

LMD-B26-19

**JUDGMENT OF SHERIFF G LAMONT**

in the summary application under the Protection of Vulnerable Groups (Scotland) Act 2007  
section 21

by

DAVID ALEXANDER

Pursuer

against

THE SCOTTISH MINISTERS

Defenders

**Act: Sloan, Messrs Aamer Anwar & Co**

**Alt: Stevenson, Scottish Ministers**

**Lochmaddy 4 February 2021**

The sheriff, having resumed consideration of the application, refuses same; repels the pursuer's pleas-in-law; sustains the defenders' second plea-in-law; confirms the defenders' decision to list the pursuer in the children's list; appoints parties to be heard on the matter of expenses.

[1] This is an appeal under section 21 of the Protection of Vulnerable Groups (Scotland) Act 2007. The pursuer seeks to exercise his right of appeal against being listed on the children's list by the defenders. Parties were agreed that the matter was to be determined by section 21(3) which provides as follows:

21(3) The Sheriff must determine an appeal under subsection (1) –

- (a) Where the sheriff is satisfied by information relating to the individual's conduct that the individual is unsuitable to work with children, by confirming Ministers' decision to list the individual in the children's list, or
- (b) Where the Sheriff is not so satisfied, by directing Ministers to remove the individual from the children's list.

[2] The appeal called before me for an evidential hearing on 4 November 2020. I heard evidence from the appellant and the following witnesses:

- (a) Aman Toor, Criminal Justice Social Worker, Comhairle nan Eilean Siar (for the defenders)
- (b) Douglas George, Senior Social Worker, Community Justice, City of Edinburgh Council (for the defenders)

In addition, a consolidated joint minute of agreement was before the court. Submissions were heard on 3 December 2020.

[3] I found the following facts to be admitted or proved:

1. On 11 October 2018, at Lochmaddy Sheriff Court, the pursuer was convicted after

trial of three offences under section 3 of the Sexual Offences Act 2009 in the following terms:

“On various occasions between 1 January 2016 and 31 July 2016, both dates inclusive, at Sgoile Liniclate, Liniclate, Benbecula and at the North Uist Games, Balelone and the Machair near Balelone, North Uist you DAVID ALEXANDER did sexually assault ..., c/o the Police Service of Scotland, Stornoway in that you did rub her leg and thigh, place your hand under her clothing and handle her breasts and handle her genitals over her clothing and over her underwear; CONTRARY to section 3 of the Sexual Offences (Scotland) Act 2009.

On two occasions between 1 April 2015 and 30 April 2016, both dates inclusive, at an address unknown to the prosecutor in Balivanich, Benbecula and Screen Machine, Liniclate, Benbecula you DAVID ALEXANDER did sexually assault... c/o the Police Service of Scotland, Stornoway in that you did handle her leg over her clothing and place your hand under her top and handle her breasts over her bra; CONTRARY to section 3 of the Sexual (Offences) Act 2009.

On various occasions between 1 October 2016 and 26 June 2017, both dates inclusive, at Sgoil Liniclate, Liniclate, Benbecula you DAVID ALEXANDER did sexually assault..., then aged 15 and 16 years of age, c/o the Police Service of Scotland, Benbecula in that you did repeatedly touch and rub her leg and upper thigh and on 26 June 2017 you did persistently handle her genitals over her clothing; CONTRARY to section 3 of the Sexual (Offences) Act 2009.”

2. The offences were committed against three teenage female complainers. The complainers were aged 13, 14 and between 15 and 16 respectively at the time of the offences. The pursuer was aged 15, 14 and between 15 and 16 respectively at the time of the offences.
3. The offences took place between April 2015 and June 2017.
4. The offences committed were committed by the pursuer without the consent of the three complainers and without any reasonable belief they consented. The pursuer did not seek consent. He assumed consent.
5. The offences involved elements of power, control and manipulative behaviour by the pursuer. They occurred in public places. Complainers felt uncomfortable, upset and embarrassed. In some instances the assaults took place in circumstances where the complainers felt unable to take action to stop the sexual assault.
6. On 4 December 2018 the pursuer was sentenced *in cumulo* to a community payback order with a supervision requirement of two years, associated conduct requirements relevant to sexual offending and an unpaid work requirement of 180 hours. The pursuer completed his unpaid work requirement to a high standard. This work did not involve working with children.
7. On 18 September 2019 the defenders included the pursuer on the children’s list.
8. The social work department carried out regular assessments of the pursuer after conviction. The purpose of these assessments included assessing the level of risk associated

with the pursuer, identification of appropriate interventions and the prevention of reoffending.

9. In respect of sexual offending, the pursuer was recorded as presenting a moderate risk or requiring medium supervision in each assessment carried out by the social work department. In respect of sexual offending, on no occasion was he assessed by the social work department (or any professional) as falling into the lowest category of risk or lowest level of supervision needs.

10. The most recent assessment of the pursuer was a Stable 2007 assessment completed on 3 February 2020. This form assesses the dynamic risk factors in relation to sexual offending relevant to the pursuer. The pursuer was assessed as being in the "moderate" category.

11. The pursuer has continued to assert his innocence since his conviction. This limited the effectiveness of social work intervention. In particular, it prevented offence focused work being carried out effectively.

12. The pursuer has not sought to obtain independent expert psychiatric, psychological or social work input into his suitability for working with children.

13. The pursuer is currently studying law. He is concerned at his ability to work in a legal career if he remains on the children's list. He is concerned about being labelled a "paedophile". He is in a long-term relationship. He has recently completed his community payback order. He wishes to move on with his life.

14. The pursuer lacks meaningful insight into his offending. He lacks empathy. He minimises his offending behaviour. He does not understand consent.

15. The pursuer is unsuitable to work with children.

**Note**

[4] The defenders are required by section 1 of the Protection of Vulnerable Groups (Scotland) Act 2007 (“the Act”) to keep a list of persons considered by them to be unsuitable to work with vulnerable children in Scotland. This is known as the children’s list. The pursuer was included in the children’s list on 1 October 2019. The defenders intimated their decision by correspondence to the pursuer dated 1 October 2019. As a listed person, the pursuer is barred from engaging in regulated work with children in terms of section 92 of the Act. This prohibition encompasses a wide range of activities, establishments and positions as set out in schedule 2 of the Act.

[5] The pursuer has exercised his right of appeal against inclusion on the list by way of summary application in terms of section 21(3) of the Act. In terms of the section, if I am satisfied on the evidence before me relating to the pursuer’s conduct that the pursuer is not suitable to work with children I require to confirm the defenders’ decision. If not so satisfied I must direct the pursuer be removed from the list. Accordingly, I require to make an independent assessment and decision based on the evidence placed before me. This is not a review of the defenders’ decision.

[6] The pursuer was convicted of three sexual offences on 11 October 2018. The sheriff presiding at the trial provided a report (at 6/12 of process) which was agreed between parties to be the equivalent of oral testimony. I accept the contents of the report in its entirety. The report provides more detail as to the index offences. The conduct described by the complainers included the touching of breasts over clothing, rubbing of thigh progressing towards groin area and rubbing of vagina over underwear. The assaults lasted up to 15 minutes. They were committed in a variety of locations. This included a table at a school cafeteria with others sitting at the table, a cinema and in class. At trial, the complainers

described in evidence their reaction. This included feeling uncomfortable, not knowing what to do, not wanting to cause a fuss and being upset or embarrassed. The sheriff held that the pursuer could have had no reasonable belief that the complainers consented to his conduct. The pursuer did not seek consent but assumed consent.

[7] The offences were committed relatively recently between April 2015 and June 2017. The complainers were peers of the pursuer. He had been friends with at least two complainers (and possibly all three) prior to the trial. They were of similar ages to the pursuer. Each complainer was sexually assaulted on more than one occasion.

[8] The pursuer's position at trial was that either the conduct did not take place or that any touching was done in the reasonable belief that the complainers consented. The presiding sheriff found the pursuer's evidence unconvincing. In contrast he found the complainers' evidence to be credible and reliable.

[9] Mr Toor, criminal justice social worker, gave evidence in respect of the pursuer. He was appointed as the pursuer's case worker on 4 January 2019. Prior to that he had been involved in the assessment of the pursuer for the purpose of the criminal justice social work enquiry report dated 30 November 2018 (5/2 of process) and associated AIM(2) assessment after conviction. The AIM(2) assessment is a tool used to assess the likelihood of the pursuer conducting future sexual offences. He set out the additional assessments required for sexual offenders. He met with the pursuer on numerous occasions (30 to 40 times) and prepared regular reports in this regard. He gave evidence relating to risk assessments, the social work assessment of risk factors and criminogenic factors.

[10] Mr Toor was the author of the community payback order progress reports dated 22 February 2019, 20 May 2019, 31 July 2019 and 7 October 2019 (5/3-5/6 of process). They record the pursuer presenting with medium level of supervision needs in relation to sexual

offending and to be supervised as medium risk. The July 2019 report refers to a Stable (2007) assessment which indicated the pursuer required a moderate level of service supervision. The reports highlight in general terms the pursuer's compliance with the social work department. However, the assessments in May 2019 and July 2019 particularly highlight the difficulties faced by the social work department concerning the pursuer's insight into his offending and the associated challenge of carrying out offence focused work.

[11] Mr Toor stated that he found the pursuer to show little remorse in respect of his victims. The pursuer engaged in 'victim-blaming' and suggested collusion between the complainers. In addition, in his opinion, the pursuer did not display an understanding of consent. Mr Toor found the pursuer's responses to be 'cut and paste' rather than showing a genuinely empathetic response. He described the pursuer as struggling with responses unless they were theoretical. Mr Toor could not say the pursuer properly understood consent.

[12] Mr Toor further confirmed he had been limited in his ability to carry out offence-focused work with the pursuer. This was as a result of the pursuer's refusal to accept his guilt. Accordingly, work that Mr Toor might have been able to undertake to reduce the risk of the pursuer's further sexual offending was not undertaken. In sessions with the pursuer general examples required to be used rather than examples related to his specific offending. This reduced the effectiveness of social work input in reducing risk.

[13] Mr Toor assessed the pursuer as having medium supervision needs in relation to sexual offending. He did not accept that the pursuer's compliance had been appropriate or positive in relation to risk given the pursuer's refusal to accept his guilt and engage in appropriate offence-focused work.

[14] He described the pursuer as an intelligent young man with the potential to achieve. However, he highlighted the pursuer's emotional immaturity. He also highlighted the power and control elements in the offences and the premeditation and planning required. The pursuer had acted on his own. The offences were not isolated occasions but repeated occasions involving more than one complainer. I accept without hesitation the evidence of Mr Toor as both credible and reliable.

[15] During the period between conviction and the pursuer moving to Edinburgh the pursuer was assessed on numerous occasions by the social work department by means of AIM(2) assessment, Stable (2007) assessment and the aforementioned community payback order progress reports. He was to be supervised as having medium supervision needs in relation to sexual offending risk. His risk was assessed as moderate or medium.

[16] The pursuer moved to Edinburgh in the summer of 2019. This required a new social worker to be appointed to him. Mr George was appointed his supervising social worker on 10 October 2019. He carried out an assessment of the pursuer and identified that the pursuer still presented with risk factors. These included the nature of the offences, the pursuer's ongoing denial, the fact that intervention had been limited and that a full assessment of the pursuer had also been limited. He considered the pursuer to have limited insight into his offending. He indicated the pursuer showed limited remorse for his offending. I accept without hesitation the evidence of Mr George as both credible and reliable.

[17] Mr George carried out a Stable-2007 assessment of the pursuer on 3 February 2020 (5/10 of process). This assessment is used to identify risk factors in sexual offenders relevant to the risk of reoffending. He indicated that the assessment should be viewed with some

caution given the age of the pursuer. However, the assessment placed the pursuer in the 'moderate' category. This is the most recent risk assessment of the pursuer.

[18] Accordingly, at no stage post-conviction has the pursuer been assessed by the social work department in the lowest category in relation to supervision needs or risk in respect of sexual offending.

[19] In general, the focus of the pursuer's evidence was how the conviction had impacted on him rather than his suitability to work with children. He had been forced out of school, had limited support from teachers and been unable to find employment on the island. He is now studying law and lives in Edinburgh. He is in a long-term relationship. To the pursuer's credit it appears his studies are going well. He wishes to take up a career in law and was concerned about how being listed on the children's list would impact his employment prospects. However, no evidence was led from an employment expert or from the Law Society on this point. The pursuer had not met with the Law Society to discuss the ramifications of being placed on the children's list as he had done after conviction. The pursuer did not plan to practice family law. He stressed he was not "a paedophile". He was shocked and disgusted to be put on the list. The complainers were his peers. He was not attracted to children. He expressed that he felt his sentence was being extended.

[20] Given the pursuer's evidence he should note that the decision to place him on the children's list is not a punishment but is a public protection decision made when the Scottish Ministers decide someone is unsuitable to undertake regulated work with children.

[21] The pursuer confirmed in evidence that he continued to deny his guilt. His position was that he was unaware the complainers were unhappy. He was shocked to be convicted. He found the offences disgusting.

[22] Despite this denial, the pursuer claimed to understand consent. When giving evidence on this topic the pursuer looked uncomfortable. His answers were formulaic and shallow. They lacked empathy and made little meaningful reference to the other person. He became more hesitant and less precise when answering questions. In cross-examination he stated that his understanding of consent was the same as it had been before the offences. This is concerning given that it was held at trial the pursuer could have had no reasonable belief the complainers consented. Indeed, it is difficult to reconcile the pursuer's claimed understanding of consent with the content of the note prepared by the sheriff who presided at his trial. I formed the view that the pursuer still did not understand consent. This assessment is similar to the evidence of Mr Toor and perhaps is not surprising given the limitations of social work involvement on this topic.

[23] It was submitted on the pursuer's behalf that being placed on the children's list represented a disproportionate interference in the pursuer's right to a private life. It was argued that there was a stigma attached to a listing which would have a disproportionate effect on his future prospects. Reference was made to article 8 of the European Convention on Human Rights which is in the following terms:

1. *Everyone has the right to respect for his private and family life, his home and his correspondence.*
2. *There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*

There was insufficient evidence before the court to allow any appropriate determination that the pursuer's employment prospects would be adversely impacted by being placed on the children's list. Little evidence was led regarding whether this would impact either his

admission to the legal profession (e.g. no witness from the Law Society) or impact his employment prospects (e.g. no employment expert). No witness was led from the Law Society or from an employment expert. The pursuer had not inquired with the Law Society what the impact of being placed on the children's list would be. The only evidence in this regard came from speculation by the pursuer. In any event, it was accepted (correctly) by the pursuer's agent that the scheme exists to protect children from potential harm. It was accepted (again correctly) that the principal aim of the scheme was one of risk management and protection of vulnerable groups. The legitimate aim of listing the pursuer is one of public safety and prevention of further offending. Accordingly, even if article 8 had been properly engaged, the listing of the pursuer would fall within the exceptions set out in article 8(2) given the evidence before me.

[24] It was further submitted on behalf of the pursuer that the court should look at the reality of the type of work the pursuer wanted to do. The pursuer stated he had no plans to work with children. He does not wish to practice in family law. Reference was made to the case of *LG v Scottish Minsters* (unreported). In that case it was stated that the sheriff considered the type of work the pursuer wished to carry out and that the convictions she had accrued did not translate into a risk to children in her capacity as a kinship carer. The pursuer's convictions in that case related to dishonesty, not assaults on children. She had been assessed as suitable to be a kinship carer by social workers. She had regularly counselled children prior to her listing without objection. There had been no convictions for either physical or sexual assault on children. The court assessed that there was no risk of the pursuer physically harming children on the evidence available to the court. The facts of that case are readily distinguishable from this case given the pursuer's convictions for actual

sexual assaults on teenage girls and the aforementioned evaluations of the pursuer by the social work department.

[25] A submission was also made on behalf of the pursuer in relation to the Scottish Sentencing Council publication 'The Development of cognitive and emotional maturity in adolescents and its relevance in judicial contexts' (5/7 of process). In general, the purpose of this was to allow the court to factor in the youth of the appellant, his associated immaturity and adolescent behaviour. During oral submission it was clarified that the extent of this submission could be summarised from the wording of the executive summary as "...it is however recommended that the brain's continued growth, until as late as 25-30 years of age, and the resulting cognitive immaturity, should be considered during judicial processes involving adolescents and young people". The document deals with the culpability of adolescents and young people in a sentencing context. The particular phrase highlighted is in the context of sentencing guidelines. It may assist in the sentencing of young people in order that appropriate sentencing options are considered making an allowance for age and development. In the current case it does not assist to any great extent in assessing whether the pursuer is suitable to work with children. If the pursuer was attempting to set up a submission that his offending behaviour was due to cognitive immaturity and that he had now matured then appropriate expert evidence (e.g. a psychiatrist or psychologist specialising in development) would require to be led. This would involve an up-to-date assessment of the risk posed by the pursuer in relation to sexual offending against children. No such evidence was before the court regarding the relevance of this publication to the current case or to evidence a change in the pursuer's cognitive immaturity as a result of his development. Accordingly, on the basis of the evidence before me, I did not find this document to be of particular assistance in assessing the suitability of the pursuer to work

with children. It was also pointed out by the pursuer that although the offences were against children he was also a child at the time of the offences. The offences were committed against his peer group. He stated he was not attracted to children. He was not a paedophile. He was shocked and disgusted to be placed on the list. A court would require to take into account any expert psychiatric/psychological/social work evidence which was relevant to the pursuer's conduct in assessing his suitability to work with children and any associated risk. However, no such evidence was led. I take into account as far as I am able to that the pursuer was of broadly the same age as the complainers, that he was also a child at the time of the offences and that young people may continue to develop. Section 97 of the Protection of Vulnerable Groups (Scotland) Act 2007 defines a child as an individual under the age of 18. The pursuer is currently aged 19. The difference in age between the pursuer and a female child aged 17 is no greater than the two year difference between himself and the complainer in his first offence. The pursuer has recently demonstrated the capacity to sexually assault teenage girls. No expert evidence was led by the pursuer to show that he was no longer attracted to females under the age of 18 or that he no longer posed a risk to that age group.

[26] Section 21(3) requires me to consider the matter afresh on the basis of the evidence put before me. All of the offences took place against teenage girls. They were committed relatively recently. Each of the three complainers was sexually assaulted on more than one occasion. The offending took place over a period in excess of two years. The pursuer's conduct demonstrated power, control and manipulation of complainers. He acted alone. The pursuer continues to refuse to accept his guilt for the offences. As a result, offence-focused work and social work input was restricted. This reduced the effectiveness of social work involvement with the pursuer regarding issues concerning consent. The pursuer was

assessed as requiring medium supervision in relation to sexual offending throughout his community payback order (completed in December 2020). His most recent risk assessment by the social work department assesses him in the moderate category. The pursuer lacks a proper understanding of consent, shows little empathy or remorse and lacks insight into his offending behaviour.

[27] Section 21(3) requires me to consider the matter afresh on the evidence put before me. Having done so, I am satisfied that the appellant is unsuitable to work with children. Accordingly, I am obliged to confirm the Ministers' decision to list the applicant.

[28] I will assign a hearing to be addressed on the matter of expenses.