Easter Term
[2010] UKSC 17
On appeal from: 2009 EWCA Civ 792

JUDGMENT

R (on the application of F (by his litigation friend F)) and Thompson (FC) (Respondents) *v* Secretary of State for the Home Department (Appellant)

before

Lord Phillips, President
Lord Hope, Deputy President
Lord Rodger
Lady Hale
Lord Clarke

JUDGMENT GIVEN ON

21 April 2010

Heard on 3 and 4 February 2010

Appellant
James Eadie QC
Jeremy Johnson
(Instructed by Treasury Solicitors)

1st Respondent
Hugh Southey QC
Adam Straw
(Instructed by Stephensons)

2nd Respondent
Tim Owen QC
Pete Weatherby
(Instructed by Irwin Mitchell)

1st Intervener
Lord Boyd of Duncansby QC
James Mure QC
(Instructed by Scottish Government Legal Directorate Litigation Division)

2nd Intervener
Aidan O'Neill QC

Christopher Pirie
(Instructed by Balfour & Manson)

LORD PHILLIPS (with whom Lady Hale and Lord Clarke agree)

Introduction

1. Sexual offences can inflict harm whose consequences persist throughout the lives of their victims and some sexual offenders never lose their predisposition to commit sexual offences. Section 82 of the Sexual Offences Act 2003 ("the 2003 Act") imposes on all who are sentenced to 30 months' imprisonment or more for a sexual offence the duty to keep the police notified of where they are living and of travel abroad ("the notification requirements"). This duty persists until the day they die. There is no right to a review of the notification requirements. These appeals raise the question of whether the absence of any right to a review renders the notification requirements incompatible with article 8 of the European Convention on Human Rights ("the Convention"). That article provides:

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

2. These appeals arise out of two independent claims for judicial review. The first was brought by F. When he was eleven years old he committed a number of serious sexual offences, including two offences of rape, on a six year old boy. On 17 October 2005, having been convicted of these offences after a contested trial, he was sentenced to 30 months' imprisonment on each count concurrent. This sentence automatically brought into effect the notification requirements.

3. The second claim was brought by Mr Thompson. He was born on 1 March 1951. On 12 December 1996 he was sentenced to 5 years' imprisonment, concurrent, on two counts of indecent assault on his daughter, together with other concurrent sentences for assault occasioning actual bodily harm. This sentence also brought into effect the notification requirements.

4. Neither claimant was in a position to bring proceedings pursuant to section 7(1) of the Human Rights Act 1998 on the ground that the imposition of the notification requirements unlawfully infringed his Convention rights, for section 6(2) of that Act precluded such a claim. Each commenced proceedings for judicial review claiming a declaration that the notification requirements were incompatible with article 8 of the Convention. The claims succeeded before the Divisional Court (Latham LJ, Underhill and Flaux JJ) on 19 December 2008, whose decision was upheld by the Court of Appeal (Dyson, Maurice Kay and Hooper LJJ) on 23 July 2009, [2010] 1 WLR 76. The ground on which the claims succeeded was a narrow one. The courts below held that the notification requirements interfered with article 8 rights, that the interference was in accordance with the law and that it pursued legitimate aims, namely the prevention of crime and the protection of the rights and freedoms of others, but that the lack of any provision for review of the notification requirements rendered these a disproportionate manner of pursuing that legitimate aim.

5. It is not to be inferred from the judgments below that, had either claimant been entitled to challenge, by way of a review, the notification requirements made in his case, the challenge would have succeeded. The only issue raised by these appeals is a general one. Does the absence of any right to a review render lifetime notification requirements disproportionate to the legitimate aims that they seek to pursue?

The statutory provisions

6. I propose to adopt, with some additions, the helpful summary of the relevant statutory provisions set out by the Court of Appeal.

7. Statutory notification requirements for sex offenders were first introduced by section 1(3) of the Sex Offenders Act 1997 ("the 1997 Act"). They were automatic on conviction. Under the 1997 Act regime, the notification requirements were to give the police details of the offender's name, address and date of birth within 14 days of conviction, and to notify any address at which he would be staying for 14 days or longer.

8. The Criminal Justice and Courts Services Act 2000 ("the 2000 Act") reduced the initial notification time to 3 days and introduced a new requirement that an offender notify the police if he intended to travel overseas in accordance with regulations made by the Secretary of State. Regulations were made pursuant to the 2000 Act which required that notification of travel should be made at least 48 hours prior to departure and that it should include the identity of the carrier, all

points of arrival in destination countries, accommodation arrangements, return date and point of arrival if known.

9. Under the 1997 and 2000 Acts the required notifications could be given either by attending in person at a local police station or by sending a written notification to any such station.

10. All these provisions were repealed by the 2003 Act. Section 82(1) of the 2003 Act contains a table which prescribes the notification periods for different categories of offenders. As I have said, for persons who have been sentenced to imprisonment or detention for 30 months or more, an indefinite period beginning with “the relevant date” is prescribed. For present purposes the relevant date is defined as the date of conviction (section 82(6)). Section 82(2) provides that, where a person is under the age of 18 on the relevant date, the determinate periods prescribed in the table are halved in respect of sentences shorter than 30 months.

11. Section 83 makes provision for initial notification. Thus, within 3 days of the relevant date, the offender must notify to the police the information specified in subsection (5), namely his date of birth; his national insurance number; his name on the relevant date and, where he used one or more other names on that date, each of those names; his home address on the relevant date; his name on the date on which notification is given and, where he uses one or more other names on that date, each of those names; his home address on the date on which notification is given; and the address of any other premises in the United Kingdom at which, at the time the notification is given, he regularly resides or stays.

12. Section 84 makes provision for the notification of changes in the information given pursuant to section 83 within 3 days of the changes occurring. This includes notification of the person's "having resided or stayed, for a qualifying period, at any premises in the United Kingdom the address of which has not been notified to the police…" (subsection (1)(c)). Subsection (6) provides that "qualifying period" means (a) a period of 7 days, or (b) two or more periods, in any period of 12 months, which taken together amount to 7 days.

13. Section 85 provides for periodic notification of the information specified in section 83(5). Section 86(1) provides that the Secretary of State may by regulations make provision requiring offenders who leave the United Kingdom to give a notification under subsection (2) before they leave and a notification under subsection (3) about their subsequent return. A notification under subsection (2) must disclose the date on which the offender will leave; the country (or the first country) to which he will travel and his point of arrival in that country; and any other information prescribed by the regulations which the offender holds about his

departure from or return to the United Kingdom or his movements while outside the United Kingdom. A notification under subsection (3) must disclose any information prescribed by the regulations about the offender's return to the United Kingdom.

14. Section 87(1) provides that a person gives a notification by "(a) attending at such police station in his local police area as the Secretary of State may by regulations prescribe…, and (b) giving an oral notification to any police officer, or to any person authorised for the purpose by the officer in charge of the station". Section 87(4) provides that where a notification is given, the relevant offender must, if requested to do so by the police officer or authorised person, allow the officer or person to take his fingerprints and/or photograph any part of him.

15. Section 91(1) provides that a person commits an offence "if he – (a) fails, without reasonable excuse, to comply with section 83(1), 84(1), 84(4)(b), 85(1), 87(4)…or any requirement imposed by regulations made under section 86(1)". Section 91(2) provides that a person guilty of an offence under this section is liable on conviction on indictment to imprisonment to a term not exceeding 5 years and on summary conviction to a term not exceeding 6 months or a fine or both.

16. Pursuant to section 86 the Secretary of State made the Sexual Offences Act 2003 (Travel Notification Requirements) Regulations 2004 (SI 2004/1220). These require extremely detailed information to be given in relation to travel plans. Just as in the case of information required by sections 83, 84 and 85, this information had to be provided in person at a police station.

The approach to proportionality

17. In order to decide whether interference with a fundamental right is proportionate to the legitimate end sought to be achieved the court has to ask the questions identified by the Privy Council in *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69 at p 80:

> "whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective."

However, as Lord Bingham of Cornhill observed in *Huang v Secretary of State for the Home Department* [2007] UKHL 11; [2007] 2 AC 167 at para 19, there is an

overriding requirement to balance the interests of the individual against those of society.

18. In this case the importance of the legislative objective has never been in doubt. The prevention of sexual offending is of great social value and the respondents have not suggested that, insofar as notification requirements play a useful role in assisting to achieve this objective, they are not a proportionate means of doing so. The debate has been as to the necessity and utility of imposing notification requirements for life without any review. In respect of this debate the observations of Lord Nicholls of Birkenhead in *Wilson v First County Trust Ltd (No 2)* [2003] UKHL 40; [2004] 1 AC 816 at paras 62-64 are in point. He remarked that when a court makes a value judgment in respect of proportionality the facts will often speak for themselves, but that sometimes the court may need additional background information tending to show, for instance, the likely practical impact of the statutory measure. Such information may be provided in the course of Parliamentary debate, and it is legitimate to have recourse to Hansard in the search for it.

Domestic jurisprudence

19. The Court of Appeal considered three cases, to which this court has also been referred, in which the relevant provisions of the 2003 Act, or its predecessor the 1997 Act, were considered. The first was *In re an application by Kevin Gallagher for Judicial Review* [2003] NIQB 26, a decision of Kerr J sitting in the High Court of Northern Ireland. The applicant had been sentenced to 33 months' imprisonment on three counts of indecent assault and, in consequence, become subject to the automatic reporting restrictions. He complained that these were disproportionate in that they were automatic. The trial judge had no jurisdiction to disapply or vary them where it was clear to him that they were unnecessary or inappropriate. The applicant was particularly concerned with the obligation to give notification of proposed travel arrangements added by the 2000 Act as he moved regularly across the border to the Republic of Ireland, usually for very short periods. The decision and reasoning of Kerr J appear from the following paragraphs of his judgment.

> "22 . . . the absence of a dispensing provision whereby the applicant might apply to be relieved of the reporting requirements after a stipulated period will not render the provisions automatically disproportionate. That feature is undoubtedly relevant to the issue but it alone cannot dictate the outcome of the examination of a scheme's proportionality.

23. It is inevitable that a scheme which applies to sex offenders generally will bear more heavily on some individuals than others. But to be viable the scheme must contain general provisions that will be universally applied to all who come within its purview. The proportionality of the reporting requirements must be examined principally in relation to its general effect. The particular impact that it has on individuals must be of secondary importance.

24. The gravity of sex offences and the serious harm that is caused to those who suffer sexual abuse must weigh heavily in favour of a scheme designed to protect potential victims of such crimes. It is important, of course, that one should not allow revulsion to colour one's attitude to the measures necessary to curtail such criminal behaviour. A scheme that interferes with an individual's right to respect for his private and family life must be capable of justification in the sense that it can be shown that such interference will achieve the aim that it aspires to and will not simply act as a penalty on the offender.

25. The automatic nature of the notification requirements is in my judgment a necessary and reasonable element of the scheme. Its purpose is to ensure that the police are aware of the whereabouts of all serious sex offenders. This knowledge is of obvious assistance in the detection of offenders and the prevention of crime. If individual offenders were able to obtain exemption from the notification requirements this could – at least potentially - compromise the efficacy of the scheme.

26. By the same token the fact that the notification requirements persist indefinitely does not render the scheme disproportionate. While this is unquestionably an inconvenience for those who must make the report, that inconvenience must be set against the substantial benefit that it will achieve of keeping the police informed of where offenders are living and of their travel plans so that further offending may be forestalled both by rendering detection more easily and deterring those who might be tempted to repeat their offences.

27. I am therefore satisfied that the notification requirements are proportionate and the application for judicial review must be dismissed."

20. This passage is of obvious relevance, albeit that Kerr J was considering submissions directed at the role of the trial judge. I observe that he treated as axiomatic both the "substantial benefit" to which he referred in paragraph 26 and the statement in paragraph 25 that it could, at least potentially, compromise the efficacy of the scheme if individual offenders were able to obtain exemption from the notification requirements.

21. In *Forbes v Secretary of State for the Home Department* [2006] EWCA Civ 962; [2006] 1 WLR 3075 Sir Igor Judge P endorsed Kerr J's analysis of the principles underpinning and justifying the notification requirements. As the Court of Appeal observed, however, *Forbes* was not concerned with indefinite notification requirements, nor with the possibility of a review of these.

22. *A v Scottish Ministers* [2007] CSOH 189; 2008 SLT 412 concerns the 2003 Act, as it applies in Scotland, and regulations made pursuant to it. The provisions are not in all respects identical in the two jurisdictions. A brought a petition for judicial review, challenging the compatibility of these provisions with article 8 of the Convention. The petition was refused by the Lord Ordinary and a reclaiming motion was considered by the Inner House on 19 to 21 January. The First Division has reserved judgment until after the court has delivered judgment in this appeal. In these circumstances the court granted permission to intervene in these appeals to both the Lord Advocate and to A.

23. The Lord Ordinary reviewed the relevant jurisprudence in a lengthy judgment and concluded that the notification requirements were proportionate to the legitimate aim at which they were directed and were compatible with article 8 of the Convention (paragraph 58). As the Court of Appeal observed, however, this conclusion was not easy to reconcile with the following passage in paragraph 52 of his judgment:

> "In light of the importance of the aims being pursued I am satisfied that the rigid and indeterminate nature of the scheme under discussion does not result in this petitioner having to bear an individual and excessive burden. That is not to say that if the facts of the case were different the same view would necessarily be arrived at. For example, the proportionality of an indefinite interference with the art 8 rights of an elderly man who had been in no trouble for very many years might cause the issue to be focused in quite a different way."

The Lord Ordinary had earlier accepted the proposition that his task was to look at the facts as they applied to the applicant rather than in the abstract, albeit in the

context of the general aims of the legislation (para 49), and this is what he appears to have done. His judgment did not focus on the question of whether the lack of any review of the notification requirements could be justified.

The Strasbourg jurisprudence

24. An appropriate starting point when considering the Strasbourg jurisprudence is the following statement of the Strasbourg Court in *Stubbings & Others v United Kingdom* (1996) 23 EHRR 213 at para 62 in relation to the positive obligation owed by States to protect individuals against sexual abuse:

> "Sexual abuse is unquestionably an abhorrent type of wrongdoing, with debilitating effects on its victims. Children and other vulnerable individuals are entitled to state protection, in the form of effective deterrence, from such grave types of interference with essential aspects of their private lives."

The reference to deterrence was particularly relevant on the facts of that case, and the duty extends to taking such other steps as are reasonable to prevent the commission of sexual offences.

25. In *Ibbotson v United Kingdom* (1998) 27 EHRR CD 332, an admissibility decision, the issue was whether the notification requirements under the 1997 Act constituted a "penalty" for the purposes of article 7 of the Convention. The Commission held that it did not, remarking that the measures did not go beyond a requirement to furnish to the authorities information which could, in any event, be in the public domain.

26. The same conclusion was reached in another admissibility decision, *Adamson v United Kingdom* (1999) 28 EHRR CD 209. The Court reached the following conclusion as to the purpose of the notification requirements:

> ". . . the purpose of the measures in question is to contribute towards a lower rate of reoffending in sex offenders, since a person's knowledge that he is registered with the police may dissuade him from committing further offences and since, with the help of the register, the police may be enabled to trace suspected reoffenders faster."

27. The applicant in that case also sought to make an article 8 challenge to the notification requirements. In finding such a challenge inadmissible the Court held that the notification requirements amounted to an interference with private life within article 8(1). The requirements were, however, "in accordance with the law" and they pursued the legitimate aims of "the prevention of crime and the protection of the rights and freedoms of others". It was thus necessary to consider whether the measures were proportionate. This required weighing the fact that they required no more than registration of information with the police against the importance of the aims pursued by the Act, namely to protect individuals from grave forms of interference. The Court found the notification requirements proportionate and the complaint manifestly ill-founded.

28. As the Court of Appeal observed at paragraph 21 the Court did not expressly consider the impact of the lack of a mechanism for review since that was not the subject of the complaint.

29. *Massey v United Kingdom* (Application No 14399/02) (unreported) 8 April 2003 was another case where the Court ruled an application in relation to the notification requirements inadmissible. In that case the applicant made a discrete complaint that there was no "assessment or review" of the necessity for registration in his particular case. The Court of Appeal at paragraph 23 treated this as a complaint that focussed on the moment when the sentence was imposed. I am not sure that this reading is justified. While "assessment" naturally applies to the time of sentence "review" suggests a subsequent process. But this complaint was a subsidiary point to more fundamental challenges to the applicant's conviction and sentence and the absence of any review of the notification requirements received no separate consideration by the Court.

30. I now turn to the Strasbourg decisions that have the greatest relevance, and which were particularly relied upon by the respondents. The second of these post-dates the decision of the Court of Appeal. In *S and Marper v United Kingdom* (2008) 48 EHRR 1169 the first applicant had been charged with attempted robbery and acquitted. The second applicant had been charged with harassment of his partner, but the case against him was formally discontinued. Each had had fingerprints, cellular samples and DNA samples taken. They complained that the fact that the police were lawfully entitled to retain these indefinitely infringed their article 8 rights.

31. In holding that there had been a violation of article 8 the Court had regard to a number of matters: the blanket and indiscriminate nature of the power of retention; the fact that the nature and gravity of the suspected offence was immaterial, as was the age of the suspected offender; the fact that the power to retain was unlimited in time and

> "…in particular, there is no provision for independent review of the justification for the retention according to defined criteria, including such factors as the seriousness of the offence, previous arrests, the strength of the suspicion against the person and any other special circumstances."

32. In *Bouchacourt v France* (Application No 5335/06) (unreported) 17 December 2009 an unsuccessful application was made by a man who had been sentenced to ten years' imprisonment for rape and sexual assault on minors. This resulted in his name being placed automatically on a Register of Sexual and Violent Offenders. It also resulted in an obligation to confirm his address every year and to give notice of any change of address. This could be done by registered letter including a receipt or invoice, not more than three months old, containing the applicant's name and address. How long an offender's name remained on the register depended on the gravity of the offence, but it could be for twenty or thirty years.

33. The Court held that there had been no violation of article 8, for reasons that appear in the following paragraphs of its judgment:

> "67. Comme l'indique le Gouvernement, il s'agit d'une durée maximale. Quoi qu'importante en l'espèce puisqu'elle est de trente ans, la Cour observe que l'effacement des données est de droit, une fois ce délai écoulé, lequel se compute dès que la décision ayant entraîné l'inscription cesse de produire tous ses effets. La Cour relève également que la personne concernée peut présenter une demande d'effacement au procureur de la République si la conservation des données la concernant n'apparaît plus pertinente compte tenu de la finalité du fichier, au regard de la nature de l'infraction, de l'âge de la personne lors de sa commission, du temps écoulé depuis lors et de sa personnalité actuelle (paragraphe 16, article 706-53-10 du CPP). La décision du procureur est susceptible de recours devant le juge des libertés et de la détention puis devant le président de la chambre de l'instruction.
>
> 68. La Cour considère que cette procédure judiciaire d'effacement des données assure un contrôle indépendant de la justification de la conservation des informations sur la base de critères précis (*S. et Marper*, précité, § 119) et présente des garanties suffisantes et adéquates du respect de la vie privée au regard de la gravité des infractions justifiant l'inscription sur le fichier. Certes, la mémorisation des données pour une période aussi longue pourrait poser un problème sous l'angle de l'article 8 de la Convention, mais

la Cour constate que le requérant a, en tout état de cause, la possibilité concrète de présenter une requête en effacement des données mémorisées alors que la décision ayant entraîné son inscription a cessé de produire tous ses effets. Dans ces conditions, la Cour est d'avis que la durée de conservation des données n'est pas disproportionnée au regard du but poursuivi par la mémorisation des informations."

Unofficial translation:

"67. As the Government points out, it is a maximum duration. Although significant in this case, since it is of thirty years, the Court observes that what is important in this case, where the period is thirty years, is that the deletion of information is of right once the time has lapsed, as calculated from the date on which the sentence giving rise to registration ceases to have effect. The Court also notes that the person concerned can apply to the prosecutor for the deletion of the information if its preservation no longer appears to be relevant, taking into account the purpose of the register and having regard to the nature of the offence, the age of the person at the time that it was committed, the length of time that has lapsed since then, and the offender's current character (paragraph 16, Article 706-53-10 of the Code of Criminal Procedure). The prosecutor's decision is subject to appeal to the *juge des libertés et de la detention*, then to the president of the investigating chamber.

68. The Court considers that this judicial procedure for removing the information ensures independent review of the justification for the retention of the information according to defined criteria (*S and Marper*, already cited, para 119) and provides adequate and sufficient safeguards in relation to respect for private life, with regard to the seriousness of the offences justifying registration on the sex offenders' register. Certainly, the retention of data for so long a period could be problematic in terms of Article 8 of the Convention, but the Court notes that the Applicant has in any case the concrete opportunity to apply for the deletion of the data retained when the sentence giving rise to his registration has ceased to have effect. In these circumstances, the Court is of the opinion that the length of time that the data is kept is not disproportionate to the aim pursued by the storage of the information."

The effect of the jurisprudence

34. The Court of Appeal found in paragraph 35 that there was no authority binding on the court which decided the question of whether the imposition of indefinite notification requirements without the possibility of review was itself a disproportionate interference with an offender's article 8 rights. It might have held that there was no such authority, binding or otherwise. That analysis holds good, despite the decisions in *S and Marper* and *Bouchacourt.* Those decisions show, however, that the Strasbourg Court considers that the possibility of reviewing the retention of sensitive personal information and notification requirements in respect of such information is highly material to the question of whether such retention and notification requirements are proportionate and thus compliant with article 8. Paragraph 68 of *Bouchacourt* suggests that, but for the right to apply for deletion of the data retained, the lengthy registration period would have been held disproportionate.

The decision of the Divisional Court

35. Giving a judgment with which the other two members of the court agreed, Latham LJ found that there was general justification for continuing notification requirements for the lifetime of serious sexual offenders. He held, however, that the real question was

> "whether an offender who can clearly demonstrate that he presents no risk, or no measurable risk, of re-offending should be precluded from obtaining a review of the notification requirements."

36. Latham LJ gave a negative answer to that question. He held that it was not justifiable in article 8 terms to deny to a person who believed himself to be in a position to establish that he presented no risk the opportunity to do this.

The decision of the Court of Appeal

37. The Court of Appeal considered the impact of the notification requirements imposed by the 2003 Act. The court concluded that counsel for the Secretary of State was wrong to describe these as no more than very slight interference with article 8 rights. The court annexed in an appendix to its judgment examples of the difficulty that the requirements posed to those who needed to travel frequently and at short notice, either within the jurisdiction or abroad. The court also made the point that the notification requirements are capable of leading to the disclosure to third parties of the fact that the person subject to them has a past conviction for a

sexual offence. For these reasons, while the impact of the notification requirements might be modest for some, for others they would be more substantial.

38. The court considered the submission that a right of review would compromise the utility of the notification requirements as a tool for the prevention and detection of sexual offences. It did not accept that submission for the reasons set out in paragraph 44:

> ". . . The aim of the notification requirements regime is to assist in the prevention and detection of sexual offences. The assumptions that underpin the provision for indefinite notification requirements are that (i) there is a risk that those who have committed serious sexual offences (ie offences which attract a custodial sentence of at least 30 months in length) may commit further sexual offences *for the rest of their lives*; and (ii) the notification requirements will assist the police in preventing and detecting such offences and may deter offenders from further offending. These two assumptions are falsified in a case where it is clear that there is no real risk that the sexual offender will re-offend. No purpose is served by keeping on the Sexual Offences Register a person of whom it can confidently be said that there is no risk that he will commit a sexual offence. To keep such a person on the police data base does nothing to promote the aims of the notification requirements. To say that the data base is no longer complete begs the question of what a complete data base should comprise. In our judgment, it should not include offenders who no longer present a risk of sexual offending."

39. The court rejected the submission that resource implications were a bar to granting a right of review and that it would be difficult to operate a review process. It observed that a flood of applications could be avoided by setting a high threshold for review as to the time that an application could first be made, the frequency of applications and what had to be proved in order to succeed on the review. To the submission that it would be difficult for applicants to demonstrate that they no longer presented a risk of sexual offending the court observed that this was not a reason for depriving them of the opportunity of attempting to do this, regardless of the circumstances of the particular case.

40. For these reasons the court concluded that an offender was, as a matter of principle, entitled to have the question of whether the notification requirements continued to serve a legitimate purpose determined on a review. This entitlement was even stronger in the case of child offenders because of the fact that children change as they mature.

Discussion

41. The issue in this case is one of proportionality. It is common ground that the notification requirements interfere with offenders' article 8 rights, that this interference is in accordance with the law and that it is directed at the legitimate aims of the prevention of crime and the protection of the rights and freedoms of others. The issue is whether the notification requirements, as embodied in the 2003 Act, and without any right to a review, are proportionate to that aim. That issue requires consideration of three questions. (i) What is the extent of the interference with article 8 rights? (ii) How valuable are the notification requirements in achieving the legitimate aims? and (iii) To what extent would that value be eroded if the notification requirements were made subject to review? The issue is a narrow one. The respondents' case is that the notification requirements cannot be proportionate in the absence of any right to a review. The challenge has been to the absence of any right to a review, not to some of the features of the notification requirements that have the potential to be particularly onerous.

42. I turn to consider the extent of interference with article 8 rights that can result from the notification requirements. When the Strasbourg Court held in *Adamson* that the notification requirements interfered with private life within the meaning of article 8.1 the interference identified was the obtaining and retention of information by law enforcement authorities. The information, name, date of birth and address was, on the face of it innocuous. The reality is, however, that it is implicit in the requirement to notify the police of his name and address that the ex-offender will have to explain the purpose of the notification. The significance of notification is that it links the ex-offender with the recorded particulars of his conviction. Thus the notification requirements have been treated as being equivalent to being placed on a Sexual Offences Register and it is convenient to use this terminology, as did the Court of Appeal, see paragraph 44. The notification requirements become a much more serious interference with private life when the information that the individual is on the Sexual Offences Register is conveyed to third parties. As Mr Eadie QC pointed out, one of the objects of the notification requirements is that this information should be conveyed to third parties in circumstances where this is necessary for the prevention of further offending, as in some circumstances it will be. He rightly submitted that the possibility of such use should not be held to add to the case that the requirements are disproportionate. He further submitted that the court should proceed on the premise that the information will only be conveyed to third parties where this is necessary. I do not accept this submission. Giving information to the local police in relation to one's address and one's movements coupled with the explanation that this is necessary because one is on the Sexual Offences Register will necessarily carry the risk that the information may be conveyed to third parties in circumstances where this is not appropriate.

43. This said, the fact that under the 1997 Act the relevant notification could be made in writing and that the information to be provided was limited meant that the task of giving the notification could be described as a mere inconvenience. This ceased to be the case with the increased requirements imposed first by the 2000 Act and then by the 2003 Act. These requirements, which included the requirement to give notification in person at a police station, imposed a considerable burden on anyone who was a frequent traveller, whether within or outside the jurisdiction, as illustrated by the examples given by the Court of Appeal. There is an obvious risk inherent in making repeated visits to a police station to give notification of travel plans that third parties will become aware of the reason for so doing.

44. In short, the changes made by the 2000 and 2003 Acts to the notification requirements will have given some of those subject to those requirements very good reason for wishing to have the requirements lifted, for they are capable of causing significant interference with article 8 rights.

45. I turn to consider how important notification requirements are in furthering the aims of preventing crime and protecting potential victims of crime. It is obvious that it is necessary for the authorities that are responsible for the management and supervision of those convicted of sexual offences to be aware of the whereabouts of those who are subject to active management or supervision. The nature and extent of the management and supervision of such offenders will vary and will depend, in part, upon an assessment of the degree of risk of re-offending that they pose. I do not propose to attempt to set out all the complex statutory provisions in relation to sentencing that are relevant, but will summarise the effect of some of them. An offender who has received a fixed term sentence will be released on licence after serving the requisite custodial period. The licence will remain in effect for the length of the sentence. An offender who has been given a life sentence, or a sentence of imprisonment for public protection ("IPP") will be released on licence after serving his minimum term if the Parole Board is satisfied that it is no longer necessary for the protection of the public that he be confined. An offender who has been given a life sentence will remain on licence for the rest of his life. An IPP prisoner can apply to the Parole Board which will order the licence to cease to have effect if satisfied that it is no longer necessary for the protection of the public that the licence remain in force. While the licence remains in force, the conditions of the licence will make provision for the supervision of the offender by the appropriate authority. Thus where the Parole Board orders a licence to cease to have effect it is presumably satisfied that such supervision is no longer necessary for the protection of the public.

46. Section 104 of the 2003 Act grants power to a magistrates' court to make a sexual offences prevention order ("SOPO") in relation to a qualifying offender who has acted in such a way as to give reasonable cause to believe that it is

necessary for such an order to be made. Those subject to notification requirements are qualifying offenders.

47. Section 114 of the 2003 Act grants power to a magistrates' court to impose a foreign travel order in respect of a qualifying offender where his behaviour makes it necessary to make such an order for the purpose of protecting children generally or any child from serious sexual harm. Such an order prevents the offender from travelling to the countries specified, which may be all countries, outside the United Kingdom.

48. Section 325 of the Criminal Justice Act 2003 requires the responsible authority for each area to establish arrangements for the purpose of assessing and managing the risks posed in that area by relevant sexual and violent offenders. The responsible authority means the chief officer of police, the probation board or provider of probation services and the Minister of the Crown exercising functions in relation to prisons, acting jointly. Relevant sexual offenders include those who are subject to notification requirements.

49. Section 327A of the same Act requires the responsible authority for each area, in the course of discharging its functions under section 325, to consider whether to disclose information in its possession about the relevant previous convictions of any child sex offender managed by it and goes on to make detailed provision for circumstances in which there is a presumption that this should be done.

50. The responsible authority has made Multi-Agency Public Protection Arrangements ("MAPPA") pursuant to the duty imposed on it by section 325 and makes an annual report in relation to the operation of these. Counsel provided the court with a little information about the manner in which risk is managed under MAPPA and the court has since obtained a press notice issued on the occasion of the publication of MAPPA's 8th Report for 2009. This states that there are three levels of management of offenders. At Level 1 offenders are "subject to the usual management arrangements applied by whichever agency is supervising them". At Level 2 risk management involves the active involvement of several agencies via regular multi-agency public protection meetings. At Level 3 cases require the involvement of senior officers to authorise the use of special resources, such as police surveillance or specialised accommodation and, sometimes, senior management oversight.

51. The interrelationship between these measures and the notification requirements is obvious. In the first place, the same criteria often apply to determine those who are subject to the notification requirements as apply to

determine those who are potentially subject to the various methods of management and supervision. In the second place, notification requirements are important in that they assist the responsible authorities to keep tabs on those whom they are supervising and managing. This case turns, however, on one critical issue. If some of those who are subject to lifetime notification requirements no longer pose any significant risk of committing further sexual offences and it is possible for them to demonstrate that this is the case, there is no point in subjecting them to supervision or management or to the interference with their article 8 rights involved in visits to their local police stations in order to provide information about their places of residence and their travel plans. Indeed subjecting them to these requirements can only impose an unnecessary and unproductive burden on the responsible authorities. We were informed that there are now some 24,000 ex-offenders subject to notification requirements and this number will inevitably grow.

52. Both the Divisional Court and the Court of Appeal proceeded on the premise that there were some who were subject to notification requirements who could "clearly demonstrate" that they presented no risk of re-offending or of whom "it can confidently be said that there was no risk" that they would commit a sexual offence. Mr Eadie came close to admitting that, if this premise were correct, it would be hard to gainsay the proposition that there ought to be a right to a review to enable notification requirements to be lifted in respect of those who no longer posed a risk. He submitted, however, that the nature of sexual offences was such that it was never possible to be sure that someone who had been guilty of a serious sexual offence posed no significant risk of re-offending, and that this was borne out by statistical evidence. Either all sexual offenders had a (possibly) latent predisposition to commit further sexual offences or, if some did not, it was impossible to identify who these were. Whether these submissions are well founded is the question that lies at the heart of this appeal. I turn to consider the evidence before the court.

Parliamentary material

53. Mr Eadie told the court that there had been a consultation exercise before the introduction of the 1997 Bill that led to the 1997 Act, but that this provided no assistance on the issue raised by this appeal. No material was placed before the court to explain the changes that were made to the notification requirements by the 2000 Act or the 2003 Act. The court was referred to an extract from Hansard for 4 February 1997 (HC Debates), Cols 19, 23, 25 which reported the moving of two amendments in Standing Committee D to the 1997 Bill. I have considered this in the search for background information to explain why the Act contained no right to a review of the notification requirements. The second proposed amendment would have introduced a right to apply to the court to vary the duration of the notification requirements if a chief officer of police certified that the applicant was no longer likely to be a danger to others. Mr Timothy Kirkhope, resisting this amendment,

raised the question of how the court would decide whether the need for a notification requirement remained and suggested that such a provision would have resource implications, would create bureaucracy and could weaken the Bill's protection. He said that the course adopted reflected the results of consultation. This throws little light on the question of whether reliable risk assessment can be carried out in the case of sex offenders.

54. Mr Eadie relied primarily on statistical evidence to support his submission that a reliable review of the risk posed by those convicted of serious sexual offences was not practicable. The most detailed statistics were provided in a paper published in 2004 in *Legal and Criminological Psychology* by Ms Jenny Cann and others, then of the Research, Development and Statistics Department of the Home Office. This examined reconviction rates of sexual offenders released from prison in England and Wales in 1979, over a 21-year period. Of 419 offenders 103, or about 25%, committed a total of 405 sexual offences during this period. Of these 37 first re-offended over 5 years after release from prison and 19 at least 10 years after release. The authors comment that these figures suggest that sexual offending by sexual offenders released from custody has a longer "life-span" than general re-offending and one which often begins a number of years after discharge. The paper recommends further research to look at the type of sexual offender most at risk of receiving a first reconviction for a sexual offence 10 years following discharge.

55. This recommendation illustrates why this paper is inconclusive. Caution must, of course, be taken in relying on reconviction statistics because these will necessarily be lower than the actual incidence of re-offending. Nonetheless, these statistics show that 75% of the sexual offenders who were monitored were not reconvicted. No light is thrown on the question of whether it was possible to identify by considering these whether there were some reliable indications of offenders who did not pose a significant risk of re-offending.

56. No evidence has been placed before this court or the courts below that demonstrate that it is not possible to identify from among those convicted of serious offences, at any stage in their lives, some at least who pose no significant risk of re-offending. It is equally true that no evidence has been adduced that demonstrates that this is possible. This may well be because the necessary research has not been carried out to enable firm conclusions to be drawn on this topic. If uncertainty exists can this render proportionate the imposition of notification requirements for life *without review* under the precautionary principle? I do not believe that it can.

57. I have referred earlier to a number of situations in which the degree of risk of re-offending has to be assessed in relation to sexual offenders. I think that it is obvious that there must be some circumstances in which an appropriate tribunal

could reliably conclude that the risk of an individual carrying out a further sexual offence can be discounted to the extent that continuance of notification requirements is unjustified. As the courts below have observed, it is open to the legislature to impose an appropriately high threshold for review. Registration systems for sexual offenders are not uncommon in other jurisdictions. Those acting for the first respondent have drawn attention to registration requirements for sexual offenders in France, Ireland, the seven Australian States, Canada, South Africa and the United States. Almost all of these have provisions for review. This does not suggest that the review exercise is not practicable.

58. For these reasons I have concluded that the Divisional Court and the Court of Appeal were correct to find that the notification requirements constitute a disproportionate interference with article 8 rights because they make no provision for individual review of the requirements. I would dismiss this appeal and repeat the declaration of incompatibility made by the Divisional Court.

LORD HOPE

59. I agree with the judgment of Lord Phillips. For the reasons he gives, with which I agree, I too would hold that the indefinite notification requirements in section 82(1) of the Sexual Offences Act 2003 are incompatible with article 8 of the European Convention on Human Rights because they do not contain any mechanism for the review of the justification for continuing the requirements in individual cases. I wish also to associate myself with Lord Rodger's comments, with which I am in full agreement.

60. I would dismiss the appeals.

LORD RODGER

61. I agree that the appeal should be dismissed for the reasons given by Lord Phillips, but subject to the following comments.

62. First, at para 33 of his judgment, Lord Phillips quotes the "unofficial translation" of para 67 of the judgment of the European Court of Human Rights in *Bouchacourt v France* (Application No 5335/06) 17 December 2009, unreported. The beginning of that translation is inaccurate and misleading. What the court actually says is "As the Government points out, [the prescribed period of preservation of the data] is a maximum duration. Although significant in this case,

since it is of thirty years, the Court observes that the deletion of the data is by right once this period has elapsed…."

63. Secondly, in the case of the most serious offenders, of which the respondents in these cases are examples, the notification period under section 82 of the Sexual Offences Act 2003 ("the 2003 Act") is "an indefinite period". Although the language was, no doubt, carefully chosen, it is perhaps a little surprising: "life" would have been a shorter and clearer way of expressing what is actually involved, since, whatever happens, there is no means of ever bringing the notification requirements in question to an end. Indeed such a requirement can only be ended in one situation: under section 93 and Schedule 4, where it relates to an abolished homosexual offence. Schedule 4 provides a mechanism of an application to the Secretary of State, with the possibility of an appeal to the High Court, with the permission of the court.

64. Thirdly, I see no basis for saying that, in themselves, the notification requirements, including those relating to travel, are a disproportionate interference with the offenders' article 8 rights to respect for their family life, having regard to the important and legitimate aim of preventing sexual offending. That is particularly the case where, as Lord Phillips explains, these requirements are not to be seen in isolation, but as underpinning the scheme of Multi-Agency Public Protection Arrangements which are designed to manage the risk of re-offending. Of course, it is possible that the information which offenders provide to the police will be wrongly conveyed to third parties in circumstances where disclosure is not appropriate. The same can be said of the information which we have to supply, say, to Her Majesty's Revenue and Customs, or to the social security authorities. The proportionality of the requirement to provide that information has to be judged by reference to its proper use, not by reference to any possible misuse. Organisations which gather sensitive information will, in practice, have adopted administrative practices that are designed to minimise the risk of misuse. The Data Protection Act 1998 provides a legal framework for handling personal data and makes knowing or reckless disclosure of the data a criminal offence. That framework applies to the gathering and retention of information supplied under the 2003 Act. In that situation the proportionality of the requirements made by the Act should be judged on the basis that the information supplied will be handled appropriately. If, as may well happen on occasions, the information is wrongly disclosed or otherwise misused, then the assumption must be that appropriate steps will be taken both to identify and punish those who misuse it and to prevent similar misuse in the future.

65. Fourthly, the need for an offender to give the notification in person at a police station does, of course, impose a burden on him and entails some additional risk of his status becoming known. But it also helps to eliminate the familiar excuses (such as letters allegedly going astray, or real or imaginary delays in the

post) which can bedevil the operation of a system which depends, for its effectiveness, on notification being given within short, fixed, time-limits - limits which those affected may be understandably reluctant to comply with and astute to avoid. Again, I see nothing disproportionate in the requirement.

66. Finally, the case of F shows that, where his offence has been of the most serious kind, a child will be subject to an indefinite notification requirement. That requirement will affect the whole of his adult life. Judges, as individuals, may have views on whether children who offend in this way are likely to have a tendency to repeat that behaviour when they are adults, or will tend to "grow out of it." No doubt, in years to come, advances in genetic research may clarify the position. In the meantime it must be open to Parliament to take the view that, as a precaution against the risk of them committing serious sexual offences in future, even such young offenders should be required to comply with the notification régime indefinitely. But that makes it all the more important for the legislation to include some provision for reviewing the position and ending the requirement if the time comes when that is appropriate.