Neutral Citation Number: [2021] EWCA Crim 568

Case No: 202000623 A2; 20200624 A2;
202001162 A4; 202100096 A3

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM
HHJ Evans, HHJ Pugh, Mr Rec Benson QC
Luton T20187259. Luton T20190517, Cambridge T20207205

Royal Courts of Justice
Strand, London, WC2A 2LL
Date: 23/04/2021

Before:

LORD JUSTICE HOLROYDE
MRS JUSTICE CHEEMA GRUBB DBE
and
MR JUSTICE BOURNE

- -

Between:

ISUF PLAKU
EDUART PLAKU
SIMON BOURDON — **Appellants**

- and –

THE QUEEN — **Respondent**

AND IN THE MATTER OF A REFERENCE
BY HER MAJESTY'S ATTORNEY-GENERAL
pursuant to section 36 of the Criminal Justice Act 1988

THE QUEEN
-and-
BENJAMIN SMITH

- -

Mr Charles Royle (instructed by **Saunders Solicitors**) for **Isuf Plaku and Eduart Plaku**
Mr Peter Spary for **Simon Bourdon**
Mr Mark Shelley for **Benjamin Smith**
Mr Tom Little QC (instructed by **Crown Prosecution Service, Appeals and Review Unit**) for the **Respondent to the appeals and appearing on behalf of HM Attorney-General in the Reference**

Hearing dates: 30th March 2021

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Approved Judgment

Covid-19 Protocol: This judgment been handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website.
The date and time for hand-down has been deemed to be 10:00am on 23rd April 2021.

Lord Justice Holroyde:

1. When sentencing an offender who has pleaded guilty, section 73 of the Sentencing Code created by Sentencing Act 2020 (formerly section 144 of Criminal Justice Act 2003) requires a court to take into account

> "(a) the stage in the proceedings for the offence at which the offender indicated the intention to plead guilty, and
>
> (b) the circumstances in which the indication was given."

2. The Sentencing Council's definitive guideline on "Reduction in sentence for a guilty plea" ("the guideline") sets out the principles a court should follow in reducing the punitive aspects of a sentence by reason of a guilty plea.

3. These cases have been listed for hearing together because they all raise issues as to the correct approach to determining the appropriate reduction. Isuf and Eduart Plaku, who admitted conspiracy to supply class A controlled drugs and received long prison sentences, complain that they should have had "credit in the order of 33 per cent" for their guilty pleas, instead of the 25 per cent reduction which the sentencing judge allowed. Simon Bourdon, who admitted stalking and related offences and received an extended determinate sentence ("EDS"), complains that he should have received credit of 30 per cent rather than 25 per cent. Benjamin Smith admitted aggravated burglary and other offences and received an EDS. Her Majesty's Solicitor General believes the sentence to have been unduly lenient, in part because credit of one-third was given when the offender was not entitled to it, and applies pursuant to section 36 of Criminal Justice Act 1988 for leave to refer the case to this court so that the sentencing may be reviewed.

4. We are grateful to all the advocates for their written and oral submissions, and in particular to Mr Little QC, who appears for the respondent in the appeals and on behalf of the Solicitor General in the Reference, and who has therefore assisted the court with submissions both as to issues of principle and in relation to each of the cases. We shall consider first the issues of general principle, and then turn to the individual cases.

5. The guideline, which has been in effect since 1 June 2017, makes clear that its purpose is to encourage those who are going to plead guilty to do so as early in the court process as possible. The reasons why that encouragement is given are set out, in section B of the guideline, in the following key principles:

> "Although a guilty person is entitled not to admit the offence and to put the prosecution to proof of its case, an acceptance of guilt:
>
> 1. normally reduces the impact of the crime upon victims;
>
> 2. saves victims and witnesses from having to testify; and
>
> 3. is in the public interest in that it saves public time and money on investigations and trials.

> A guilty plea produces greater benefits the earlier the plea is indicated. In order to maximise the above benefits and to provide an incentive to those who are guilty to indicate a guilty plea as early as possible, this guideline makes a clear distinction between a reduction in the sentence available at the first stage of the proceedings and a reduction in the sentence available at a later stage of the proceedings.
>
> The purpose of reducing the sentence for a guilty plea is to yield the benefits described above. The guilty plea should be considered by the court to be independent of the offender's personal mitigation."

6. It appears, from the submissions made in the present cases, that there is still some misunderstanding of the guideline. It is therefore important to emphasise three points. First, by section 59 of the Sentencing Code (formerly section 125 of Coroners and Justice Act 2009), a court must follow any relevant sentencing guideline unless satisfied that it would be contrary to the interests of justice to do so. Secondly, the guideline, like section 73 of the Sentencing Code, focuses on the time when the guilty plea is *indicated*, not when it is *entered*. Thirdly, a clear distinction is deliberately drawn between the reduction in sentence available at the first stage of proceedings and the reduction available at any later stage. That distinction is reinforced in section D of the guideline which, so far as is material for present purposes, states:

> "**D. Determining the level of reduction**
>
> **The maximum level of reduction in sentence for a guilty plea is one-third**
>
> **D1. Plea indicated at the first stage of the proceedings**
>
> Where a guilty plea is indicated at the first stage of proceedings a reduction of one-third should be made (subject to the exceptions in section F). The first stage will normally be the first hearing at which a plea or indication of plea is sought and recorded by the court.
>
> **D2. Plea indicated after the first stage of proceedings – maximum one quarter – sliding scale of reduction thereafter**
>
> After the first stage of the proceedings the maximum level of reduction is **one-quarter** (subject to the exceptions in section F).
>
> The reduction should be decreased from **one-quarter** to a maximum of **one-tenth** on the first day of trial having regard to the time when the guilty plea is first indicated to the court relative to the progress of the case and the trial date (subject to the exceptions in section F). The reduction should normally be decreased further, even to zero, if the guilty plea is entered

> during the course of the trial." [emphasis as in the guideline itself]

7. The section F exceptions referred to in that quotation cover a number of situations. The application of any of those exceptions in a particular case will of course be a fact-specific decision, and a court making that decision will be careful not to go beyond the limited terms of the exception. Fairness to all defendants, in all courts, requires that the exceptions should not be extended beyond their proper scope.

8. A court will also keep in mind the practical difficulties of defendants accessing legal advice during the Covid-19 emergency, a point noted by the Sentencing Council in a statement published in June 2020 concerning the application of well-established sentencing principles during the emergency.

9. Exception F1 makes provision for cases in which the accused needs further information, assistance or advice before indicating his plea. It states that a reduction of one-third should still be made where the court is satisfied that

> "… there were particular circumstances which significantly reduced the defendant's ability to understand what was alleged or otherwise made it unreasonable to expect the defendant to indicate a guilty plea sooner than was done."

Exception F1 goes on to distinguish, in this regard, between

> "… cases in which it is necessary to receive advice and/or have sight of evidence in order to determine whether the defendant is in fact and law guilty of the offence(s) charged, and cases in which a defendant merely delays guilty plea(s) in order to assess the strength of the prosecution evidence and the prospects of conviction or acquittal."

10. We emphasise the distinction drawn in the latter part of that quotation. Both the proper application of the guideline, and fairness to those who do indicate a guilty plea at the first stage of the proceedings, demand that the distinction be observed. By way of example, a defendant who knows that he is in fact and law guilty of the offence charged, or can be advised to that effect on the basis of the prosecution case against him, is of course entitled to plead not guilty and to challenge the admissibility of the evidence by which the prosecution seek to prove his guilt. He is entitled to plead not guilty and hope that his representatives will be able to persuade the prosecution to accept a guilty plea to a different, less serious offence. But if the admissibility issue is resolved against him, or the prosecution decline to accept any lesser plea, and the defendant then changes his plea, he cannot expect to be given credit for his guilty plea as if it had been entered at a much earlier stage of the proceedings. In such circumstances, the benefits of a guilty plea, identified in section B of the guideline, have not accrued, or have accrued to only a limited extent.

11. The issues raised by the present cases make it necessary to focus upon the meaning of "the first stage of the proceedings". Although we are principally concerned with cases in which the defendant is charged with an indictable-only offence, and therefore

must be sent for trial to the Crown Court, we consider the phrase also in the context of either-way offences, which may either be heard by a magistrates' court or be sent to the Crown Court. Appended to the guideline are two flow charts illustrating how the guideline operates in relation to each of those categories of offence. The flow charts are not part of the guideline, and are subject to the exceptions contained in the guideline, but they helpfully summarise what happens when a case first comes before a magistrates' court.

12. In relation to either-way offences, it is a necessary part of the plea before venue procedure under section 17A of Magistrates' Courts Act 1980 that a defendant must be asked "whether (if the offence were to proceed to trial) he would plead guilty or not guilty". The section then sets out the procedure to be followed if the accused indicates that he would plead guilty, or indicates that he would plead not guilty; and subsection (8) states that if the accused fails to indicate how he would plead, he shall be taken to indicate that he would plead not guilty.

13. If the accused indicates he would plead guilty, the illustrative flow chart shows, his sentence will be reduced by one-third, whether the sentence is imposed by a magistrates' court or, following a committal for sentence, by the Crown Court. If he indicates a not guilty plea, or gives no indication, the magistrates will have to decide whether the case is suitable for summary trial. If he is sent for trial to the Crown Court, and there pleads guilty at the first hearing, he will receive a one-quarter reduction. If his case is listed for trial, whether in a magistrates' court or the Crown Court, then he will receive a reduction on a sliding scale, decreasing from one-quarter to a maximum one-tenth on the day of trial.

14. In relation to indictable-only offences, rule 9.7(5) of the Criminal Procedure Rules requires that the accused must be asked whether he intends to plead guilty in the Crown Court. If the answer is 'yes' the magistrates' court must make arrangements for the Crown Court to take the accused's plea as soon as possible. If the answer is 'no', or the accused gives no answer, then arrangements must be made for a case management hearing in the Crown Court.

15. The illustrative flow chart accordingly shows that at the first hearing in a magistrates' court the defendant will be asked to indicate his plea. If he indicates a guilty plea, and enters such a plea at the first hearing before the Crown Court, he will receive a one-third reduction. If he indicates a not guilty plea, or gives no indication, but pleads guilty at his first appearance before the Crown Court, he will receive a one-quarter reduction. If his case is listed for trial in the Crown Court, he will receive a reduction on a sliding scale decreasing from one-quarter to one-tenth.

16. The Criminal Procedure Rule Committee has since 2016 published a Better Case Management ("BCM") form on which information relevant to the listing and hearing of a case is recorded by the parties and the magistrates' court. Although the terms of the form have recently been revised, as we indicate later in this judgment, it has always included a box in which to record the defendant's intention as to plea. Mr Little rightly points to the need for the Crown Court to have a clear record of what indication was given in the lower court. We agree: when a case is sent to the Crown Court, it is essential that the BCM form is uploaded to the Digital Case System ("DCS"). As the Common Platform is rolled out across courts, it will be equally essential that the BCM form is uploaded to the Common Platform.

17. In a number of cases in recent years, this court has made clear that for the purposes of determining the appropriate reduction in sentence, an indication of a guilty plea must be an *unequivocal* indication. We endorse that principle. An indication of a "likely" or "probable" plea is not enough, as by definition such an indication keeps open the possibility of a not guilty plea and thus negates the advantages referred to in the "key principles" section of the guideline. Words such as "likely" or "probable", or anything else which places a qualification on the intended plea, should therefore be avoided. We summarise six relevant cases.

18. In *R v Davids* [2019] EWCA Crim 553, [2019] 2 Cr App R (S) 33, an indication on the BCM form "Likely to be guilty pleas on a basis" was held to be insufficient to entitle the defendant to full credit: "It was keeping options open, both as to whether a guilty plea would be offered and the basis on which it was offered".

19. That decision was followed in *R v Khan* [2019] EWCA Crim 1752, where the BCM form indicated that the defendant was likely to plead guilty. He subsequently pleaded guilty at a plea and trial preparation hearing ("PTPH") in the Crown Court. A submission on appeal that full credit should have been given was rejected: the court held at [25] that "the statement that a plea is 'likely' is not an indication of a plea of guilty".

20. In *R v Yasin* [2019] EWCA Crim 1729 [2020] 1 Cr App R (S) 43 the court emphasised that it was for the parties and their legal representatives, not the magistrates' court, to complete the relevant part of the BCM form. A defendant who had not completed the appropriate section of the form, but had pleaded guilty to an indictable-only offence on his first appearance before the Crown Court, was therefore not entitled to full credit even if the magistrates' court had not specifically requested an indication of plea.

21. Conversely, in the case of one of the defendants in *R v Bailey and others* [2020] EWCA Crim 1719, the court at [62] held that full credit should have been given where the defendant's representative had completed the BCM form in terms which indicated an intention to plead guilty to an indictable-only offence, notwithstanding that a court officer had subsequently made a potentially inconsistent entry on another part of the form.

22. In *R v Handley* [2020] EWCA Crim 361 the defendant's representative had written "G indication" in the relevant box on the BCM form. The court held that he had given an unequivocal indication that he would plead guilty and was entitled to full credit. Although the judgment does not refer in any detail to the course of proceedings before the magistrates' court, we infer that the defendant – consistent with that indication – must have answered the court's oral enquiry by indicating that he would plead guilty.

23. In *R v Hodgin* [2020] EWCA Crim 1388, [2020] 4 WLR 147, where the offence charged was indictable-only, the court reviewed earlier decisions, and concluded at [37] that

> "in order to receive full credit of one-third pursuant to the guideline, where at the magistrates' court it is not procedurally possible for a defendant to *enter* a guilty plea, there must be an

> *unequivocal indication* of the defendant's intention to plead guilty. An indication only that he is *likely* to plead guilty is not enough."

The court observed that the decision in *R v Hewison* [2019] EWCA Crim 1278, where full credit was allowed in circumstances which might appear to contradict that principle, turned on the wording of the form used by the magistrates' court in that case, which was an unauthorised version in terms which differed from those of the correct BCM form.

24. The revised version of the BCM form, to which we have referred earlier, was drafted after the decision in *Hodgin* and in the light of recommendations made by a working party. It came into force on 2 November 2020 and therefore post-dates the indications of pleas in the present cases. The section which the parties are now required to complete before the hearing includes a box requiring the following information in relation to each charge:

> "**Pleas** (either way) or **indicated pleas** (indictable only) or **alternatives** offered.
>
> **Warning: this information may affect credit for plea.**
>
> If there is a limited basis of plea insert details in 'real issues'." [emphasis as in the form itself]

25. Use of that form, in its current iteration, is obligatory. Alternative and unauthorised versions, such as was found in *Hewison*, must not be used.

26. The revised wording is in our view helpful. Subject to the specific exceptions in the guideline, we summarise the position as follows:

i) A defendant charged with an either-way offence will be asked, pursuant to section 17A(5) of the 1980 Act, whether, if the offence were to proceed to trial, he would plead guilty or not guilty. If he unequivocally indicates that he would plead guilty, he is treated as having pleaded guilty, and a reduction of one-third should be made. That is so even if an indication that he would plead guilty is given, not at the outset, but following a reconsideration at a slightly later stage of the procedure in accordance with section 20(7) of the Act.

ii) A defendant charged with an indictable-only offence cannot enter any plea before the magistrates' court but will be asked to indicate whether he intends to plead guilty in the Crown Court. If he unequivocally indicates that he does, and enters his guilty plea when he first appears before the Crown Court, a reduction of one-third should be made.

27. We have considered submissions as to whether a reduction "of the order of one-third", or of somewhere between one-third and one-quarter, should be made where a defendant does not indicate a guilty plea at the first stage of the proceedings but communicates an intention to plead guilty before he next appears in court. We have drawn attention to the clear distinction which the guideline deliberately draws

between the first stage of the proceedings and any later stage. We have also referred to the exceptions in the guideline, including the F1 exception for those who genuinely need further advice before knowing whether they are guilty of the offence with which they are charged and who may therefore still receive full credit even after the first stage of the proceedings. In our view, there will be very few occasions when the sentence of a defendant who has not pleaded guilty at the first stage of the proceedings, and who cannot bring himself within one of the exceptions, could properly be reduced by more than one-quarter. It would be wholly inconsistent with the structure of the guideline to introduce an additional sliding scale of reduction between one-third and one-quarter, and we reject the suggestion that such an approach should be routinely, or frequently, adopted. Bearing in mind the infinite variety of situations which come before the criminal courts, and the consequent undesirability of ever saying "never", we are prepared to accept that there may be exceptional circumstances in which a court might be persuaded that an unequivocal guilty plea notified to the prosecution and to the court very shortly after the first court appearance should be treated as tantamount to a plea at the first stage of proceedings and should receive full, or almost full, credit. But such circumstances will be rare.

28. We have also considered the position where a defendant faces more than one charge and does not at the first stage of proceedings give an unequivocal indication of an intention to plead guilty to all the charges. The circumstances of such cases will vary widely. In some cases it will be appropriate to view the charges separately and give the differing levels of credit which are appropriate in respect of each individually. In others it may be better to take a view across the charges as a whole and make the same reduction in each case. We do not think any guidance can be given which could be of general application.

29. The guideline, at Section D, makes clear that the *maximum* level of reduction for a guilty plea is one-third. Matters such as early admissions and cooperation with the police investigation might enable a defendant to put forward mitigation which justifies some reduction in the sentence which would otherwise be appropriate before reduction for a guilty plea. So too might the action of a defendant in being the first of a number of co-accused to break ranks and plead guilty: see *R v Hodinott* [2019] EWCA Crim 1462 at [29] and *Bailey and others* at [46]. In the same way, a mitigating factor might be found if a defendant pleads guilty when his co-accused are contesting issues which might be resolved in a way favourable to him. But, we emphasise, mitigating factors of this or a similar nature must be considered on a fact-specific basis *before* the appropriate reduction for a guilty plea is determined, and cannot lead to an increase in the level of that reduction.

30. The correct approach is illustrated by *R v Price* [2018] EWCA Crim 1784, [2019] 1 Cr App R (S) 24. The defendant had made admissions when interviewed by the police, but at the magistrates' court hearing indicated a not guilty plea. He pleaded guilty at the PTPH in the Crown Court, and was allowed a 25 per cent reduction. On appeal, he submitted that in view of the admissions made in interview he should have received credit of one-third. His appeal was dismissed: the plea had not been indicated at the first stage of proceedings; his admissions in interview could be taken into account as part of his personal mitigation, but did not affect the level of reduction.

31. We consider finally the situation in which a defendant who has not indicated a guilty plea at the first stage of the proceedings, and who does not come within any of the exceptions in section F of the guideline, appears before the Crown Court and asks to postpone arraignment to a later hearing. It follows from what we have said that, even if such a request is granted, there can be no question of the defendant "preserving full credit" until the next hearing. He is already too late to receive full credit, even if he pleads guilty at his first appearance before the Crown Court. If there is good reason for arraignment to be postponed, the judge might be persuaded, as an exercise of discretion in the application of the sliding scale, to preserve credit of one-quarter until the next hearing.

32. With those general principles in mind, we turn to the individual cases before us.

33. Isuf Plaku, now aged 41, and his brother Eduart Plaku, now aged 43, appeared before a magistrates' court on 19 November 2018, and were sent for trial on a charge of conspiracy to supply cocaine. No BCM form was uploaded to the DCS in either of their cases, though information provided by the magistrates' court to the Criminal Appeal Office indicates that a form would have been completed in each case. No application has been made by either appellant to adduce evidence showing that the normal procedure was not followed.

34. Strong circumstantial evidence linked the appellants to 43kg of cocaine seized by the police on 16 November 2018. The cocaine was of an unusually high level of purity, placing the appellants close to the importation, and had a street value in excess of £4.3 million. Both appellants had previous convictions, and at the time of the drugs conspiracy Eduart Plaku was on licence from a sentence of 6 years' imprisonment, imposed in 2015 for an offence of conspiracy to acquire criminal property.

35. The case was listed for a PTPH in the Crown Court at Luton on 17 December 2018. Mr Royle, who did not appear below but represents both brothers in this court, tells us that a successful application was made to adjourn the hearing and to preserve credit. The day before that adjourned hearing, the prosecution gave notice of an amendment to the indictment which extended the conspiracy period from 1 day (the day of the arrests) to 11 days. At the hearing, on 29 January 2019, both brothers pleaded guilty. Sentencing did not take place until 3 September 2019. No pre-sentence reports were prepared. None was necessary.

36. At the sentencing hearing, counsel then appearing for Isuf Plaku did not suggest that any written indication of an intention to plead guilty had been given at any stage, though he did say there had been an informal indication of plea before the adjourned PTPH on 29 January 2019. On behalf of Eduart Plaku, counsel then appearing submitted that the appellant had not been asked to indicate a plea in the magistrates' court, and sought full credit on the basis that the guilty plea was entered at the first opportunity. Counsel accepted that no written indication of a guilty plea had been given before the hearing on 29 January 2019.

37. The sentencing judge, HHJ Evans, found that both appellants had played a leading role in the conspiracy. He gave each of them one-quarter credit for their guilty pleas. He sentenced Isuf Plaku to 15years' imprisonment and Eduart Plaku to 15 years 9 months' imprisonment.

38. It is unnecessary to go into further detail about the facts of the offence, because the appellants have leave to argue only a single ground of appeal relating to the level of credit they received for their guilty pleas. An application for leave to appeal on the basis that the judge had wrongly assessed their roles, and so had passed a sentence which was manifestly excessive in length, was refused both by the single judge and by the full court.

39. Mr Royle submits that the guilty pleas were entered at what was the first stage of proceedings, and that therefore credit in the order of 33 per cent should have been given. He refers to what was said by this court in *R v Caley and others* [2012] EWCA Crim 2821, [2013] 2 Cr App R (S) 47.

40. Mr Little resists the appeals, relying on the decision in *Yasin* and emphasising that neither appellant had given any indication of a guilty plea either in the magistrates' court, or before the first PTPH, or at that PTPH. He submits, in our view correctly, that much of what was said on this subject in *Caley* must be regarded as out of date: that case was decided with reference to an earlier guideline issued by the Sentencing Guidelines Council, at a time when local practices as to indication of pleas differed, and the court expressly stated that the Sentencing Council was known to have the preparation of a new guideline on its agenda.

41. In the light of the general principles which we have stated, we can express our conclusions briefly. There is a lack of clarity as to precisely what happened in the magistrates' court; but even if it could be accepted that no oral enquiry was made as to the intended pleas, despite the duty under rule 9.7(5), it seems clear that BCM forms must have been completed. It is not suggested that either appellant indicated a guilty plea on his form. Nor is it suggested that any formal written indication of a guilty plea was given by either appellant in advance of the PTPH. In those circumstances, the judge was correct to reduce their sentences by one-quarter. The submission that the hearing on 29 January 2019 was the first opportunity to enter guilty pleas is, with respect, misconceived. This is in our view a classic example of a case in which the appellants knew that they had been involved in drug dealing, knew or could readily have been advised that they were in fact and law guilty of conspiracy to supply controlled drugs, and therefore could not bring themselves within exception F1. Issues as to the duration of the conspiracy or as to the precise roles played did not prevent an indication of guilty plea being given at the first hearing in the magistrates' court. The appellants therefore could have indicated their guilty pleas at the first stage of the proceedings, and should have done so if they wished to be given full credit. The later application for adjournment of the PTPH was successful in preserving the level of credit appropriate at that stage, namely one-quarter, but could not increase it to one-third.

42. For those reasons the appeals of the Plaku brothers fail and are dismissed.

43. Simon Bourdon, now aged 59, was charged with an offence of stalking causing serious alarm or distress, four offences of breach of a restraining order, and an offence of disclosing a private photograph with intent to cause distress. The offences were committed between early April and mid-November 2019. The victim was the appellant's former partner. The appellant had commenced a campaign of harassment against her in 2018 after she broke off their short-lived relationship. The complainant reported him to the police late in 2018, and in February 2019 the appellant was

convicted of harassment, sent to prison for 8 weeks and made subject to a restraining order which prohibited him from contacting the complainant.

44. On his release from that short sentence the appellant ignored the restraining order and renewed his campaign, committing the present offences. He repeatedly contacted the complainant, both directly and indirectly, by phone, post, email and on social media. He sent her unwanted gifts. He applied for a credit card in her name. He caused an unknown man to contact her with a view to meeting her for sex. He was arrested and interviewed, but denied all allegations of stalking and breach of the restraining order and was released under investigation. He promptly resumed his stalking, continuing to make contact with the complainant. He applied for a loan in her name. He sent her tickets to a concert. He posted sexual images of the complainant, taken without her knowledge, on a dating website and later on an Instagram account. At the beginning of July 2019 he was arrested again. He again denied all offences and was released. His offending continued until November 2019.

45. When yet again arrested and interviewed in November 2019, the appellant admitted that he had sent gifts to the complainant and had made the credit card application, which he said he had done with a view to putting money into the account as a present.

46. The appellant made his first appearance before a magistrates' court on 18 November 2019. The court record shows that he either indicated pleas of not guilty or gave no indication of plea. The BCM form, uploaded to the DCS, stated "G pleas anticipated to most of these charges at PTPH. Court does not request PSR given the vagaries over which offences will be G pleas." We have also been provided with an attendance note by the appellant's solicitor, from which it is clear that a decision was taken not to give any indication of plea because it was hoped that discussions with the prosecution might reduce the number of charges.

47. At a PTPH on 16 December 2019, in the Crown Court at Ipswich, the appellant pleaded guilty to the offences which we have mentioned. Sentence was adjourned to 17 March 2020, before HHJ Pugh.

48. The complainant had made two victim personal statements, which set out in stark terms the effects of the offending upon her. She has suffered mental and physical ill health as a result of the offences and has had long periods off work. She describes living in a constant state of anxiety, panic and fear. For present purposes, we do not think it necessary to go into greater detail.

49. The appellant had previous convictions including offences of harassment against a different former partner in 2004, 2012 and 2014. A pre-sentence report referred to a pattern of obsessive and compulsive behaviour towards ex-partners. The author of a later addendum report assessed the appellant's pattern of behaviour as being bolstered by harmful beliefs and attitudes linked to male privilege and a sense of entitlement. He considered that the appellant poses a high risk of serious psychological harm to a future partner who ended their relationship.

50. The judge in his sentencing remarks noted that the appellant, although showing some remorse, lacked insight into the impact of his behaviour. He assessed that impact as very severe. He held that the stalking offence fell into category 1A of the relevant definitive guideline, with a starting point of 5 years' custody and a range from 3 years

6 months to 8 years. He considered it appropriate to pass a sentence for that offence which would reflect the overall criminality, with concurrent sentences for the other offences. The judge found that the aggravating features were the previous convictions for similar offending, the commencement of the present offences so soon after release from prison, and the fact that some of the offences were committed whilst on post-sentence supervision and others whilst released under investigation. He accepted as mitigation the appellant's health issues, including some mental health issues, his years of military service and a number of favourable references. He allowed 25 per cent credit for the guilty pleas which were entered at PTPH. He found the appellant to be a dangerous offender and regarded an extended determinate sentence as necessary.

51. The sentence for the stalking offence was an EDS of 8 years, comprising a custodial term of 6 years and an extension period of 2 years. Concurrent sentences of 3 years for each of the offences of breach of the restraining order, and one year for the offence relating to the private photograph, were imposed. A further restraining order was made.

52. Mr Spary, representing the appellant in this court as he did below, submits that the judge should have reduced the custodial term by 33 per cent, not 25 per cent, because an intention to plead guilty was advanced at an early stage. He further submits that the judge placed the offence of stalking into too high a category in the relevant guideline and therefore imposed too long a sentence.

53. Mr Spary also challenges the finding of dangerousness. He relies on a psychiatric report, obtained post-sentence, in which a consultant forensic psychiatrist noted the appellant's history of previous diagnoses of PTSD and previous anti-depressant treatment, but also noted problems related to alcohol. The psychiatrist expressed the opinion that any risk would be significantly reduced by the appellant seeking help with his alcohol abuse and engaging in talking therapies, and that the appellant was not a man whom the court would find dangerous as that term is defined for sentencing purposes.

54. All the grounds of appeal are resisted by Mr Little.

55. We can again express our conclusions briefly. The judge sensibly treated the stalking charge as the lead offence, and reflected the overall criminality in the sentence for that offence. Before the reduction for the guilty pleas, the sentence was at the top of the guideline range. That was a stiff sentence, particularly bearing in mind that the offending did not involve any physical violence. However, the judge was entitled to place the offence into category 1A: as he observed, there were multiple features of high culpability, and there was clear evidence in the victim personal statements that the complainant had suffered severe psychological harm. The offending was greatly aggravated by the context of the former relationship, by the factors which the judge identified and by the number of distinct breaches of the restraining order. The judge took into account the limited personal mitigation. The appellant's mental health problems did not reduce his culpability. The judge of course had to have careful regard to totality, and to keep in mind that the other offences could to some extent be viewed as overlapping with the stalking offence; but he also had to reflect the seriousness of persistent offending over a long period by a man who regarded himself as above the law and who caused serious harm to his victim. In those circumstances,

stiff though the sentence was, we are unable to say that the custodial term was manifestly excessive.

56. As to the reduction in that term for the guilty plea, we are unable to accept Mr Spary's submission. Applying the general principles expressed earlier in this judgment, we think this is clearly a case in which the appellant failed to give an unequivocal indication of guilty pleas at the first stage of the proceedings. On the contrary, he chose to keep his options open in the hope that he would ultimately be able to plead to fewer offences. The judge was therefore correct to limit the reduction to one-quarter. He could not properly have made any greater reduction.

57. Finally, against the background of the previous convictions and having regard to the persistent nature of the latest offences, the judge was entitled to make the finding of dangerousness. By his repeated offending, including after arrests and interviews in which he had falsely denied his actions, the appellant had shown himself to present a high risk to any woman who entered into a relationship with him but then brought it to an end. As the harm suffered by this unfortunate complainant showed, his conduct carried a significant risk of causing serious psychological harm. We see no basis for challenging the judge's decision to impose an extended determinate sentence.

58. The appeal of Simon Bourdon therefore fails and is dismissed.

59. We come finally to the Reference relating to Benjamin Smith, now aged 31.

60. In the early hours of 14 September 2020 Smith forced his way into the home of a married couple aged in their seventies, Mr and Mrs Morley. He left his girlfriend, aged just 15, to keep watch outside. He wore a scarf around his face and was armed with a hammer, which he had photographed himself holding some 40 minutes earlier. He was later to admit that he was intoxicated with alcohol and cocaine.

61. Mrs Morley was woken by the sound of Smith breaking a window to gain entry. She went to investigate and was confronted by Smith. She screamed, and her husband came to her assistance. Smith demanded their money, and refused to accept their answer that they had none in the house. He forced them upstairs into the bathroom and took their wedding rings, injuring Mrs Morley's hand as he did so. He then went to search the bedrooms. The Morleys took the opportunity to bolt the bathroom door, and Mr Morley shouted from the window for help. Hearing this, Smith broke down the bathroom door and dragged his victims into the bedroom. Mr Morley took up the hammer which Smith had left on the bed, but before he could use it Smith took it from him and used it to strike Mr Morley in the face, causing bruising and swelling but fortunately no more serious injury. He then tied up his victims and ransacked the room, taking bank cards and jewellery. He told Mrs Morley that if she gave him the PINs for the cards, he would return the jewellery. She did as he wanted, but he then left with the jewellery. The items which he stole, none of which were recovered, were of the greatest sentimental value to the Morleys, representing their 47 years of married life.

62. When arrested and interviewed, Smith made no comment. He was charged with offences of aggravated burglary, false imprisonment of both his victims and unlawful wounding of Mr Morley.

63. At the first appearance before the magistrates' court, the "indicated pleas|" section of the BCM form had been completed with the words "potential indicated plea". The "real issues in the case" section had been completed with the words "none known – possible basis of plea to be mooted". We are told that the defence advocate indicated that Smith was likely to plead guilty but did not accept either striking Mr Morley with the hammer or tying up Mr and Mrs Morley. The prosecution advocate said, unsurprisingly, that that was unlikely to be accepted as a basis of plea. The court record stated "Plea of not guilty or non indicated".

64. At a PTPH in the Crown Court at Cambridge on 16 October 2020, Smith pleaded guilty to all charges. No basis of plea was put forward. He was sentenced by Mr Recorder Benson QC on 27 November 2020, when he asked for 6 further offences to be taken into consideration: two offences of house burglary, in one of which he was confronted by the householder; three offences of burglary of non-domestic premises; and one offence of attempted theft. All those offences had been committed in August and September 2020, the latest two in the sequence being committed one day before, and two days after, the aggravated burglary of Mr and Mrs Morley's home.

65. At the sentencing hearing, the recorder considered victim personal statements in which Mr and Mrs Morley spoke of the fear in which they had lived since the invasion of their home, which now feels like a prison to them. He also considered a PSR, in which the author recorded Smith's account that he had not been fully aware of his actions, because of the alcohol and cocaine he had consumed, but had committed the aggravated burglary because he needed money to pay a drug debt. The author assessed Smith as being highly likely to commit further serious offences which could cause serious harm to others.

66. Smith had previously been convicted on 12 occasions of a total of 26 offences including burglary and robbery. He had received an extended sentence in 2013 for a sexual offence. At the time of the present offences he was subject to post-sentence supervision following a conviction for failing to comply with his notification requirements.

67. Counsel and the recorder were all agreed that the aggravated burglary offence fell within category 1 of the relevant guideline, with a starting point of 10 years' custody and a range from 9 to 13 years. The wounding offence also fell into category 1, with the relevant guideline giving a starting point of 3 years' custody and a range from 2 years 6 months to 4 years. Mr Mark Shelley, then as now representing Smith, realistically accepted that the recorder would be entitled to make a finding of dangerousness. He argued for credit of one-third to reflect the guilty pleas.

68. In the course of the sentencing hearing, there was the following exchange between counsel then appearing for the prosecution and the recorder:

> "Counsel: Your Honour, I've put in my note that credit should be 25 per cent for plea in this court without previous indication, but my learned friend rightly points out there was no opportunity for him to plead [inaudible] and so your Honour …
>
> The recorder: If offences are indictable only, can you indicate a plea in the magistrates or not? You can't, so he hasn't had an

> opportunity. So the first opportunity is – there hasn't been a PTPH.
>
> Counsel: Yes, 16th October.
>
> The recorder: There wasn't – that's when he pleaded? Right. So, he pleaded at the first opportunity, so he's entitled to a third."

Counsel in that exchange unfortunately did not give the recorder the assistance to which he was entitled. In fairness to counsel, we note that this hearing took place only four weeks after the court gave its decision in *Hodgin*.

69. In his sentencing remarks, the recorder did indeed make a finding of dangerousness, and decided to impose an EDS for the aggravated burglary, with concurrent sentences for the other offences. He identified as aggravating features Smith's previous convictions, the fact that he was subject to post-sentence supervision, his intoxication and his recruitment of a 15 year old girl to act as his lookout. He concluded that those features made it necessary to move upwards from the guideline starting point to a sentence of 12 years 6 months. He reduced that custodial term by one-third to reflect what he described as a plea of guilty "at the first opportunity". He imposed the following sentences: for aggravated burglary, an EDS of 13 years, comprising a custodial term of 8 years 4 months and an extension period of 4 years 8 months; for each of the false imprisonment offences, a concurrent determinate sentence of 8 years; and for the wounding offence, a concurrent determinate sentence of 3 years.

70. For the Solicitor General, Mr Little submits that the sentencing was unduly lenient. With reference to the aggravated burglary guideline, he submits that four of the six features of greater harm were present: the victims were at home; Smith threatened his victims and attacked Mr Morley with the hammer, causing serious harm; there was ransacking of the bedroom; and there was a significant degree of loss because of the sentimental value of the stolen jewellery. In addition, at least two, and arguably three, of the higher culpability factors were present: Smith was equipped for burglary; he had a weapon with him when he entered the premises; and there was undoubtedly some degree, and arguably a significant degree, of planning. The guideline states that multiple features of harm or culpability can merit an upwards movement from the starting point before considering aggravating and mitigating factors, and Mr Little submits the recorder should have made such a movement in this case. There were then multiple aggravating features, as identified by the recorder, and the guideline states that such factors may make it appropriate to move outside the category range. Moreover, the sentence for this offence had to reflect the overall seriousness of the offending, as the other sentences would run concurrently. Mr Little submits that in the circumstances of this case, a sentence outside the range was necessary.

71. Mr Little submits in addition that the appropriate reduction in sentence was one-quarter not one-third, and that the recorder made an error of principle in that regard. However, he very fairly makes clear that he does not contend that the sentence should be increased on that basis alone: he submits that the sentence was unduly lenient because of the cumulative effect of the custodial term being too short, and the reduction for plea being too large.

72. Mr Shelley resists this reference. He submits that the sentence was not unduly lenient. He argues that the recorder went almost to the top of the range before reflecting the guilty plea, and had a discretion to give full credit.

73. This was undoubtedly very serious offending. The features to which Mr Little has drawn attention provided ample reason for the recorder to move upwards to, or near to, the top of the guideline range. We do not think the recorder could have been criticised if he had concluded that a sentence somewhat in excess of the range, before reduction for guilty pleas, was necessary to reflect the overall seriousness of the offending. We are not however persuaded that he was required to reach that conclusion or that a sentence at or near the top of the guideline range was not properly open to him. The custodial term of 12 years 6 months, before credit for the guilty pleas, was lenient, but we are not persuaded that it was in itself unduly so.

74. With respect to the recorder, he was led by counsel, and fell, into clear error of principle in allowing full credit for the guilty pleas. Smith could not have entered a guilty plea in the magistrates' court, but he could have given an unequivocal indication of his intention to do so. It is, we think, unnecessary to consider any question arising from the suggested basis of plea which was put forward at the first hearing. The simple fact is that at that hearing, Smith did not give an unequivocal indication of an intention to plead guilty. At most, an oral indication was given that he was "likely" to plead guilty. As we have made clear earlier in this judgment, a qualified indication of that kind is not sufficient to attract full credit. Smith's guilty pleas at PTPH could not attract more than a one-quarter reduction. We cannot accept Mr Shelley's submission that the recorder was entitled as an exercise of discretion to make a one-third reduction. The making of such a reduction was therefore wrong in principle.

75. In view of the concession properly and fairly made on behalf of the Solicitor General, we do not find that that error of principle in itself causes the sentence to be unduly lenient. Nor are we persuaded that the combination of matters on which the Solicitor General relies leads to that conclusion. Smith's sentence will therefore remain unchanged. This Reference has however rightly been brought, and has identified an error of principle. In those circumstances we grant leave to refer but we make no order on the Reference.