering what form of sentence is necessary to protect the public, it may be relevant

to consider the practical effect of the different types of sentence: see *R v Bourke* [2017] EWCA Crim 2150, [2018] 1 Cr App R (S) 42 at [42]. To take an example suggested by Mr Wright KC: if the appropriate determinate sentence to be imposed on a dangerous offender will in any event keep him in prison until he is very elderly, there may be no need for an extended sentence, or it may be sufficient to set a shorter period of extended licence than would be necessary for a younger offender.

16. The sentencer will usually wish to have the assistance of a pre-sentence report addressing the issue of dangerousness. The sentencer is not bound to follow the view expressed in the report; but, as Rose LJ observed in *Lang* at [17(ii)] –

> "A sentencer who contemplates differing from the assessment in such a report should give both counsel the opportunity of addressing the point."

Special custodial sentences under s278:

17. So far as is material for present purposes, s278 provides –

> "**278 Required special custodial sentence for certain offenders of particular concern**
>
> (1) This section applies where the court imposes a sentence of imprisonment for an offence where –
>
> (a) the offence is listed in Schedule 13,
>
> (b) the person …
>
> (ii) is aged 21 or over when convicted of the offence, and
>
> (c) the court does not impose any of the following for the offence (or an offence associated with it) –
>
> (i) an extended sentence under section 279, … or
>
> (ii) a sentence of imprisonment for life. …
>
> (2) The term of the sentence must be equal to the aggregate of –
>
> (a) the appropriate custodial term, and
>
> (b) a further period of 1 year for which the offender is to be subject to a licence, and must not exceed the maximum term of imprisonment with which the offence is punishable.
>
> (3) For the purposes of subsection (2), the 'appropriate custodial term' is the term that, in the opinion of the court, ensures that the sentence is appropriate. …"

18. The intention and effect of s278 is to ensure that an offender to whom it applies will be subject to licence conditions for at least one year after his release, even if the Parole

Board does not direct his release until he has served the whole of the custodial term. Its application extends, but is not limited, to offenders who have been found to be dangerous. It is important to note, however, that the list of sexual offences in Sch.13 is shorter than the list of specified sexual offences in Part 2 of Sch.18: it comprises offences under ss5 and 6 of the Sexual Offences Act 2003 (rape, and assault by penetration, of a child under 13), inchoate offences of those kinds, and abolished offences which would have constituted an offence of those kinds.

Required life sentences:

19. Although none of these cases is an appeal against a life sentence, we should also set out the provisions of s285:

> "**285 Required life sentence for offence carrying life sentence**
>
> (1) This section applies where a court is dealing with an offender for an offence where –
>
> (a) the offender is aged 21 or over at the time of conviction,
>
> (b) the offence is a schedule 19 offence (see section 307),
>
> (c) the offence was committed on or after 4 April 2005, and
>
> (d) the court is of the opinion that there is a significant risk to members of the public of serious harm occasioned by the commission by the offender of further specified offences (see sections 306(1) and 308).
>
> (2) The pre-sentence report requirements (see section 30) apply to the court in relation to forming the opinion mentioned in subsection (1)(d).
>
> (3) If the court considers that the seriousness of –
>
> (a) the offence, or
>
> (b) the offence and one or more offences associated with it,
>
> is such as to justify the imposition of a sentence of imprisonment for life, the court must impose a sentence of imprisonment for life.
>
> (4) An offence the sentence for which is imposed under this section is not to be regarded as an offence the sentence for which is fixed by law."

20. In *Burinskas* Lord Thomas CJ said, at [18], that a life sentence remains a sentence of last resort. With reference to the corresponding provisions of the CJA 2003, he said at [22] -

> "… the question in s225(2)(b) as to whether the seriousness of the offence (or of the offence and one or mor offences associated with it) is such as to justify a life sentence requires consideration of :
>
> (i) The seriousness of the offence itself, on its own or with other associated with it ... . This is always a matter for the judgement of the court.
>
> (ii) The defendant's previous convictions …
>
> (iii) The level of danger to the public posed by the defendant and whether there is a reliable estimate of the length of time he will remain a danger.
>
> (iv) The available alternative sentences."

Length of custodial sentence:

21. Section 231 applies to discretionary custodial sentences generally, including both extended sentences and special custodial sentences under s278. So far as is material for present purposes, it provides –

> "**231 Length of discretionary custodial sentences: general provision**
>
> (1) Subsection (2) applies where a court passes a custodial sentence in respect of an offence.
>
> This is subject to subsections (3) to (6).
>
> (2) The custodial sentence must be for the shortest term (not exceeding the permitted maximum) that in the opinion of the court is commensurate with the seriousness of –
>
> (i) the offence, or
>
> (ii) the combination of the offence and one or more offences associated with it. …
>
> (6) Subsection (2) does not apply where the custodial sentence is an extended sentence, except as provided in sections … 281(2) (determination of appropriate custodial term). …
>
> Procedure for forming opinion.
>
> (7) In forming its opinion for the purposes of subsection (2), the court must take into account all the information that is available to it about the circumstances of the offence, or of it and the associated offence or offences, including any aggravating or mitigating factors.

> (8) The pre-sentence report requirements (see section 30) apply to the court in forming that opinion, except where the sentence is an extended sentence.
>
> (9) See section 232 for additional requirements in the case of an offender suffering from a mental disorder."

22. Given the context of these appeals, we would emphasise that the requirement in s231(2) applies, however grave the offending. As Mr Wright KC submitted, the nature and circumstances of the offending must not cause the sentencer to lose sight of that statutory duty. It is important also to keep in mind that an extended sentence achieves the purpose of protecting the public by extending the period of licence – not by increasing the length of the custodial term beyond that which is appropriate in accordance with s231(2).

23. In determining the length of the sentence, the court must of course follow any relevant sentencing guidelines, both those which are offence-specific and those which contain overarching principles. In cases of this nature, the Overarching principles: domestic abuse guideline will often be relevant.

24. The appropriate length of the custodial sentence, or of the total custodial sentence in a case involving more than one offence, will depend on the seriousness of the offending. We have been referred by counsel to the sentences in a number of cases involving multiple serious sexual offences: *R v Watkins* [2014] EWCA Crim 1956, [2015] 1 Cr App R (S) 6; *R v DJ* [2015] EWCA Crim 563, [2015] 2 Cr App R (S) 16; *R v Leighton* [2017] EWCA Crim 2057; *R v Falder* [2018] EWCA Crim 2514, [2019] 1 Cr App R (S) 46; *AG's Reference, JRM* [2021] EWCA Crim 524; and *AG's Reference, R v Wilson* [2021] EWCA Crim 839. The facts and circumstances of cases inevitably differ. The assistance to be gained by comparing sentences in other cases is therefore limited. Those cases show, however, that it will be comparatively rare for the total custodial term of an extended sentence for multiple sexual offences to exceed about 30 years after a trial. Sentences of greater length have been reserved for particularly serious offending.

25. In *R v McCann, Sinaga and Shah* [2020] EWCA Crim 1676, [2021] 4 WLR McCann and Sinaga, two unconnected prolific sexual offenders, had received life sentences with minimum terms of 30 years. HM Attorney General submitted that their sentences should be increased to whole life tariffs. The court held, at [89], that a discretionary life sentence should only be imposed with a whole life tariff in wholly exceptional circumstances. It found, however, that each of the cases was within the category of the most serious cases of multiple rapes and merited a notional determinate term of 60 years. The court therefore increased the minimum term in each case to 40 years.

26. In *AG's Reference, JRM*, an exceptional case involving about 150 rapes, the court concluded that the appropriate total sentence after trial would have approached 60 years.

27. However, the court in *Wilson* rejected at [45] a submission that the decisions in *McCann, Sinaga* and *AG's Reference, JRM* mandated a higher level of sentencing than would previously have been considered appropriate. It held that those cases were not intended to set a new benchmark, or to initiate a general increase in the levels of

sentencing for offenders convicted of multiple sexual offences, where the offending fell below the level of exceptional seriousness illustrated by those cases.

28. In cases of this nature, we would echo the warning given by Treacy LJ in *DJ* at [44]:

> "It seems to us that care needs to be taken in relying on phrases such as 'the depths of depravity' as if that established a particular category of offence. There will in any given case be a number of factors to be taken into account. A case may reach the level of the utmost seriousness by a variety of routes and the attaching of labels is not a particularly good guide. What is required is a careful assessment of the facts."

29. We would similarly caution against sentencers treating the phrase "campaign of rape", which appears in the Sentencing Council's definitive guideline for sentencing offences of rape, as if it were a term of art. The guideline sets an offence range of 4-19 years' custody; but, as in all guidelines, that range applies to a single offence. At Step 1 of the guideline, immediately before the tables of harm and culpability factors, the guideline states that –

> "Offences may be of such severity, for example involving a campaign of rape, that sentences of 20 years and above may be appropriate"

In that context, the reference to a "campaign of rape" indicates that the total sentence for multiple offences of rape may exceed the offence range for a single offence. The total length of sentence is therefore not determined by debate as to whether a particular course of offending should or should not be labelled "a campaign of rape" : the important question is what total sentence is just and proportionate for the offending as a whole.

The length of the extended licence period:

30. Where an extended sentence is imposed for sexual offending, it should not be assumed that a long custodial term necessarily requires an extended licence period high in the range of up to 8 years. As s280(3) makes clear, the length of the extended licence period must not exceed that which the court considers necessary for the purpose of protecting members of the public from serious harm occasioned by the commission by the offender of further specified offences. It is relevant to note that – in contrast to those serving a sentence of imprisonment, or a special custodial sentence under s278 – a prisoner serving an extended sentence who is released on licence but then recalled from licence will not be considered for automatic further release: see s255A of the Criminal Justice Act 2003 as amended with effect from 28 April 2022.

31. A fact-specific assessment of the appropriate extension period must therefore be made in each case. Relevant factors are likely to include the number and nature of the offences for which the offender is being sentenced, and his age, antecedents, personal circumstances and physical and mental health. The court will also want to consider what can realistically be done within the extension period to secure the offender's rehabilitation and prevent reoffending: see *R v Phillips* [2018] EWCA Crim 2008,

[2019] 1 Cr App R (S) 11. A pre-sentence report may provide valuable assistance in this regard.

Totality and structure of sentencing for multiple offences:

32. The Sentencing Council's Totality guideline states the two important general principles as follows:

> "1. All courts, when sentencing for more than a single offence, should pass a total sentence which reflects all the offending behaviour before it and is just and proportionate. This is so whether the sentences are structured as concurrent or consecutive. Therefore, concurrent sentences will ordinarily be longer that a single sentence for a single offence.
>
> 2. It is usually impossible to arrive at a just and proportionate sentence for multiple offending simply by adding together notional single sentences. It is necessary to address the offending behaviour, together with the factors personal to the offender, as a whole."

33. The guideline goes on to set out the general approach to the imposition of concurrent or consecutive determinate custodial sentences, concluding by directing the sentencer to –

> "Consider whether the sentence is structured in a way that will be best understood by all concerned with it."

34. That aim may be particularly difficult to achieve where the court has to sentence for sexual offending against more than one victim. In such circumstances, it will be important for the sentencing remarks to include an explanation of the way in which the overall sentencing has been structured.

35. Consecutive extended sentences may be imposed, but great care will be needed in explaining their effect. An extended sentence may be made consecutive to a determinate sentence; but sentencers should where possible avoid making a determinate sentence consecutive to an extended sentence.

36. If consecutive sentences under s278 are imposed, consecutive further periods of licence must follow, because such a sentence is indivisible, and must comprise the aggregate of the appropriate custodial term and the further one-year period of licence: see *R v Fruen* [2016] EWCA Crim 561, [2016] 2 Cr App R (S) 30 at [23]. Treacy LJ explained at [24] –

> "The consequence for judges is that they will need to give careful consideration to the structuring of their sentences as decisions as to whether to make sentences concurrent or consecutive will impact upon the length of the further licence period."

The approach to sentencing:

37. We are concerned in these appeals with sexual offending which was plainly so serious that nothing less than a long custodial sentence could be justified. Our observations as to the correct approach to sentencing apply to such cases. We therefore need not refer in detail to the five purposes of sentencing adult offenders (s57(2)), the assessment of seriousness (s63) or the duty of the court in relation to sentencing guidelines (ss59-60 and 62). It is however appropriate to note that where a court is considering whether to impose an extended sentence, s61(2) makes clear that s60 applies to the determination of the appropriate custodial term.

38. In cases such as these, the court will first need to consider whether it is required to impose a life sentence pursuant to s283 (life sentence for second listed offence). Such a sentence may be required by s283 even if the offender is not assessed as dangerous. It was not required in any of these cases, and we therefore do not consider it in further detail.

39. Where s283 does not apply, the court will need to make its assessment of dangerousness in accordance with s308. The approach should then be as follows.

40. If the offender is not assessed as dangerous –

    i) If the offence concerned is punishable with life imprisonment, the court has the power to impose a discretionary life sentence. However, such a sentence will be appropriate only in exceptional circumstances.

    ii) If s278 applies, the court is required to pass a special custodial sentence in accordance with that section.

    iii) If s278 does not apply, the court will impose a standard custodial sentence.

41. If the offender is assessed as dangerous –

    i) If the criteria in s285 are satisfied, and the court considers that the seriousness of the offending justifies a life sentence, then a sentence of life imprisonment is required.

    ii) If a life sentence is not required, but the criteria in s280 are satisfied, the court may pass an extended sentence of imprisonment.

    iii) If the court does not pass an extended sentence, but s278 applies, the court is required to pass a special custodial sentence in accordance with that section.

    iv) If s278 does not apply, the court will impose a standard determinate custodial sentence.

42. Having made those general observations, we turn to the individual appeals. We are concerned in each appeal with the nature and length of the sentence and therefore need not refer to the various ancillary orders which were made.

AYO:

43. On 8 October 2021 in the Crown Court at Kingston upon Hull, having been convicted of 33 sexual offences, AYO was sentenced to an extended sentence of 40 years,

comprising a custodial term of 36 years and an extended licence period of 4 years. That sentence was passed on five counts of rape (counts 3-5 and 8-9) and one count of attempted rape of a child under 13 (count 25). Shorter determinate terms of imprisonment were imposed on all other counts and ordered to run concurrently.

44. The appellant is now 36 years of age. There were four victims of his offending, all of them members of his family: his wife, her younger sister and two daughters of the marriage. The relationship between the applicant and his wife began when she was 15 years of age. In due course they married and had four children. On frequent occasions during the marriage the applicant sexually assaulted and raped her. She described about 20 occasions when he had raped her over a period of about 13 years. If she refused his sexual demands he would become aggressive, insulting and belittling towards her. The effect on her of the totality of his offending has been, and continues to be, significant. He was convicted of two counts of assault by penetration: count 6 related to the first occasion when he digitally penetrated her vagina without her consent; count 7 was a multi-incident count which, like other multi-incident counts on the indictment, alleged offences on no fewer than 3 further occasions. He was sentenced to concurrent terms of 6 years' imprisonment for these offences. He was also convicted of two counts of vaginal rape, count 8 being the first such offence and count 9 a multi-incident count, for which he received concurrent extended sentences of 40 years.

45. In 2006 the appellant, then aged 19, began sexually abusing his sister-in-law. She was then aged 13 and would stay with her sister and the applicant. In what the trial judge described as grooming behaviour he progressed from kissing to digital penetration and then repeated rape. The appellant would take her downstairs from the bedroom in which she was sleeping and rape her on the sofa, without any form of contraception. She became pregnant and had to have a termination when she was 15 years old, but the offences were repeated. He was convicted of two counts of assault by penetration, reflecting the first occasion (count 1) and a multi-incident count (count 2), for which he was sentenced to concurrent terms of 10 years' imprisonment, and three counts of rape, reflecting the first such offence (count 3), a multi-incident count (count 4) and an occasion when he raped her in his bed (count 5). She was 15 when the last offence was committed. For the offences of rape he was sentenced to concurrent extended sentences of 40 years.

46. The offending against his daughters began in 2011 when the appellant was 25 years old and his older daughter was aged 5. It continued until she was 12. All the offending took place in the family home, or at his parents' home when the family were residing there temporarily before moving to a new home, and then in that new house. The offences continued after the appellant split up from his wife and he was living with his parents. There were four counts of assault by digital penetration of a child under 13 when she was aged between 5 and 9 (counts 10, 11, 12, 16), one count when he committed such an offence by performing oral sex on her when she was 8 or 9 (count 18) and a further count of assault by digital penetration when she was 10 or 11 and they were in the new house (count 20). He was sentenced to concurrent terms of 15 years' imprisonment for each of these offences. There were also occasions when the applicant sexually assaulted her when she was under 13, the counts representing the different forms of such abuse, being acts of penetrating her mouth with his tongue (counts 13, 22 and 24), using a vibrator on the outside of her vagina (count 14), or grinding his genitals against her in an act of simulated sex (counts 19, 21 and 23). He was sentenced

to concurrent terms of 7 years' imprisonment for each of these offences. There were occasions when she was aged between 5 and 9 when he also forced her to masturbate him (counts 15 and 17), for which he was sentenced to concurrent terms of 10 years' imprisonment. Finally, when she was 11, he attempted to rape her vaginally (count 25). A concurrent extended sentence of 40 years was imposed for that offence.

47. The appellant's younger daughter was aged 5-8 years when he sexually abused her. He was 30-33 years of age at the time. The abuse began in 2017. He digitally penetrated her vagina when they were living at his parents' home (counts 26 and 27) and then in his girlfriend's home after he separated from his wife (counts 30 and 31), for which he was sentenced to concurrent terms of 15 years' imprisonment. He also sexually assaulted her by kissing her and putting his tongue in her mouth, both at his parents' house (counts 28 and 29) and at his girlfriend's house (counts 32 and 33), and was sentenced to concurrent terms of 4 years on each of these counts.

48. The appellant had a number of previous convictions, principally for road traffic offences and breaches of court orders. In March 2019 he received a suspended sentence of imprisonment, with a requirement of unpaid work, for an offence of arson. He had never served an immediate custodial sentence.

49. The judge found the appellant to be dangerous. He relied on the evidence of the appellant's repeatedly having sexually abused his victims, undeterred by the distress he caused or by making his sister-in-law pregnant; and on his previous convictions, in particular the conviction for arson at his brother's home, which demonstrated his callousness and lack of empathy. The judge was fortified in his conclusion by the view of the author of the pre-sentence report, who assessed the appellant as presenting a high risk of sexual harm to any female to whom he had access. He indicated that he had come close to passing a life sentence. Plainly, the judge was entitled to find the appellant dangerous, and there is no challenge to that finding, or to the imposition of an extended sentence.

50. On behalf of the appellant, Mr Wright KC makes the preliminary point that the judge appeared to sentence on the basis of the evidence of the complainants, in particular his wife and sister-in-law, as to the number of occasions offences were committed, rather on the particularised offences of which he was convicted by the jury, which were limited specific and multi-incident counts. We agree that some of the sentencing remarks can be understood in that way. The cardinal rule is that a judge may only sentence for offences of which the accused has been convicted or which he has asked to be taken into consideration: see *R v Canavan* [1998] 1 Cr App R 79 and, more recently, *R v A* [2015] EWCA Crim 177, [2015] 2 Cr App R (S) 12 at [43]. In the circumstances of this case, however, we do not consider the difference as to the totality of the number of the offences of which he was convicted and the greater number referred to by the judge of itself to be sufficient to impact upon the appropriate sentences.

51. Mr Wright KC advances a single ground of appeal, namely that the custodial element of the extended sentence was too long. He points to the reference in the guideline (noted at para 29 above) to the potential for offences to be of such severity that sentences of 20 years and above may be appropriate, and submits no real regard was had to totality. The judge did not articulate into which categories the offences fell, but referred to a significant breach of trust in respect of three of the victims as well as grooming of two

of them, who were also extremely young. He also referred to the "immeasurable" damage caused, including psychological harm, but said that in the absence of medical evidence, he could not find severe psychological harm. The judge then added that arguments about whether there was severe psychological harm versus psychological harm didn't "particularly help in this case".

52. In response, Mr Atkinson KC emphasises the aggravating features of significant breach of trust, grooming, a repeated course of sexual abuse of family victims in the home over 16 years, the extreme youth of the victims, psychological harm, regular unprotected sex and ejaculation and committing one offence in a public place (swimming baths). He also refers to the appellant's lack of remorse

53. There can be no doubt that a very substantial extended sentence was appropriate in this case. However, for the reasons we have set out above, a custodial term longer than 30 years requires very careful consideration. In our judgment, notwithstanding the number and nature of offences, the ages of the victims and the harm caused, the offending was not so serious as to merit a total custodial term of 36 years after a trial.

54. We therefore grant leave to appeal. We allow the appeal to the extent that we quash the extended sentences of 40 years passed on counts 3, 4, 5, 8, 9 and 25. On each of those counts we substitute an extended sentence of 34 years, comprising a custodial term of 30 years and an extended licence period of 4 years. All other sentences remain unaltered.

BKL:

55. BKL, now aged 42, was convicted of 14 sexual offences against his daughters. He had raped and sexually abused C1 when she was aged 6-8, and C2 when she was aged 5-11. On 22 January 2022, in the Crown Court at Nottingham, he was sentenced to special custodial sentences under s278 comprising a total of 38 years' imprisonment and extended licence periods totalling 2 years.

56. On counts 1, 2 and 3 BKL was convicted of rapes of C1, a girl under 13, and was sentenced to a special custodial sentence of 18 years plus 1 year's licence. On count 4 he was convicted of sexual assault of a child under 13, C1 and sentenced to 5 years' imprisonment, ordered to run concurrently. On counts 5 to 13, the rapes of a girl under 13, C2, he was sentenced to a special custodial sentence of 21 years plus 1 year's licence. On count 14, sexual assault of C2, he was sentenced to a concurrent term of 4 years' imprisonment.

57. The judge described the offences as a campaign of sexual abuse and rape, both anal and vaginal. He placed all the offences in category A and listed the aggravating factors as including grooming and bribery. He found there to have been a breach of trust, and found that the girls were vulnerable by virtue of their age and "the location within your family". He described the psychological effects as "catastrophic and likely to last for ever". One of the children had suffered significant physical injury by one instance of rape. The offending was also aggravated by the fact that the appellant continued this conduct even after a complaint had been made to the Social Services.

58. The only mitigation available was the absence of any previous convictions and the gap of approximately 10 years since the end of this offending. The judge found that the

applicant did not pose a risk to any child outside his own family and did not find him to be dangerous.

59. The appeal is brought on the basis that the judge failed adequately to reflect the principle of totality and the sentence was manifestly excessive as a result. The individual terms that make up the sentence are not challenged. Mr Wesley's principal submission is that the judge found that the offending amounted effectively to two campaigns of rape and on that basis, without having proper regard to totality, imposed a total sentence reflecting an aggregation of two terms of approximately 20 years.

60. Mr Wesley further submits that conduct identified as bribery and grooming was nothing more than a normal aspect of family life. The appellant did buy presents; but Mr Wesley submits that, on the judge's approach, any gift or kindness would fall to be identified as grooming in a case involving sexual abuse within a family.

61. As we have said in para 29 above, the description "campaign of rape" is not a term of art. In some cases of sexual abuse within a family, often involving more than one victim, there will be repeated acts of rape. The repetition of such acts must be reflected in the sentence by a major upward adjustment from the appropriate guideline starting point. Even where there is a substantial increase, the principle of totality must still be applied and the term adjusted to reach a total that is just and proportionate.

62. Applying those principles, we accept the submission that the total term in this case is manifestly excessive. We therefore grant leave to appeal. We allow the appeal, and quash the sentences imposed below on counts 1, 2, 3, 5, 6, 7, 8, 9. 10, 11, 12 and 13. On each of those counts we substitute a special custodial sentence under s278 comprising a custodial term of 14 years and an extended licence period of one year. We order that the sentences on counts 1-3 will run concurrently with one another. The sentences on counts 5-13 will run concurrently with one another but consecutive to those on counts 1-3. Thus the overall special custodial sentence under s278 becomes 28 years' custody and extended licence periods totalling 2 years. The sentences on counts 4 and 14 remain unaltered.

Mark Ashley Burgess:

63. Burgess was convicted of 46 historical sexual offences against children. On 30 June 2021, in the Crown Court at Portsmouth, he was sentenced to concurrent terms of imprisonment totalling 25 years, and a consecutive special custodial sentence under s278 of 15 years with an extended licence period of 1 year. The total custodial term was, accordingly, 40 years.

64. Most of the charges were under the Sexual Offences Act ("SOA") 1956 or the Indecency with Children Act 1960. The offences, and the sentences imposed, can be abbreviated and summarised in tabular form:

Victim/count	Offence	Sentence	Concurrent/ consecutive	Maximum
C1: ct 2	Indecent Assault on a Male Person, s.15(1) of SOA 1956	3 years' imprisonment	Concurrent	10 years
C1: ct 3	Indecency with a Child,	1 year	Concurrent	2 years

	s.1(1) of ICA 1960	imprisonment		
C2: ct 5	Indecent Assault on a Male Person, s15(1) of SOA 1956	1 year imprisonment	Concurrent	10 years
C2: cts 6, 7, 8 & 9	Indecent Assault on a Male Person, s15(1) of SOA 1956	3 years' imprisonment	Concurrent	10 years
C2: ct 10	Indecent Assault on a Male Person, s15(1) of SOA 1956	5 years' imprisonment	Concurrent	10 years
C3: cts 11 & 13	Indecent Assault on a Male Person, s15(1) of SOA 1956	6 years' imprisonment	Concurrent	10 years
C3: ct 12	Indecency with a Child, s.1(1) of ICA 1960	1 year imprisonment	Concurrent	2 years
C4: cts 14, 15, 20, 21	Indecency with a Child, s.1(1) of ICA 1960	1 year imprisonment	Concurrent	2 years
C4: cts 16 & 17	Indecent Assault on a Male Person, s15(1) of SOA 1956	5 years' imprisonment	Concurrent	10 years
C4: ct 18	Buggery, s12(1) of SOA 1956	s278 Special Custodial sentence of 16 years	**Consecutive to counts 23, 29 & 43**	Life
C4: ct 19	Buggery, s12(1) of SOA 1956	5 years' imprisonment	Concurrent	Life
C5: ct 22	Attempted Indecent Assault, contrary to s.1(1) Criminal Attempts Act 1981	2 years' imprisonment	Concurrent	10 years
C5: ct 23	Indecent Assault on a Male Person, s15(1) of SOA 1956	9 years' imprisonment	**Consecutive to counts 18, 29 & 43**	10 years
C6: cts 24, 25, 26, 27, 28	Indecency with a Child, s.1(1) of ICA 1960	1 year imprisonment	Concurrent	2 years
C6: ct 29	Buggery, s12(1) of SOA 1956	8 years' imprisonment	**Consecutive to count 18, 23 & 43**	Life
C7: ct 30	Indecent Assault on a Male Person, s15(1) of SOA 1956	1 year imprisonment	Concurrent	10 years
C7: ct 31	Indecent Assault on a Male Person, s15(1) of SOA 1956	3 years' imprisonment	Concurrent	10 years
C8: cts 32, 33, 36, 37	Indecent Assault on a Male Person, s15(1) of SOA 1956	3 years' imprisonment	Concurrent	10 years
C8: cts 34,	Indecency with a Child,	1 year	Concurrent	2 years

35, 39	s.1(1) of ICA 1960	imprisonment		
C8: ct 40	Buggery, s12(1) of SOA 1956	8 years' imprisonment	Concurrent	Life
C9: ct 41	Indecent Assault on a Male Person, s15(1) of SOA 1956	5 years' imprisonment	Concurrent	10 years
C9: ct 42	Indecency with a Child, s.1(1) of ICA 1960	1 year imprisonment	Concurrent	2 years
C9: ct 43	Indecent Assault on a Male Person, s15(1) of SOA 1956	8 years' imprisonment	**Consecutive to counts 18, 23 & 29**	10 years
C10: ct 44	Indecent Assault on a Male Person, s15(1) of SOA 1956	5 years' imprisonment	Concurrent	10 years
C11: cts 45 & 46	Sexual Activity with a Child, contrary to s.9(1) of the Sexual Offences Act 2003	3 years' imprisonment	Concurrent	14 years
C12: cts 47, 48	Indecent Assault on a Male Person, s15(1) of SOA 1956	3 years' imprisonment	Concurrent	10 years
C12: ct 49	Indecent Assault on a Male Person, s15(1) of SOA 1956	1 year imprisonment	Concurrent	10 years
C13: ct 50	Indecent Assault on a Male Person, s15(1) of SOA 1956	5 years' imprisonment	Concurrent	10 years
C13: ct 51	Indecent Assault, s15(1) of SOA 1956	7 years' imprisonment	Concurrent	10 Years

65. Thus the total sentence was made up of terms imposed on the "lead" offences in count 18, buggery – 15 years plus 1 year licence; count 23, indecent assault – 9 years; count 29, buggery – 8 years; and count 43, indecent assault – 8 years. The judge formed the view that the appellant was dangerous at the date of sentence but that his age and the length of sentence meant an extended sentence was not necessary for the protection of the public.

66. When passing sentence, the judge observed that only count 18 met the criteria for a special custodial sentence under s.278. In fact, count 15 also required such a sentence. The appellant was aged over 18, the complainant was a child aged 10, and the offence involved penetration of the complainant's mouth by the appellant's penis. If committed today this would have been charged as an offence of rape of a child under 13 contrary to s5 of SOA 2003. The indictment charged the offence as Indecency with a Child, contrary to s. 1(1) of the Indecency with Children Act 1960. That offence has subsequently been abolished and so paragraph 12 of schedule 13 to the Sentencing Code applies, and a sentence under s.278 should also have been passed on this count.

67. It appears that the Crown Court record incorrectly shows that the sentence on count 18 was imposed under s. 236A of CJA 2003. That error does not affect the lawfulness of the sentence. We will direct that the Crown Court record be amended to show the sentence as having been imposed under s.278.

68. The appellant had been a choir master or music director at a number of schools and churches. Whilst employed in those positions, he had committed the offences against 13 children aged between 7 and 15 years of age. The offending spanned the periods 1976 to 1994 and 2006 to 2009. The offending included repeated acts of anal rape, penetrative oral sex and sexual assaults. A number of the incidents took place in the presence of other children. The complainants were made to perform sexual acts on the appellant and each other. There were many instances of grooming behaviour and on one occasion a child was given alcohol to facilitate the offending. All were in clear breach of trust. All the victims have suffered significant harm with the effects described by a number as "life-long".

69. The appellant was aged 68 at the date of sentence. He had no previous convictions. There had been a gap of 12 years since his last offence. He had provided a number of positive character references.

70. The grounds of appeal argue that the judge did not properly apply the principle of totality to the combination of sentences. In addition, it is argued that the sentences on counts 45 and 46 are manifestly excessive, although it is accepted that those terms are subsumed into the whole.

71. We consider that discrete ground of appeal first. Counts 45 and 46 reflected two specific acts of sexual touching of C11, the only female complainant, when she was aged between 13 and 15. The appellant had given her alcohol and cigarettes. On the first occasion, the appellant grabbed her bottom over her clothing. On the second, he briefly put his hand on her breast, again over clothing. The judge placed the offences in category 3A of the relevant guideline, which has a starting point of 26 weeks' custody and a range from a high level community order to 3 years' custody.

72. We readily accept that these offences have had a long-lasting impact on C11. They were aggravated by the features of breach of trust and the provision of alcohol to a child victim. However, even taking those factors into account, the offending did not merit sentences at the top of the category range, and the sentences were manifestly excessive. In our view, the appropriate sentences were 12 months' imprisonment on each of these counts, concurrent with one another and with the special custodial sentence on count 18.

73. We turn to the submissions as to the total term. The judge was right to identify "lead offences" and to build the total sentence around those terms. There is no challenge to that approach. The judge said that he would balance the sentences to reflect the principle of totality. Mr Daniel Wright submits, however, that in reaching a total custodial term of 40 years the judge failed properly to adjust the individual sentences to reach a proportionate total.

74. The offending was undoubtedly very serious. The victims were children, and the appellant acted in breach of trust. Many of the offences were penetrative, frequently with ejaculation. Alcohol was used to facilitate the offending. On occasions, the

victims were made to perform sexual acts on the appellant and on one another. The consequences for them are life-long.

75. As we have indicated, in cases of multiple sexual offences it will only be comparatively rarely that a total custodial term in excess of 30 years will be appropriate. In our judgement, Burgess' offending could properly be dealt with by a total sentence around that level, and the total custodial term of 40 years was not just and proportionate.

76. We therefore allow the appeal to the following extent. We quash the sentence imposed on count 15 and substitute a special custodial sentence under s278 comprising one year's imprisonment and an extended licence period of one year. We quash the consecutive sentence of 9 years' imprisonment imposed on count 23 and substitute for it a concurrent sentence of 9 years' imprisonment. We quash the sentences of three years' imprisonment imposed on counts 45 and 46, and substitute for them concurrent terms of 12 months' imprisonment. All other sentences remain unaltered.

77. In the result, the total of the determinate sentences of imprisonment becomes 16 years, and the special custodial sentence on count 18 of 15 years' imprisonment, plus one year's extended licence, will run consecutively. The overall custodial term thus becomes 31 years.

BCJ:

78. BCJ, now aged 50, was convicted of 21 sexual offences. On 1 October 2021, in the Crown Court at Bradford, he was sentenced to an extended sentence of 35 years, comprising a custodial term of 30 years and an extended licence period of 5 years, on each of two counts of rape. Concurrent determinate sentences were imposed for the other offences. In addition, he was made subject to a Sexual Harm Prevention Order of indefinite duration.

79. As a child, the appellant lived in the family home with his siblings, including his younger sisters C1 and C2. In the late 1970s, he began sexually abusing C1, who is three years younger than him. The appellant was not yet 10 years old when the abuse began, and so was below the age of criminal responsibility. The abuse of C1 began when she was only 4, and continued for many years until she was 15. As the appellant grew older, he also began to sexually abuse C2, who is 7 years younger than him. In 2007, when he was in his 30s, he sexually abused the adolescent daughter of his then partner, C3.

80. In the 1970s and 1980s, C1 was the victim of abuse in the family home not only by the appellant but also by her late father. The appellant's abuse began with his putting his fingers into her vagina. He progressed to forcefully inserting his penis into her vagina on many occasions, always without protection. When she said that it hurt, he told her that she would "learn to like it". He was sometimes violent, holding her down and removing her lower clothing. He threatened her by saying that she would get in trouble with the police if she told anyone and he would start on C2. C1 submitted to his demands in an attempt to protect her younger sister. She informed the police about the abuse in 2017, when she was aged 42.

81. The judge was faced with a complex sentencing process. Unfortunately, he fell into error about his sentencing powers in a number of respects.

82. The appellant was charged on count 1 with indecent assault, reflecting offending when he was under 14 and C1 was aged 8-10 years. He was sentenced to 18 months' imprisonment. Under s. 53 of the Children and Young Persons Act 1933, which was in force at that time, he could not have received any form of custodial sentence (see R. v. Forbes [2016] EWCA Crim 1388). The sentence was therefore unlawful.

83. Counts 2-11 charged the appellant with offences of rape when he was aged 14-20 and C1 was aged between 11 and 16 years. He was sentenced to concurrent sentences of 7 years, 6 months' imprisonment on counts 2 to 5; 8 years, 8 months' imprisonment on counts 6-9; and extended determinate sentences of 35 years on counts 10 and 11.

84. The appellant also forced C1 to perform oral sex on him (counts 12-13) for which he was sentenced to terms of 2 years and 4 years' imprisonment respectively. Those counts covered the period 1983 to 1992 when the appellant was aged between 11 and 20 years. The judge made no finding of fact as to when during that period the offending occurred, in order to determine the sentencing options available to him. It is therefore necessary to apply the least severe sentencing regime; and, as with count 1, any custodial sentence for offending when he was under the age of 14 was unlawful.

85. The appellant was also sentenced to 12 months' imprisonment for indecency with a child (count 13). That offence was committed in 1987, when he was aged 14 or 15. Under s. 4 of the Criminal Justice Act 1982, the maximum sentence at that time for a person aged 14 was 4 months' detention. Consideration must then be given to the guideline for sentencing children and young persons (see R. v. Limon [2022] EWCA Crim 39).

86. C2 had also been the victim during her childhood of sexual abuse by both the appellant and her father. The appellant had also been physically and emotionally abusive to her. She too spoke to the police for the first time in 2017, when she was aged 37.

87. The sexual abuse by the appellant started in the 1980s, when C2 was 7 or 8 years old. He forced her to masturbate him, in return for letting her have a go on his drum kit (count 14). Later in the 1990s, when she was about 17, she stayed with the appellant and his then partner. After nights out, the appellant began to put pornography on the television and put his hands on her leg and try to put his hands up her top (counts 15 &16).

88. One night, having been out drinking with the appellant and his partner, C2 went home on her own. She fell unconscious on the way. When she came round, she did not remember what had happened but she was bleeding from her vagina. She had been raped by the appellant. She later found out she was pregnant. She gave birth to a severely disabled baby, of whom the appellant was the father. The baby was taken into care. The appellant claimed at trial that the pregnancy was as a result of drunken consensual sexual intercourse between him and C2. He was sentenced to 12 years' imprisonment for rape (count 17), that sentence reflecting the appellant's total culpability and harm caused in respect of all the offences against C2.

89. The appellant was in a relationship with C3's mother in the mid-2000s. In 2008, when she was 13, C3 told police that the appellant had touched her in an inappropriate manner on two occasions in 2007. He had touched her bottom and breasts over her clothing on the first occasion (counts 19 & 20) and touched her breasts again, over her clothing, on

the second occasion (count 21). He was sentenced to concurrent terms of 2 years' imprisonment on counts 19 and 20 and 12 months' imprisonment on count 21.

90. When sentencing, the judge noted that the appellant had relevant previous convictions for sexual assault by penetration in 2015, and for three failures to comply with notification requirements in 2018, and so had been committing offences over a period of 30 years. The offences against C1 had the aggravating features of the use and threat of violence, and threats to abuse C2 if she did not submit to him The offences were committed in her home and included forced oral sex and ejaculation. The offences against C2 were said to have been in breach of trust after the death of her father. Similarly, C3 regarded the appellant as a father figure and he abused her trust. The judge concluded that the offences committed when he was over 18 (counts 10 and 11) constituted "a campaign of rape". He found the appellant to be dangerous due to the nature of the offending, the timespan and his previous convictions. The pre-sentence report showed his inability to take responsibility for his offending, his manipulative personality and his pre-occupation with sex. He concluded that there was a high risk of serious harm to both adult and child females, and that an extended sentence was required to protect the public.

91. The judge found that, having regard to the modern sentencing guidelines, the offences of rape of C1 were of such severity to amount to "a campaign of rape" and merited a sentence of 22 years. The rape of C2 fell into Category 2A of the guideline by reason of her particular vulnerability and the abuse of a position of trust and he moved up from the starting point of 10 years to 12 years to reflect his previous convictions for sexual offences and to take account of the other offences he committed against her. Finally, in relation to C3 he applied the guideline starting point of 1 year which he increased to two years to reflect the fact there were three offences and his previous convictions. Applying the principle of totality he reduced what would otherwise have been a sentence of 36 years to 30 years, which was the custodial term passed for counts 10 and 11 as part of the extended sentence, with all other sentences to run concurrently.

92. The appellant raises three grounds of appeal. First, it is submitted the imposition of an extended sentence was wrong in principle. Secondly, insufficient regard was had to the principle of totality. Thirdly, the lead offences against C1 and C2 were wrongly categorised.

93. The appellant had, from young childhood through to adulthood, committed very serious sexual offences, with total disregard for the seriousness of the harm caused. He had continued to commit sexual offences against children and had disregarded the terms of a protective order. We are satisfied that, for the reasons that he gave, the judge was entitled to find the appellant to be a dangerous offender and to pass an extended sentence.

94. For the reasons we have indicated above, we do not find it helpful to attach undue significance in a case such as this to categorisation of the offending by reference to the phrase "a campaign of rape". Clearly, the offending was very serious, commencing when both the appellant and C1 were children but continuing until the appellant was a young adult, and each offence fell within the highest category of the relevant guideline. In relation to C2, the judge correctly identified the relevant guideline range. We are unpersuaded that there was any error in his approach to categorisation generally.

95. However, we do see merit in the submission that, despite the seriousness of the offending, the final custodial term of 30 years did not pay sufficient regard to the principle of totality. Nor did it give sufficient weight to his very young age at the time of some of the offences: it is relevant in that regard to note that the pre-sentence report referred to the possible impact on the appellant's behaviour of his "harmful and unconventional upbringing". In our judgement, grave though these crimes were, the appropriate custodial term should have been one of 25 years.

96. We therefore allow the appeal to the following extent. We quash the sentences imposed on counts 10 and 11 and substitute concurrent extended sentences of 30 years, comprising a custodial term of 25 years and an extended licence period of 5 years. We quash the unlawful sentences imposed on counts 1, 12 and 13 and substitute no separate penalty on each of those counts. We quash the unlawful sentence of 12 months' imprisonment on count 14, and substitute a concurrent term of 3 months' imprisonment. All other sentences remain as before.

97. Thus the total becomes an extended sentence of 30 years, comprising a custodial term of 25 years and an extended licence period of 5 years.

Abdul Hasib Elahi:

98. Elahi, now aged 27, pleaded guilty to 162 offences committed over 3 years against 72 victims resident in the UK and in other countries. On 12 December 2021, in the Crown Court at Birmingham, he was sentenced in total to an extended sentence of 40 years, comprising a custodial term of 32 years and an extended licence period of 8 years.

99. One of Elahi's victims was a 10-year old child of Ms AVJ, who was sentenced at the same time. We deal with her case later in this judgment.

100. In very bare outline, Elahi used the internet to commit grave offences against vulnerable victims all over the world. By a mixture of exploitation, fraud and blackmail he targeted young women and girls and caused them to engage in sexual activity, much of it of an extreme and depraved nature. He caused mothers to abuse their own children, some of them very young, and children to abuse their siblings. He required his victims to make video recordings and images of themselves, which he then used as the basis for his blackmail. He uploaded their imagery, with their names, to pornography websites. He also sold the imagery to other paedophiles and laundered the proceeds of that crime. The vast scale, sophistication and organisation of his offending were such that he was able to market, at terabyte levels of data, boxed sets of indecent images and videos which he sold for around £250 each. On one day he sold 310,000 photographs, and over a thousand hours of videos, to a single purchaser. Some of his victims were subsequently targeted for further blackmail by persons who had bought the imagery from Elahi.

101. The offending began in 2017. Elahi was first arrested in July 2018, and electronic devices were seized. He continued to offend whilst on police bail. Further arrests were made in December 2018 and June 2019, and in March 2020 he was made subject to a Sexual Risk Order which amongst other things prohibited him from having a phone or laptop unless he informed the relevant authorities. He nonetheless continued offending.

102. The majority of the offending can be broadly categorised as follows:

i) Offences of causing or inciting a child under 13 to engage in sexual activity, contrary to s8 of SOA 2003, and causing or inciting sexual activity with a child, contrary to s10 of SOA 2003, involving the encouragement of mothers or family members, by the prospect of financial reward, to commit sexual acts on babies and young children.

ii) Offences of encouraging sexual activity with a child, contrary to s44 of the Serious Crime Act 2007, similarly involving the encouragement of mothers or family members, by the prospect of financial reward, to commit sexual acts on babies and young children.

iii) Offences of sexual assault of a child under 13, contrary to s7 of SOA 2003, involving the appellant's participation, on a joint enterprise basis, in the acts which he encouraged.

iv) Offences of causing sexual exploitation of a child, contrary to s48 of SOA 2003, involving child victims being made to record videos of penetrative sexual acts.

v) Offences of blackmail, contrary to s21 of the Theft Act 1968, involving threats that the explicit material which his victim had sent to him would be sent to their family or friends, or posted on websites such as Pornhub, if she did not record and send worse videos.

vi) Offences of fraud, contrary to s1 of the Fraud Act 2006, involving the use of false identities and the promising of financial reward which was never paid.

vii) Offences of making, possessing and distributing indecent photographs of a child, contrary to s1 of the Protection of Children Act 1978 ("POC Act 1978"); possessing prohibited images of children, contrary to s62 of the Coroners and Justice Act 2009; and possessing extreme pornographic images, contrary to s63 of the Criminal Justice and Immigration Act 1978.

viii) Breaches of the Sexual Risk Order made on 6 March 2020.

103. The appellant, under a variety of aliases and false personas, used websites to target young women who were in financial difficulties. Posing as a wealthy middle-aged man, and skilfully falsifying imagery to persuade his victims that he had previously transferred large sums of money to other women, he initially offered to pay for a few topless or nude photographs. He corresponded with multiple victims at the same time, cutting and pasting from a script. Under the pretence of needing to ensure that they were not under age, he obtained copies of his victims' identification documents, which he then used in his blackmail.

104. By a combination of promises of ever-larger sums, threats not to pay for the material already received, and threats to send the images to others, he then required more explicit images and recordings of his victims masturbating or inserting objects into themselves. Compliance with his demands often caused his victims considerable pain. He required them to film themselves as they engaged in degrading behaviour such as drinking their own urine, licking the lavatory seat, or defecating on the floor and eating their faeces. He gave very specific instructions, demanded that his victims repeat the filming if he claimed it had not been done properly, and in that way obtained more, and more

extreme, imagery. He caused some to use a permanent marker to scrawl abusive terms on their bodies, or to choke or beat themselves, or to mutilate themselves, for example by carving his pseudonym initials into their breasts. In some cases he obtained photos of his victim's child, by claiming that he needed proof that the person he was "helping" was a single mother, and then progressed to demands that his victim record herself naked with the child and then actively abusing her child.

105. The judge said:

> "There are so many examples of your sadistic and depraved exploitation, bullying and blackmail of these desperate and vulnerable women, often leading in some cases to the sexual abuse of their children or siblings or themselves, that it would take days to cover them all again. But it is clear that throughout your offending, your demands increased in their viciousness and their brutality, and however much your victims pleaded for mercy, you ignored their pleas. Even when you knew that some of your victims were driven to attempting suicide, you seemingly sneered in the face of their despair and suggested that they should just record their efforts."

106. The evidence of Elahi's crimes makes grim reading. It is sufficient for present purposes to illustrate the offending by giving a little detail about the offences involving AVJ, and her child C4.

107. AVJ was in financial difficulties and feared she would lose her home. She was offering sexual services on websites for payment, and in May 2018 she encountered Elahi through a website which she used. He persuaded her, by the offer of money and claims to have sent large sums to other women, to record herself posing in high heels, then penetrating her anus and vagina with sex toys, beating herself with a belt and inserting a wooden spoon into her anus. After some hours, she had reached the stage of recording herself vomiting and licking up her vomit, flushing her head in the lavatory and scrawling words on her body.

108. In the early hours of the morning Elahi began to ask questions about C4, who was suffering from diarrhoea and vomiting. He told her that she had failed many of the tasks he had set her, but could make it up with incest. Photographs and videos were recorded of AVJ naked, with C4 touching her breasts and AVJ masturbating herself. There was then a break of several hours whilst AVJ slept. In the morning, she contacted Elahi again. Further videos were then recorded of AVJ engaging in sexual activity with C4 in the bath, including masturbating the child. Because of the child's diarrhoea, there was excrement in the bath.

109. Counts 12 and 13 charged sexual assault of a child under 13 contrary to s7 of SOA 2003, those counts relating to the first occasion when AVJ masturbated C4 and at least 8 further occasions when she did so in the following hours. Count 14 charged an offence of making indecent photographs of a child contrary to s1 of POC Act 1978, relating to at least nine videos and images of C4 recorded by AVJ. Elahi subsequently distributed at least two of those recordings (count 15, distributing indecent photographs of a child contrary to s1 of POC Act 1978).

110. Contact between Elahi and AVJ continued over some weeks, but AVJ refused to do any more. She was not paid. In late July, Elahi threatened to post the imagery online. Video footage showing AVJ's child was sold by Elahi to a paedophile and uploaded to a website.

111. The judge identified the following aggravating features: the planned and sustained nature of Elahi's offending, which continued even when on police bail and subject to a court order; the use of the internet to contact multiple victims; the young ages and/or vulnerability of the victims; the deliberate targeting of vulnerable victims; the breach of trust in the joint enterprise offences involving abuse of children; the use of blackmail; and the effect on the victims, increased by their knowledge that the imagery is likely to remain on the internet indefinitely, thus exposing them to further humiliation and potential blackmail by others. She indicated her categorisation of offences under the relevant sentencing guidelines. As to mitigation, the judge noted Elahi's age and the fact that he had only one minor previous conviction and no previous experience of custody. She allowed 25% credit for the guilty pleas.

112. The judge found Elahi to be a dangerous offender. She concluded that the necessary public protection could be achieved by an extended sentence and that a life sentence was not justified. She said that an appropriate overall sentence after trial would have been 60 years. Taking into account the credit for the guilty pleas, and totality, she imposed an extended sentence of 40 years, comprising a custodial term of 32 years and an extended licence period of 8 years, on count 20 of the second indictment: an offence contrary to s8 of SOA 2003, which related to Elahi causing one of his victims in America to engage in oral sex with her 9 year old brother. Shorter extended sentences were imposed on nine other counts, and shorter determinate sentences on all other counts. All sentences were ordered to run concurrently.

113. There is no challenge to the finding of dangerousness, the decision to impose an extended sentence or the length of the extended licence period. In his written and oral grounds of appeal, Mr Arnold submits that the judge took too high a starting point for the overall sentence after a trial; failed to make a sufficient reduction for totality; and failed to give Elahi the full credit which he should have received for his guilty pleas. He acknowledges the extraordinary range and gravity of the offences, but points to features which were somewhat less serious than the offending in *Falder*, *Wilson* and *Leighton*: he notes, for example, that Elahi did not cause the rape of a young child. He also submits that much of the imagery obtained by Elahi showed young adult women rather than children. He submits that full credit should have been given because all offences had been admitted by Elahi in interview.

114. This case involved offending on a very large scale, continuing over a period of 3 years and undeterred by arrests and court orders. Elahi clearly took pleasure in manipulating his victims, and he pursued them remorselessly and with callous indifference to their suffering. His offending was in our view particularly serious because of its very wide range and the number of lives which he has irreparably harmed. His conduct drove many of his victims to attempt suicide. Some were prosecuted. Some had their children taken into care. Most of them suffered significant mental health problems.

115. Mr Arnold submitted that there was a danger of sentence inflation simply because the internet enables much wider offending. We do not agree. The fact that an offender such as Elahi can ruin many lives without moving from the bedroom in his parents'

home does not of itself reduce his culpability. If, by using the internet, an offender can and does target many more victims than would have been possible some years ago, and to extend his criminality beyond the UK, he must expect to be sentenced for that wider offending.

116. The scale of Elahi's offending makes it particularly difficult to derive any assistance from a comparison with the facts and circumstances of other cases. The judge gave what was in our view entirely appropriate credit for the guilty pleas: the reduction of 25% was in accordance with the principles stated in *R v Hodgin* [2020] 4 WLR 147, *R v Plaku* [2021] EWCA Crim 568 and *Wilson*, and Elahi could not realistically have expected any greater reduction. If the judge had taken a total sentence of 60 years after trial, and reduced it only by way of credit for the guilty pleas, we agree with Mr Arnold that it would have been manifestly excessive. However, the judge also made a substantial reduction to take account of totality. The resultant custodial term of 32 years was severe, and at the top of the range properly open to the judge; but we are not persuaded that it was manifestly excessive. No criticism could be, or is, made of the judge's decision to extend the licence period by 8 years.

117. We pay tribute to the care with which the judge, and counsel, went about this difficult sentencing process. Unfortunately, two errors were made.

118. First, the judge – with the agreement of counsel – did not pronounce all the sentences in open court. Instead, she pronounced the extended sentences which she imposed on 10 counts. The sentences on all other counts were not mentioned in court, but were instead set out in a schedule which the judge provided to counsel. We understand why that seemed a convenient course in a case of this scale and complexity, but it was inappropriate. As was observed in *R v Whitwell* [2018] EWCA Crim 2301, [2019] 1 Cr App R (S) 29 at [24], "it is necessary for the sentences on each count to be pronounced by the judge in open court". The statutory duties imposed by s52 of the Sentencing Code apply to "a court passing sentence". Even in a case such as this, the sentence on each count must be passed in open court. It can of course be done in a comparatively brief way, for example by reference to the number of the count, or counts, in the indictment on which a particular sentence is imposed.

119. Secondly, when a mistake was identified in the schedule of sentences, the judge purported to correct it under s385 of the Sentencing Code (the "slip rule") by uploading an amended copy of her schedule. Under Crim PR r.28.4(2)(a), it was permissible for the judge to vary her sentence without a hearing; but under r28.4(2)(b) she was required to announce the variation, and her reasons for it, "at a hearing in public". That requirement was not fulfilled.

120. These errors do not render the sentencing, or any part of it, unlawful. We shall correct them by pronouncing the sentences imposed on each count in open court when this judgment is handed down.

121. We will also direct that the record in the Crown Court be amended to show the correct statutory provisions in relation to the extended sentences, the forfeiture and destruction order and the committal for sentence. In each of those respects, the record wrongly referred to the former statutory provisions rather than the current provisions of the Sentencing Code.

122. For those reasons, we grant leave to appeal in Elahi's case, but dismiss the appeal.

AVJ:

123. Ms AVJ, now aged 36, pleaded guilty to counts 12, 13, 14, on which she was jointly charged with Elahi. She was sentenced to a total of 6 years 9 months' imprisonment on count 12, and concurrent terms of 6 years 9 months on count 13 and 5 years 3 months on count 14.

124. We have sufficiently stated the facts of the offences when dealing with the case of Elahi: see paras 107-110 above.

125. The judge was assisted by a pre-sentence report and two psychological reports. Under the relevant sentencing guidelines, she assessed each of the offences as having a starting point of 6 years' custody and a range from 4 to 9 years. She referred to the immense harm which the offending had caused both to AVJ's child, who had written three suicide notes and had for a time displayed inappropriate sexualised behaviour, and to the child's father, who had suffered mental health problems. The judge noted as aggravating features that the child was particularly vulnerable because ill and weak at the time; the breach of trust; the motive of financial gain; and the failure to take the opportunity to cease the activities after AVJ had slept for a time.

126. As to mitigation, the judge took into account that AVJ had no previous convictions; the comparatively short duration of the filming; the passage of time since AVJ's arrest; the impact of her child having been taken into care, with only limited supervised access; and the diagnosis that AVJ was now suffering from severe depression.

127. The judge concluded that AVJ had been willing to do what she was asked, deluding herself that she was in control and could limit the harm to her child. The judge was satisfied that an extended sentence would be sufficient to address any risk of further offending. She indicated that the total sentence after trial would have been 9 years. She allowed 25% credit for the guilty pleas, and so imposed the sentences to which we have referred.

128. In her written and oral grounds of appeal, Ms Francis takes no issue with the extent of the credit given for the guilty pleas. She submits, however, that the total sentence was manifestly excessive, in particular because the judge failed to give sufficient weight to the mitigating factors and wrongly moved upwards from the guideline starting point.

129. We are unable to accept those submissions. Whatever her financial difficulties, AVJ knew that she was making films of her child which could be published on the internet. Although it covered only a few hours, the offending involved nine separate acts of abuse of the child, all done for financial gain. Quite apart from the harm already suffered by the time of sentencing, the child faces the lifelong risk of the imagery appearing on the internet. An upward movement from the starting point applicable to one of the offences was clearly necessary. The total before credit for the guilty pleas was stiff, but it was within the range properly open to the judge.

130. For those reasons, AVJ's application for leave to appeal against sentence is refused.