



Neutral Citation Number: [2022] EWCA Crim 1080

IN THE COURT OF APPEAL
CRIMINAL DIVISION
ON APPEAL FROM THE CROWN COURT AT SOUTHWARK
HIS HONOUR JUDGE GRATWICKE

Case No: 202201244 A4

Royal Courts of Justice
Strand, London
WC2A 2LL

15 July 2022

Before:

LORD JUSTICE STUART-SMITH
MR JUSTICE GOSS
THE RECORDER OF WESTMINSTER
HER HONOUR JUDGE DEBORAH TAYLOR
(Sitting as a Judge of the Court of Appeal Criminal Division)

REFERENCE BY THE ATTORNEY GENERAL UNDER
S.36 OF THE CRIMINAL JUSTICE ACT 1988

Between:

REGINA
-and-
NICHOLAS NELSON

MR B LLOYD appeared on behalf of the **Attorney General**
MR A NORRIS appeared on behalf of the **Offender**

Approved Judgment

LORD JUSTICE STUART-SMITH:

1. On 24 January 2022, the date fixed for his trial in the Crown Court at Cambridge before His Honour Judge Gratwicke, Mr Nelson pleaded guilty to three offences, details of which we set out below. He submitted a basis of plea dated 22 January 2022 to which we will refer later.
2. On 25 March 2022 before the same judge, now sitting at Southwark Crown Court, he was sentenced as follows. On Count 1 of the indictment, which was an offence of sending an electronic communication with intent to cause distress or anxiety, contrary to section 1(1)(a) of the Malicious Communications Act 1988, on his plea of guilty he was sentenced to eight months' imprisonment suspended for 24 months. On Count 2, which was a charge of racially aggravated harassment, contrary to section 32(1)(a) of the Crime and Disorder Act 1998, on his plea of guilty he was sentenced to 18 months' imprisonment suspended for 24 months. On Count 3, which was another count of racially aggravated harassment, contrary to section 32(1)(a) of the Crime and Disorder Act 1998, upon his plea of guilty he was sentenced to 18 months' imprisonment suspended for 24 months.
3. Having committed offences during the 12-month operational periods of two separate suspended sentences (a) of 20 weeks in aggregate, imposed on 10 December 2018 by the Central London Magistrates for two offences of racially aggravated harassment and (b) eight weeks' imprisonment imposed on 9 January 2019 by Thames Magistrates for an offence of sending an electronic communication with intent to cause distress, Mr Nelson was fined the sum of £200 for each breach.
4. The total sentence therefore was 18 months' imprisonment suspended for 24 months, with the following requirements: 220 hours unpaid work requirement, a requirement to participate in the Stepwise problem-solving programme, a rehabilitation activity requirement of 30 days and fines in the sum of £400 in aggregate because of the breaches of the suspended sentences. There was a victim surcharge order and he was made subject to a restraining order until further notice.
5. The Solicitor General now applies for leave to refer those sentences as being unduly lenient, both singly and in the aggregate. For the reasons that will appear we give leave.
6. As is apparent from the brief summary that we have given, Mr Nelson had relevant previous convictions. It is necessary first to summarise the timeline and substance of those convictions in order to place the present offences in their proper context.

The background

7. Between 23 and 29 March 2018 in Gloucester, Mr Nelson pursued a course of conduct which amounted to the harassment of a prominent Jewish female Labour Member of Parliament, Luciana Berger, contrary to section 2(1) and 2(2) of the Protection from Harassment Act 1997.

8. Between 24 April and 22 May 2018, Mr Nelson pursued a course of conduct which amounted to the harassment of an employee of Ruth Smeeth, another prominent Jewish female Labour Member of Parliament, contrary to the same sections by sending abusive and unpleasant emails and an abusive and unpleasant voice-mail message that were intended for Miss Smeeth but were intercepted by her assistant.
9. We do not have the details of those communications in either case, save that they were threatening, homophobic and antisemitic. Mr Nelson pleaded guilty to those charges on 15 November 2018. On each Count Mr Nelson was sentenced by the Gloucester Magistrates on 10 December 2018 to 10 weeks' imprisonment consecutive, suspended for 12 months, i.e. to 9 December 2019. Ancillary orders were made, including a rehabilitation activity requirement up to a maximum of 20 days and an unpaid work requirement of 160 hours. We shall refer to that as “the First Suspended Sentence.
10. Restraining orders were made prohibiting Mr Nelson from contacting his victims, either directly or indirectly, that order being in force until 9 December 2023.
11. While on bail in respect of those two offences, on 29 October 2018 Mr Nelson sent to Christina Patterson, a well-known journalist, four emails and Twitter messages which conveyed a message which was indecent or grossly offensive for the purpose of causing distress or anxiety to Miss Patterson, contrary to section 1(1)(a) and (4) of the Malicious Communications Act 1988. We do not have the details of those communications other than that they were indecent or grossly offensive.
12. On 9 January 2019 before the Thames Magistrates' Court Mr Nelson pleaded guilty to that offence and was sentenced to eight weeks' imprisonment suspended for 12 months, i.e. to 8 January 2020. Once again a rehabilitation activity requirement was made up to a maximum of 10 days. We shall refer to that as “the Second Suspended Sentence”. A restraining order was made that prohibited Mr Nelson from contacting Miss Patterson. The order was to remain in force until 8 January 2022.
13. On 30 September 2020 Mr Nelson pleaded guilty to three offences of sending a communication of an indecent or offensive nature, contrary to section 1(1)(b) of the Malicious Communications Act 1988. The victims were Dame Margaret Hodge, Miss Louise Ellman and Mr John Mann (as he then was) all of whom were Jewish Labour MPs. The offences were committed on 18 July 2018 (Count 2), 2 August 2018 (Count 3) and 3 September 2018 (Count 1).
14. On and from 30 September 2020 Mr Nelson was remanded on conditional bail for these offences. On 25 November 2020 before the Westminster Magistrates' Court Mr Nelson was sentenced on each count to 10 weeks' imprisonment consecutive, suspended for 18 months with an unpaid work requirement and a rehabilitation activity requirement. We shall refer to that as “the Third Suspended Sentence”.
15. In summary, the courts have already had to deal with Mr Nelson on three occasions in respect of six offences involving harassment and malicious communications committed

between March and October 2018. From 10 December 2018 until 9 December 2019 he was subject to the First Suspended Sentence totalling 20 weeks. In addition, from 9 January 2019 until 8 January 2020 he was subject to the Second Suspended Sentence of eight weeks, and from 25 November 2020 (which is after the date of the offences with which we are concerned) he has been subject to the third suspended sentence of 30 weeks, which ran until 24 May 2022.

The present offences

16. We turn to the details of the present offences in a moment. It is convenient at this stage simply to say that the three Counts on the indictment represent three more offences that are very similar in substance to the previous offences that we have outlined. In chronological order:

- a. Count 2 was an offence of racially aggravated harassment directed at Mr Lee Kern and particularised as occurring between 2 November 2018 and 11 October 2020. That period of offending was during the currency of the first suspended sentence from 10 December 2018 for a year, and the second suspended sentence from 9 January 2019 for a year. The start date, November 2018, was the month after the offence committed against Miss Patterson. From 30 September 2020 to 11 October 2020 he was on bail having pleaded guilty to the three offences that led to the Third Suspended Sentence. During that period he sent the final two messages that were covered by Count 2 of the present proceedings.

However that does not tell the whole story. Mr Nelson was originally charged with the offences that became Counts 1 to 3 of the present proceedings (to which we will refer in more detail in a moment) on 4 August 2020. At that stage the charge relating to Mr Kern was specified as running from 15 February 2019 to 17 February 2020. Despite having been charged in this way on 4 August 2020, Mr Nelson continued with his campaign against Mr Kern until 11 October 2020. In other words he took no notice of the fact that he had been charged with an offence against Mr Kern and carried on regardless.

- b. Count 3 was an offence of racially aggravated harassment particularised as happening between 8 November 2019 and 18 February 2020. That period of offending was during the period of Count 2 and during the currency of the First Suspended Sentence from 8 November 2019 until its expiry in December 2019, and the Second Suspended Sentence from 8 November 2019 until its expiry in January 2020.
- c. Count 1 was an offence of sending an electronic communication with intent to cause distress or anxiety particularised as occurring between 29 April and 2 May 2020. That was not during the currency of the first, second or third suspended sentences, but it was during the period also covered by Count 2.

17. The offending covered by Count 2 can only be described as a persistent campaign of vile, antisemitic, pornographic and homophobic abuse including some of the worst kind

imaginable. It involved the harassment of Mr Kern between 2 November 2018 and 11 October 2020. Mr Kern was and is a professional writer who used his Twitter account to speak out against antisemitism. He is Jewish. There was no prior relationship between Mr Nelson and Mr Kern. The victim received a number of abusive messages through his website which were traced back to the offender's IP address. Mr Kern reported matters to the police and then received further messages after the police investigation had begun. Mr Nelson was interviewed by the police on 15 October 2020 and made no comment. The hostility demonstrated towards Mr Kern was on the basis of his Mr Kern's membership of the Jewish community. Mr Kern found the messages highly distressing. He did not know where the messages were coming from.

18. Starting comparatively moderately by comparison with what was to follow, Mr Nelson wrote that Mr Kern was "a hateful and disgusting man", "an idiot" and "a moron". Political abuse followed with the racist aggravation of the harassment becoming prominent, accusing Mr Kern of being an Islamophobic racist enjoying right-wing, white supremacist, privileged entitlement. Other messages made direct reference to violence being perpetrated against Jews and to the Holocaust with a statement that "another Holocaust would be too good for you." Perhaps most despicable of all in a crowded field were messages asserting or describing Mr Kern performing sex acts with Hitler. These were particularly repulsive in any event, but their impact on a victim who had lost members of his family to the Holocaust can scarcely be imagined by others.
19. Although we have only seen a small selection, Mr Kern's evidence was that he received over 150 such messages, often as many as six per day, at any time of the day or night, on any day of the week. His victim impact statements explain with crystal clarity the effect on his work, his home and his wellbeing. He is a performer but because the abuse was often about his TV work, as well as being antisemitic, he stopped performing altogether because of the risk of attack that he (understandably in our view) perceived. His home life was directly affected with one occasion of particularly offensive antisemitic abuse being received on his way to bury his great uncle. He said that in time he came to doubt his own sanity. Because Mr Nelson remained anonymous to him for much of the period, it affected his relationships with relatives, friends and colleagues and to arguments with his partner because they were fearful for him and for themselves.
20. The period covered by Count 3 was shorter than that covered by Count 2, but the flow of unrestrained abuse was not dissimilar. Joanne Bell was a blogger and active user of social media. She too is Jewish. Between 9 November 2019 and 18 February 2020 she received abusive messages to her email address that were eventually traced back to Mr Nelson. Mr Nelson made extensive use of abuse directed at Miss Bell's appearance, often using sexualised and radicalized language, but the main thrust was racist abuse. We give one example. On 10 November he wrote:

"You really are a piece of shit campaigning against antisemitism does not actually include harassment and of Jews or delegitimising their experiences, idiot do better, you absolute piece of shit."
21. Although the flow of bile is almost incoherent, the sense is plain. There were

approximately 27 such messages over the period covered by the charge.

22. Miss Bell described the impact of the messages as considerable. She was deeply scared at an individual taking such a close interest in her life. She deleted all references to her home and company location in order to make it more difficult for him to trace her. She found it highly distressing to receive abuse that denigrated her appearance, body, sex and ethno-religious background. She too received abuse that was dismissive of the Holocaust which she found particularly distressing. Professionally the abuse stopped her from being able to use her blog to write political or social commentary or to broadcast it as widely as she would otherwise have done. She summarised the position as being that she found the messages to be extremely intimidating, offensive, emotionally distressing and limiting to her personal/professional reputation building on social media.
23. The chilling effect on the lives and livelihoods of both Mr Kern and Miss Bell are clear to see on the information that was available to the court below and available to us.
24. Turning to Count 1, the victim was Miss Jackie Emery who worked on reception for the Board of Deputies of British Jews. During lockdown telephone calls made to the office telephone number were diverted to her personal mobile phone. Between 30 April 2020 and 1 May 2020 she received abusive calls as follows. First, on 30 April 2020 at 6.00 pm, a call in which it was said: "You are all white supremacists, suck my dick". A second call on the same day repeated: "You are white supremacists, suck my dick". Calls 3 to 4 on the same day followed soon after. They went through to voice-mail. The first at 6.08 pm said:

"Hi, I'd like to know exactly what the Board of Deputies does when they're not harassing Labour MPs of colour, especially Diane Abbott, and not talking to Jackie Walker, a Jewish member of colour. Pathetic. You're pathetic."

25. Two minutes later a further message:

"Hi Jackie, I'm wondering where your organisation of very very pure white people gets off [...] Diane Abbott [...] which colour she might be? How can you be telling pure white people that they can't meet them? You should be punished for white supremacy, and you are disgusting, disgusting people. Suck my dick."

26. On 1 May 2020 at 10.35 am a fifth call was made but the victim hung up. Three minutes later another call was made and a voice-mail message was left:

"Hi there. I was just making a call just now, but your incompetent secretary hit hang up the second I started talking. But yes, what I was saying - Tony Greenstein and Jackie Walker are both Jewish people, neither of whom were expelled for antisemitism, and frankly for your organisation to lie about Jewish people on a daily basis is frankly disgusting. All of you would make Goebbels proud. You're all natural, natural born liars. Disgusting people. Jackie Walker and Tony Greenstein are Jews who would not commit

antisemitism. You're disgusting liars."

27. A further call five minutes later left a voice-mail on the British Board of Deputies' voice-mail machine.
28. Communications data was obtained which showed that these calls were made from Mr Nelson's mobile phone. They were directed at a receptionist who was expected to be Jewish and who was in some way to be denigrated for that.
29. Mr Nelson was interviewed on 10 June 2020. He said he had made the calls. He said he had wanted to debate a political point about Labour views on minorities. He said he was intoxicated at the time.
30. Miss Emery said that the whole process left her feeling very stressed. During the period until Mr Nelson finally indicated an intention to plead guilty on the first morning of trial she felt that her life was put on hold. She found the calls extremely offensive and Mr Nelson's use of her name made her feel queasy and sick as she felt she was being personally targeted simply for doing her job.

Antecedents

31. We have already referred to Mr Nelson's other convictions which show a consistent and persistent course of conduct which was not even remotely restrained by the imposition of the First and Second Suspended Sentences.

Medical evidence

32. We have been provided with medical evidence in the form of Mr Nelson's GP notes from 1 September 2018 to 18 March 2022, correspondence between his GP's practice and other agencies and a report from Dr Lubna Anwar, a consultant psychiatrist which is based upon a zoom consultation on 7 November 2020. The medical report was not prepared for court proceedings and contains no expert's declaration.
33. The GP's records contain relevant information as follows:
 - a. In early September 2018 Mr Nelson attended an interview which led to a clinical diagnosis of depression. Sertraline was prescribed with fair regulatory between December 2018 and March 2019.
 - b. There was then a gap until November 2020 when the records suggest that he sought medical assistance to help with the prospect of going to court.
 - c. On 2 October 2018, one month before the start of the period of offending that led to Count 2 of the present proceedings, Mr Nelson is recorded as saying that he was then on bail on a charge of harassment of "Labour MPs". It therefore appears that Mr Nelson's offending that led to Count 2 started while he was on bail. It is also worth noting that the offence against Miss Patterson was committed just under four

weeks later on 29 October 2018. The same note records that there was "No evidence of any mental illness. Essentially needs direction and to understand himself better".

- d. There are frequent references to heavy drinking and misuse of cannabis, with occasional references to using cocaine and MDMA at infrequent intervals. It is apparent that the GP tried to persuade Mr Nelson to cut down on his drinking and cannabis but that he was resistant.
- e. In February 2019 he told his GP that he felt much better. However in October 2019 he was admitted to A&E having taken an overdose of codeine tablets which his mother and stepfather took as a cry for help.
- f. In February 2020 his GP sent a referral letter to the Huntingdon First Response service. The timing and contents suggested that Mr Nelson contacted his GP in the wake of Mr Kern discovering his identity. The letter records that Mr Nelson had no previous history of contact with the mental health services. It states that Mr Nelson believed that he had an undiagnosed borderline personality disorder and identified strongly with the symptoms when they went through them, which led to the referral. The letter also referred to the need to engage with drug and alcohol services.
- g. On 6 March 2020 he was referred to A&E having set fire to curtains at home with a suspected diagnosis of a personality disorder.
- h. It appears that Mr Nelson made contact with a service known as Change Grow Live in about March 2020, as a letter from them to his GP asked for medical details with a view to providing support for Mr Nelson's alcohol problem. However, a letter dated 15 July 2020 records that Mr Nelson had failed to attend any recent appointments and had therefore been discharged from their services.
- i. A letter from the Cambridgeshire and Peterborough NHS Foundation Trust Liaison and Diversion Service dated 15 October 2020 records that Mr Nelson told them that he had not been diagnosed with any mental illness and that he knew right from wrong, but stated "This is not me, but my borderline personality disorder".
- j. The Liaison and Diversion Service found no basis for diverting him out of the Criminal Justice System. He had reported smoking half a gram of cannabis and drinking four to five pints of lager daily. His last use of cocaine or MDMA was recorded as being over a year before. He was offered support with substance and alcohol misuse and reported that he had previously engaged with Change Grow Live but had chosen to stop when Covid started.
- k. In early November 2020, Mr Nelson requested a psychiatric review. A referral was made to Dr Anwar. Apart from her report there is no further relevant information in the medical records.

1. The purpose of the referral is said by Dr Anwar in her report to be to understand Mr Nelson's longstanding difficulties with mood, emotional control and behaviour and to get appropriate advice and help. It was the doctor's understanding that the assessment was not being sought for court or legal purposes, which doubtless explains why none of the normal formalities of an expert's report for a court are present. Her "working diagnosis" was that Mr Nelson suffers from a depressive disorder, an emotionally unstable personality disorder with anti-social traits (though this needed corroboration with the informant's family) and mental and behavioural disturbance due to the harmful use of cannabinoid and alcohol. In addition to short-term medication in the face of the imminent court proceedings, she recommended a referral to local teams for appropriate psychological intervention. Her view of the influence of alcohol and cannabis is plain: he "must seek some guidance and support from local drug and alcohol services...". Her conclusion paragraph stated:

"Mr Nelson's presentations show clear features of Emotionally Unstable Personality Structure and Disorder with anti-authoritarian and antisocial stance and behaviour, though I could not have corroborative history from a family member today. Unlike Antisocial Personality Disorder however, Mr Nelson did not appear cold, callous, disregarding of needs or advice or aloof in our meeting. Instead he seemed depressed, lost and unable to find his way to a meaningful existence. He is aware of his anger management issues, need for attention, for his needs to be recognised and valued (though through perverse ways) and his need to find escape from intolerable emotions through various means. His threshold to manage frustration is low and he can act impulsively without thinking of the consequence in the long run. Today he was requesting ways he could be helped. His upcoming court case is anxiety provoking. He may need help with short-term anxiolytics use (even with a history of dependency in the past) to face the upcoming Crown Court hearing. The mainstay of treatment should be within a specialist service, which manages offending behaviour and through psychosocial interventions. His GP is requested to facilitate appropriate referrals to the local NHS mental health services at the earliest time."

34. It is important to recognise the three main limitations of Dr Anwar's report. First, it was based on one zoom consultation and evidently based to a very large extent on what Mr Nelson told her in that consultation. Second, although in her conclusion section she accepted that there were clear features of emotionally unstable personality structure and disorder, she qualified that by stating that she had not been able to obtain corroboration from a family member. Third, her report did not address the question of the impact of any mental health difficulties on Mr Nelson's responsibility for his persistent criminal conduct.

Pre-sentence report

35. The court below had the benefit of a pre-sentence report. It was dated 25 March 2022. It is a feature of the PSR and the pre-appeal PSR (to which we shall refer below) that although they record the fact of three offences, they only refer in any detail at all to the facts of the offence under Count 1, which on any view is less serious than the other two offences that the PSR was intended to address.
36. Mr Nelson expressed shame to the writer of the PSR and said that his lifestyle had changed since October 2020. Yet it was recorded that he had continued to hold grievances towards "the victim". That appears in context to be a reference to the innocent and unprovoking Miss Emery.
37. Under the heading "pattern of offending" the PSR recorded that Mr Nelson "has three previous convictions for similar offences". It noted that "this offence" (singular) represents a continuation rather than an escalation of his offending behaviour and that "the offences occurred two years ago and no further offending has taken place since then".
38. Turning to substance misuse, the PSR recorded Mr Nelson as saying that he was using cocaine "roughly once every two months and cannabis roughly once a month". He admitted being under the influence of cannabis and that he had been drinking approximately 50 to 60 units of alcohol per week at the time of the offences. His alcohol intake had now reduced to about 20 units a week, but his intake was fluctuating with his stress levels.
39. Turning to the proposed sentence, the writer gave as his assessment that Mr Nelson's risk could be safely managed in the community and made proposals for non-custodial measures which in the event the sentencing judge largely followed. The writer's attitude to an immediate period of imprisonment was that it would serve as a punitive element and a deterrent to prevent future offending, but that it would have a detrimental impact on his emotional wellbeing, his familial relationships and in turn could contribute to an increased risk of re-offending on release.

Character references

40. A short note from Mr Nelson's dad explained that he is at least partially dependent upon Mr Nelson to assist him in his everyday living. A somewhat longer letter from his mother and stepfather evidences that since the assessment by Dr Anwar he has attended first CBT and subsequently DBT sessions to try to address his difficulties and that in their view he has made serious steps towards rehabilitation. It is, as we remarked during the course of submissions, his great good fortune that he has the continued good support of his mother and his stepfather.

Basis of plea

41. When originally interviewed about the allegations to which he has now pleaded guilty Mr Nelson answered no comment. Mr Nelson's basis of plea referred to his recent diagnosis of borderline (unstable) emotional personality disorder and said that he had a significant mental health crisis between 2018 and 2020. While accepting that he "could

be very forthright and unguarded in expressing [his] views and was even more so during that period" he said that he did not wish anyone physical harm. He described his harassment of Miss Bell and Mr Kern as "crass and gratuitous brought on by struggles with my mental health..." He described his "crass comments including hurtful reference to their Jewishness and whiteness" as "impulsive, childlike and thoughtless". The basis of plea concluded:

"I have previously pleaded guilty to similar offences. I have received suspended sentences and began Rehabilitation Activity Requirement work with the Probation Service. The outbreak of the pandemic in 2020 curtailed some of that work. In November 2020 I began psychiatric treatment. I am currently under the care of a therapist to help deal with my personality disorder, insofar as I can during a pandemic.

There have been no more incidents since I began my therapy."

The hearing below

42. In opening the case to the judge, prosecution counsel referred to the offences leading to the First and Second Suspended Sentences and that the periods giving rise to Counts 2 and 3 of the present proceedings fell within the operational period of the First and Second Suspended Sentences.
43. In relation to the First Suspended Sentence, prosecution counsel wrongly told the judge that it amounted to 10 weeks' imprisonment suspended for 12 months, thereby treating the two sentences of 10 weeks as concurrent when they were in fact consecutive. He did not refer to the terms of the Second Suspended Sentence or the fact that Mr Nelson was currently subject to the Third Suspended Sentence. The facts of the current offences were lightly sketched by prosecution counsel, the judge having indicated that he had seen the extent, nature and quality of the communications. The victim impact statements from Miss Bell and Miss Emery were read. Mr Kern gave a highly charged impact statement in person along the lines that we have summarised above.
44. Turning to the guideline for racially aggravated harassment, prosecution counsel submitted that Count 2 was a case falling within Category A1: high culpability because the conduct was intended to cause maximum fear or distress and was persistent over a prolonged period, and Category 1 harm because of the very serious distress caused to the victim. Prosecution counsel referred in passing to Mr Nelson's previous convictions as aggravating factors, but it is clear that he neither had nor provided the court with adequate information since he said merely that "I understand that his previous harassment offences related to Members of Parliament." He also referred to the high level of racial or religious aggravation being central and the reason for the contact in the first place. He did not refer to the offence having been committed whilst on bail as an aggravating feature. He correctly identified that the maximum sentence was two years' imprisonment. He did not separately refer to the categorisation of Count 3 under the guideline. In relation to Count 1 he merely identified that the maximum sentence was also two years.

45. Defence counsel before the judge below was Mr Norris who has also represented Mr Nelson before us today and to whom we are grateful for the clarity of his submissions. Before the judge below he relied upon the PSR and the facts that (a) Mr Nelson had sought professional help and (b) there had been no further offending as a basis for his submission that any sentence should be suspended. It was submitted that Mr Nelson was now "reflective and remorseful" and that having banned himself from the use of all social media and taken steps to control his substance and alcohol abuse he was now a very different person from the "keyboard warrior" who committed the offences
46. Turning to the guideline, defence counsel submitted that culpability should be assessed as Category C, lesser culpability, because Mr Nelson's responsibility was substantially reduced by mental disorder. He submitted again by reference to Count 2 that Mr Nelson's conduct was offensive rather than threatening.
47. In passing sentence the very experienced judge said, accurately in our view, that nobody who read the disgusting language that had been used could feel anything but anger and revulsion and that it was when one reads of the effect of Mr Nelson's behaviour that the true nature of the offences springs to life. The judge did not refer to the Guideline for Racially Aggravated Harassment or for that matter to the Guideline on the Imposition of Community and Custodial Sentences. Having held that custodial sentences were inevitable, the judge identified as an aggravating feature that Mr Nelson had been before the courts before. He referred to Mr Nelson's plea of guilty as being "very much at the end of the spectrum that incurs credit" without identifying what, if any, credit he would give. As further mitigating features he identified that Mr Nelson had managed not to re-offend for two years, that "there appears to be, according to the [PSR], a degree of optimism that you have turned a corner" and that having considered the medical evidence "there has been a change and you are not the person that you were two to three years ago." The judge then proceeded to pass the sentences now under consideration. He did not comment on the facts of Counts 1 or 3.

Pre-appeal report

48. A further report for the purpose of this Reference has been prepared and is dated 12 May 2022. Like its predecessor it appears only to address the facts of Count 1. The writer reports that Mr Nelson is still remorseful and that he would not engage in such behaviour anymore. He says that his alcohol intake has reduced and that he has started to engage [again] with the local alcohol service (Change Grow Live) in relation to his current alcohol intake. Despite Mr Nelson stating that he is motivated to change and avoid further offending, the writer's assessment is that there remains a medium risk of serious harm. He concludes that Mr Nelson can still be safely managed in the community and that he would find the regime of custody difficult to manage because of his ongoing mental health issues. It is the writer's opinion that Mr Nelson is likely to harm himself if committed to prison.

The submissions of the Solicitor General

49. The Solicitor General is represented today by Mr Lloyd who did not appear in the court below. His submission may be shortly summarised as follows. There are three separate

offences involving three victims and the maximum sentence for each Count is two years. Accordingly if concurrent sentences were to be imposed the aggregate length of the concurrent sentences should reflect the seriousness of the three discrete offences, subject of course to the principle of totality. Counts 2 and 3 fell to be assessed by reference to the guideline. Each should be categorised as high culpability because of persistent action over a long period, and as harm Category 1 because of the very serious distress caused to the victims. The starting point for each of Counts 2 and 3 ignoring the racial aggravation was therefore a custodial sentence of 12 weeks with a range from a high level community order to 26 weeks in custody. Count 1 is not to be ignored and constitutes a serious offence of its kind for similar reasons, although there is no directly applicable guideline.

50. The offending was aggravated by his previous convictions, a degree of planning demonstrated by the use of multiple anonymised email addresses, acting under the influence of drink and drugs and breach of the first and second suspended orders. As was noted during submissions, the names of some of those anonymised accounts were themselves threatening. We note in passing the additional aggravation identified above of committing the final acts under Count 2 while on bail in respect of the offences that led to the Third Suspended Sentence. In the course of the present hearing the further aggravating feature was identified relating specifically to Count 2, namely that Mr Nelson continued his campaign against Mr Kern even after being charged on 4 August 2020.
51. Mitigating features, submits the Solicitor General, are his mental health issues, an element of remorse, progress made since the offending and his plea of guilty on the day of trial. However, there is a high level of racial aggravation.
52. The Solicitor General submits that the judge should have imposed consecutive sentences to reflect the fact that the three Counts did not arise out of the same incident or facts but represented separate and discrete courses of conduct aimed at different victims. Had he done so the judge should have arrived at an aggregate sentence of more than 18 months. Furthermore, even if an aggregate sentence of 18 months could be justified, the offending was so serious that appropriate punishment could only be achieved by an immediate sentence of imprisonment. The suspended sentences imposed by the judge were therefore unduly lenient.

Mr Nelson's submissions

53. Mr Norris placed at the forefront of his persuasive submissions the fact that Mr Nelson has committed no further offences since the end of the indictment period and has continued to make proper progress towards rehabilitation, both by complying with the requirements of the probation service and independently by engaging with continuing cognitive behavioural therapy. He is no longer using any social media and has changed. All of this, submits Mr Norris, is against the background of a possible mental disorder, though he recognises that the material that is before the court does not address the question whether or to what extent Mr Nelson's responsibility for his actions is reduced by any mental health issues. He recognises expressly that Dr Anwar does not address culpability. He also relies upon the fact that Mr Nelson has complied and continues to comply with the community-based requirements of the order imposed by the judge below and that the PSR

expresses the view that he can be managed safely in the community. Viewed overall he submits that the circumstances of the offending and Mr Nelson's personal circumstances provide a rational basis for the sentence imposed by the judge below, particularly given the prospect of further rehabilitation.

Discussion and resolution

54. We start with the length of sentence imposed by the judge. It is common ground and obvious that this case passes the custody threshold by a country mile. The judge was correct to impose sentences of imprisonment on each Count since each Count viewed in isolation passed the custody threshold, both because of their innate seriousness and because of Mr Nelson's previous history of similar behaviour. We agree with those who have identified Count 2 as the most serious of the three Counts now before the court. For the reasons we have identified above, the basic facts are about as bad a case of this type as can be imagined because of the persistence and virulence of the conduct and the serious impact it had on Mr Kern in all aspects of his life. For the avoidance of doubt we consider that the fear he expressed of violence being perpetrated against him or those who he loved was rational, understandable and justified. We reject outright the submission that Mr Nelson's conduct as directed towards Mr Kern should be regarded as offensive but not threatening. The suggestion that an abusive message to a member of the Jewish faith saying that another Holocaust would be too good for them is not to be seen as threatening lacks any sense of realism at all. Similarly, we do not accept the suggestion in Mr Nelson's basis of plea that the abuse can reasonably be regarded as merely "forthright and unguarded" expression of political views or that describing it as "impulsive, childlike and thoughtless" comes close to being an adequate description of Mr Nelson's offending.
55. Subject to one point to which we return below, we are in no doubt that Count 2 is properly to be regarded as falling within Category 1A and that it is seriously aggravated (a) because of a high level of racial or religious aggravation, (b) because of Mr Nelson's previous history of similar conduct, and (c) specifically because of Mr Nelson's complete disregard for the consequences of the First and Second Suspended Sentences or later for the fact that he was on bail for the offences that led to the Third Suspended Sentence.
56. Though less serious, and with the same reservation of one point, we would also categorise Count 3 as falling within Category A and seriously aggravated by the same features. For similar reasons we regard Count 1 as a serious case of its kind and subject to the same aggravating features as applied to Counts 2 and 3.
57. The point of reservation is that we give some weight to the medical evidence and to the working diagnosis in November 2020 that Mr Nelson was suffering from borderline personality disorder. It is at least arguable that in the terms of the harassment guideline Mr Nelson's responsibility would have been and was reduced *to some extent* by his mental disorder. However, after anxious scrutiny of the material that has been presented to us, there are clear limitations to the weight that should be placed upon this feature for two main reasons. First, as we have already mentioned neither Dr Anwar's reports nor any other evidence before the court addresses the question of the extent to which, if at all, his borderline personality disorder actually reduces his responsibility for his actions. Second,

it is plain from Dr Anwar's report and the medical records as a whole that Mr Nelson's persistent abuse of drugs and alcohol was also an important factor in his offending. How these two features interact may well be complex and is not elucidated by evidence that was before the judge or that is before us. While therefore we would treat Mr Nelson's mental health issues as a mitigating factor, we would not remove Counts 2 and 3 from the category of high culpability given (a) the uncertainty of the impact of his borderline personality disorder upon his responsibility and (b) the existence of multiple other factors indicating high culpability, namely conduct intended to maximise fear or distress, a relatively high degree of planning, persistence over a long period and, most particularly directed to Mr Kern, the implied threat of serious violence.

58. We accept the submission of the Solicitor General that the judge *could* have imposed consecutive sentences, adjusted as necessary for totality, because each offence involved separate actions in relation to a separate victim. We do not accept that he was bound to do so, provided that the imposition of concurrent sentences led to an aggregate sentence that was sufficient and within the reasonable range that was open to him, again taking into account the principle of totality. However, even if the ultimate decision was to impose concurrent sentences, it would be a necessary part of the decision-making process to consider at some stage what sentence would be appropriate for each Count when viewed in isolation so that an informed view could then be taken of the overall criminality that had to be reflected in the overall sentence that was to be imposed. It is a feature of the present case that if he did consider what would be an appropriate sentence for Counts 2 and 3 if each had stood on its own, the judge did not identify it in his sentencing remarks. All that can be said with confidence is that he must have taken the view that either Count on its own would have merited a sentence of less than 18 months since the concurrent sentences of 18 months on each Count must have reflected the aggregated criminality for both Counts 2 and 3 and also for Count 1.
59. Had there been no mitigation available to Mr Nelson our provisional view would be that an aggregated sentence of 18 months was too low. We would even accept that aggregated concurrent sentences amounting to the statutory maximum of two years may well have been unduly lenient. However in our judgment the situation is made much more complex by the mitigation that was available to Mr Nelson which falls under three main heads. The first is the fact, if such it be, of his undiagnosed mental illness. Mr Nelson was in regular contact with his GP about his mental health, including in relation to impending court appearances and, apart from his depressive disorder, any condition went undiagnosed. It lends some substance to a submission that these three offences can be seen as having elements of a single course of conduct affected by his undiagnosed mental illness. Second, it is notable that his offending appears to have stopped in or around October 2020. Whether this was attributable to Dr Anwar's working diagnosis in November 2020 or a belated realisation that his conduct was totally unacceptable and had to stop for other reasons, or both, may not matter. But the fact that he has since then engaged in treatment and continues to do so stands to his credit. Third, there is some reduction to be made for his late plea of guilty. We agree with the judge that the lateness of the pleas places them at "the end of the spectrum that incurs credit" but a reduction of five or possibly 10 per cent should be given.

60. It is also necessary to bear in mind the structure of the guideline. The starting point for a simple offence falling within Category A1, which would only be triable summarily and would be subject to a maximum sentence of six months, is 12 weeks' imprisonment. The effect of the high level of racial aggravation is to increase the maximum sentence four-fold and "may increase the length of custodial sentence if already considered for the basic offence". But it does not follow that there should be a mechanistic pro-rata increase as the guideline makes clear.
61. We turn therefore to consider what would be appropriate sentences if each Count were considered on its own, recognising as we have already said that an adjustment is likely to be necessary on grounds of totality when the final decision is made.
62. We have said that the basic facts of Count 2 are about as bad as can be. Before taking into account the factors specific to Mr Nelson that go to aggravation or to mitigation, they called for a sentence well into the upper half of the statutory range. If viewed in isolation we take the view that the minimum length of the custodial sentence that should have been imposed for Count 2 taken on its own and taking into account the aggravating and mitigating features to which we have referred would have been 12 months' imprisonment. Adopting the same approach to Count 3 the minimum length of custodial term should have been nine months. On Count 1 we consider that the eight months in fact imposed by the judge was within the range of reasonable sentences, albeit at or close to the bottom of the permissible range.
63. We start therefore with sentences on an individual basis that add up to 29 months' imprisonment rather than the 18 imposed by the judge. However, some adjustment must be made for totality and bearing in mind that in one sense the three offences can be seen as a unified continuing course of conduct. In our judgment it would be justifiable to reduce the aggregated sentences at this stage to 24 months in total. We shall refer to this interim figure later.
64. Where we must part company with the judge is his decision to suspend the sentence. We have had specific regard to the Guideline on the Imposition of Community and Custodial Sentences. Even in the absence of his previous convictions and the imposition of the first and second suspended sentences, and even despite the progress he had made in the 16 months between the end of his offending and the entering of his guilty pleas, we are clearly of the view that suspending the sentence was unjustifiable because appropriate punishment could only be achieved by immediate custody. Applying the other factors identified by the Guideline on the Imposition of Community and Custodial Sentences while it appears that the effect of the steps taken and the treatment received by Mr Nelson since 2020 have reduced the risk that he presents to the public, he has a history of poor compliance with court orders as demonstrated by his breaches of the first and second suspended sentences, and his continued offending while on bail for the offences that led to the third suspended sentence.
65. On the other side of the balance, it appears that there has been significant rehabilitation as a result of the steps taken since 2020, including the steps taken pursuant to the previous suspended sentences. His mental health issues provide personal mitigation, though it is

tempered by his persistent offending while under the influence of drink and drugs. The imposition of an immediate period of imprisonment will have a harmful impact upon his dad who relies upon him for assistance in his everyday life.

66. Given the judge's clear appreciation of the scale of Mr Nelson's behaviour, which he rightly said would cause anyone sitting in his court to feel "revulsion, sickness and downright anger" and the clear terms of the victim impact statements he had heard and read, and his knowledge of the breach of both the First and Second Suspended Sentences, it is not entirely clear how he arrived at the conclusion that it was appropriate to suspend. It is worth bearing in mind that Mr Nelson had by March 2022 had the benefit of the rehabilitative provisions of the whole of the First and Second and virtually all of the Third Suspended Sentences. It is not clear what further purpose was to be served by further court imposed requirements at a time when the court was told Mr Nelson had engaged with CBT and DBT for a period of nearly two years. This was not an appropriate case for "a last chance" since he had been given that chance at least twice and had not taken it. On any view and taking the most favourable stance in relation to the impact of the medical evidence, this was shocking behaviour of such seriousness that the court would be failing in its duty both to the victims and to the public at large if it did not impose an immediate custodial sentence.
67. The question remains whether we should in addition activate all or part of the First or Second Suspended Sentences. We bear in mind that their operational periods have passed and that there is no suggestion that Mr Nelson breached the community-based requirements that were imposed upon him, including the requirements for unpaid work in the community. But that is not the point. The point is that each suspended custodial sentence was liable to be activated if Mr Nelson offended again during its operational period. He did, and seriously - thereby showing a complete disregard for the existence of the suspended sentences.
68. The judge found that these offences put him in breach of the suspended sentences and he was therefore required to order the suspended sentences to take effect with the original terms unaltered or reduced unless he considered it would be unjust in all the circumstances to do so. If he so found (i.e. that it was unjust in all the circumstances to activate the sentences) he was required to state his reasons. Implicitly the judge found that it would be unjust to activate the suspended sentences and so imposed fines for the breaches. He did not give his reasons beyond what we have already indicated.
69. Having found that the sentences for the index offences should not have been suspended, we have to consider the totality of the sentence imposed including the activation of any suspended sentences. Having taken the fact that the offender was subject to those sentences as an aggravating factor, to order those sentences to be activated and served consecutively would amount to an element of double-counting. Accordingly, in our judgment the correct course is to activate the suspended sentences but to order them to be served concurrently with the other terms of imprisonment.
70. Thus far we have arrived at a point where the sentences aggregating to 24 months on Counts 1 to 3 are to be served immediately and the first and second suspended sentences are to be

activated but served concurrently. One final adjustment remains, which may be described as a branch a totality. We stand back and look at the sentencing exercise as a whole and in particular to the fact that Mr Nelson has complied with the community-based elements of the suspended sentence imposed by the court below that had been required of him. Taking an overall view in the light of the process that we have outlined, we consider that the balancing of the facts of the offences, and the aggravating and mitigating factors to which we have referred, can justly be achieved by a sentence now of 18 months' immediate imprisonment plus the activation of the first and second suspended sentences to be served concurrently.

71. We therefore quash the order of the court below on Counts 1 to 3 and substitute on Count 1 a sentence of eight months' imprisonment, on Count 2 a sentence of 18 months concurrent and on Count 3 a sentence of 18 months concurrent. These sentences are to be served immediately. In addition, we activate the First and Second Suspended Sentences but having regard to all the features to which we have referred, we order that they be served concurrently to the sentences on Counts 1 to 3. The sentences are to be treated as running from today.
72. For the avoidance of doubt, in quashing the sentence below we quash the orders which gave rise to a liability to pay the fines. We think it is the case that they have been paid and so steps will have to be taken to obtain repayment. The restraining order remains.

MR LLOYD:

73. My Lord, your Associate has details of the police station in terms of surrender.

LORD JUSTICE STUART-SMITH:

74. The order will be that he surrender to that station by 4 o'clock this afternoon.