

Legal Constraints on the Indeterminate Control of 'Dangerous' Sex Offenders in the Community: The English Perspective

Nicola Padfield*

Abstract

This article explores the legal constraints imposed on the rising number of so-called 'dangerous' sex offenders in England and Wales, in particular once they have been released from prison into the community. The main methods of constraint are strict licence conditions, Multi-Agency Public Protection Arrangements and civil protective orders such as Sexual Harm Prevention Orders. 'Control' in the community is thus widespread, but is difficult to assess whether it is either effective or necessary without a great deal more research and analysis. Post-sentence 'punishment' has been largely ignored by both academic lawyers and criminologists. The article concludes that financial austerity might prove to be as important as the human rights agenda in curbing the disproportionate use of powers of control.

Keywords: Dangerous, sex offenders, human rights, community supervision, punishment

1 Introduction

1.1 Changing Attitudes to Sex Offenders

In England and Wales, as in much of Europe, attitudes to sex offenders appear to have hardened in recent years. Whether this is the result of a culture of fear or 'moral panics' in an age of anxiety and insecurity is for others to judge.¹ But 'sex scandals' appear to have filled the press in recent times. Some scandals have involved those in high places in society, involving allegations against both the dead (ex-Prime Minister Edward Heath or entertainer Jimmy Saville, for example) and the living. Several celebrities are currently serving lengthy sentences for offences carried out many years ago: for example, in 2014, three famous individuals were imprisoned for sexual offending dating back many years. Rolf

Harris, an entertainer and artist, once a well-loved 'national treasure', is now serving a five-year, nine-month sentence imposed for offences carried out between 1968 and 1986; Max Clifford, a famous publicist, is serving eight years and is now facing further charges; and Stuart Hall, a TV and radio presenter, was convicted at two separate trials and served two consecutive periods of thirty months' imprisonment.

There has also been enormous media coverage surrounding the grooming and rape of vulnerable girls by 'rings' of, often, British Muslim or Pakistani-heritage men: perhaps the most famous was the Rotherham scandal: five men were found guilty of many offences committed between 1997 and 2013 involving the grooming and rape of vulnerable teenage girls. The men were sentenced in 2010 to between four and eleven years' imprisonment. Much of the press coverage has focused on the failure of the public authorities to act effectively against widespread sexual abuse against vulnerable girls.² There have been other similar and more recent convictions resulting from 'rings' of sexual offenders in Derby (2010), Rochdale (2012), Oxford (2013), Telford (2013), Bristol (2014) Banbury (2015) and Peterborough (2014, 2015). Most recently, in July 2015, six Asian men from Aylesbury were convicted of serious sexual offences against schoolgirls and were sentenced in September to lengthy terms of imprisonment, up to nineteen-and-a-half years. Similar prosecutions have started in Newcastle. There has also been a trail of scandals surrounding sex abuse by priests of various churches.³

These gangs, and the celebrities, attract enormous media attention, but it is difficult to prove any direct link between media portrayals and the number of sex offenders convicted and sent to prison, which has been rising steadily. Sex offenders now make up 17% of the prison population:

At the end of June 2015 there were 11,490 sentenced sex offenders in the prison population, which is 10% higher than twelve months before, and 33% higher when compared to June 2010. Furthermore, when

* Nicola Padfield, MA, Dip Crim, DES, Reader in Criminal and Penal Justice, University of Cambridge. I thank Michiel van der Wolf for involving me in this project and for his many useful insights and comments. This article is part of a comparative research project involving several European jurisdictions, of which the results are presented in this special issue. For further background of the theme and outline of the issue and individual articles, as well as the comparative analysis, see the contribution by Van der Wolf in this issue.

1. See Van der Wolf (this issue).

2. See e.g. A. Jay, 'The Independent Inquiry into Child Sexual Exploitation in Rotherham 1997-2014', OBE, available at: <www.rotherham.gov.uk/downloads/file/1407/independent_inquiry_cse_in_rotherham>.

3. There is now a major public inquiry into institutional child sexual abuse, chaired by a New Zealand judge, Lowell Goddard, which is scheduled to take many years and to cost millions of pounds: see <www.csa-inquiry.independent.gov.uk/about-the-inquiry>.

compared to the sentenced populations for other offence groups, the sex offender sentenced population has increased the most over this five year period. This is consistent with the recent ‘Crime in England and Wales’ bulletin from the Office for National Statistics that reported the highest number of sexual offences recorded by the police since 2002/03, for the year ending March 2015 (p. 6, Offender Management Statistics Bulletin, England and Wales, Quarterly January to March 2015).⁴

So, more offences are being reported to the police, more offenders are being convicted and offenders are also serving longer sentences. Of course, it is difficult to know whether there are more sex offenders in society, or whether victims and complainants are simply more prepared to come forward than was the case in earlier times. The political response would appear to have been largely one of passing more and more laws,⁵ and the judiciary has responded, as these statistics show, by passing longer and longer sentences.

The focus of this article is on the control of sex offenders in the community. I shall highlight a number of key characteristics of, and worrying developments in, the English system: a flexible and risk-averse prison release system; growing numbers of offenders recalled to prison after release on licence; an uncomfortable relationship between mental health law and penal law. These developments must all be evaluated, for our purposes, in the context of growing euro-scepticism and widespread wariness of a culture of human rights. The questions raised are important and under-researched: 11,490 sentenced sex offenders in the prison population today is an enormous number, and there are currently 65,083 offenders subject to Multi-Agency Public Protection Arrangements (MAPPA) in the community.⁶ To what extent is ‘control’ in the community either effective or necessary? Attempting to change attitudes within society might be a more appropriate response.

1.2 Overview

Public protection has been high on the political agenda in England for many years, which has resulted in much legislative change. It is difficult to describe the current law with simplicity or with clarity. Many sex offenders are serving indeterminate sentences. When (if) released from prison, they will be subject to licence conditions, probably for life. But even those who are sentenced to

determinate, fixed term, sentences (and who are normally released at the halfway point) will be subject not only to licence conditions until the end of their sentence, but also to other preventative orders. All sex offenders have been required to register with the police since the Sex Offenders Act 1997, which resulted in the setting up of a sex offenders’ register. This register is now known as the Violent and Sex Offender Register (ViSOR), and the rules governing registration are found in the Sexual Offences Act 2003, as amended. The register is managed by the National Crime Agency, a policing body created by the Crime and Courts Act 2013.⁷

The length of time that sex offenders are required to maintain their details on the register is not short. Anyone imprisoned for thirty months or more must remain on the register indefinitely. Notification periods are as follows:

- Imprisonment for a fixed period of thirty months or more, imprisonment for an indefinite period, imprisonment for public protection (IPP), or admission to hospital under restriction order, or subject to an Order for Lifelong Restriction: indefinitely.
- Imprisonment for more than six months but less than thirty months: ten years.
- Imprisonment for six months or less, or admission to hospital without restriction order: seven years.
- Caution: two years.
- Conditional discharge or (in Scotland) a probation order: period of discharge or probation.
- Any other: five years.

(Finite notification periods are halved if the person is under eighteen when convicted or cautioned). In *R (on the application of F and Thompson) v. Secretary of State for the Home Department* [2010] UKSC 17, the Supreme Court upheld an earlier decision of the Court of Appeal and issued a declaration of incompatibility under section 4 of the Human Rights Act 1998 in respect of notification requirements for an indefinite period. These indefinite notification requirements were, they said, disproportionate. As a result, the Government has introduced a review and appeal process for those who have been on the register for more than fifteen years, or eight years for juveniles (see the Sexual Offences Act 2003 (Remedial) Order 2012). Those who continue to pose a significant risk will still remain on the register for life. Those subject to a Sexual Offences Prevention Order (SOPO; see later) may not apply for a review of their indefinite notification requirements.⁸

The register is of course useful for the police, and other agencies, in order to ‘manage’ sex offenders in the community. How is this done? We must identify a number of routes for supervision:

4. See Ministry of Justice, ‘Offender Management Statistics Quarterly: January to March 2015’ (2015), available at: <www.gov.uk/government/statistics/offender-management-statistics-quarterly-january-to-march-2015>. See also Ministry of Justice, *Story of the Prison Population 1993 – 2012 England and Wales* (2013), at <www.justice.gov.uk/statistics/prisons-and-probation/prison-population-1993-2012>.

5. Every year, there is a significant statutory change: see the changes in the Anti-Social Behaviour, Crime and Policing Act 2014 discussed later in this article for a recent example.

6. MAPPA data in this article come from the Ministry of Justice, *Multi-Agency Public Protection Arrangements Annual Report 2013/14* (2014), available at: <www.gov.uk/government/uploads/system/uploads/attachment_data/file/369414/mappa-annual-report-2013-14.pdf>.

7. A subject outside the scope of this article is the accountability of the police in England and Wales: there have been many changes in recent years, reflecting tensions between local and national accountability, and different understandings of the importance of police ‘independence’.

8. See ‘Sexual Offences Act 2003 (Remedial) Order 2012’, available at: <www.gov.uk/government/publications/sexual-offences-act-2003-remedial-order-2012>.

1. supervision in the community for those still serving a sentence of imprisonment, or those serving community-based punishments,
2. post-sentence supervision under MAPPA,
3. civil preventative orders (breaches of which are criminal offences).

Before exploring these measures, I will offer some comments on the context in which they apply. There is disappointingly little empirical evidence available and the issues are seriously under-debated: for example why does public protection justify post-sentence ‘punishment’? What, in fact, do we mean by ‘post-sentence’ punishment – if the offender is still being ‘controlled’, should this be considered as post-sentence or as part of the punishment, part of the sentence?

2 Evaluation in the Light of Legal Theory

English law has long been ambivalent about the justifications for sentencing – or perhaps, simply recognises a plethora of sometimes contradictory justifications. When Parliament enacted section 142 of the Criminal Justice Act 2003, most judges were unimpressed. It enacted for the first time the provision that any court sentencing an offender must have with regard to the following purposes of sentencing:

- a. the punishment of offenders,
- b. the reduction of crime (including its reduction by deterrence),
- c. the reform and rehabilitation of offenders,
- d. the protection of the public and
- e. the making of reparation by offenders to persons affected by their offences.

This appeared to most sentencers to be a statement of the ‘blindingly obvious’.⁹ Sentencers knew (and know) that sentencing involves a complicated balancing of conflicting aims. Since the Criminal Justice Act 1991, judges have been urged to impose proportionate, or commensurate, sentences in the sense that a ‘custodial sentence must be for the shortest term (not exceeding the permitted maximum) that in the opinion of the court is commensurate with the seriousness of the offence, or the combination of the offence and one or more offences associated with it’ (s. 153(2) Criminal Justice Act 2003), but it is difficult to articulate how this is applied in practice. Even in 1991, sentencers were entitled to impose ‘longer than commensurate’ sentences on some offenders, and the shorthand concept of ‘dangerousness’ has been used since the Criminal Justice Act 2003. It would be useful to have research that analysed which of the

purposes of punishment are taken into account more often, and by which judges and for which offences (although, of course, what judges say they do may not be what they actually do). When it comes to serious sex offenders, it is possible to assume that the courts may put particular weight on punishment and protection of the public, not reform and rehabilitation, but this is not known.

Quite apart from the legislative framework, there is a lively academic and largely theoretical debate on the purposes of punishment. It is difficult to know how much influence this has had on Parliament or practice. Andreas von Hirsch’s work¹⁰ had a significant influence in the 1990s when versions of modern retributivism replaced reform and rehabilitation as preferred theoretical aims for the system. It is perhaps a challenge for those of us who seek to put rehabilitation at the heart of the system today that we must recognise that reform and rehabilitation went out of fashion in the 1980s and 1990s for good reasons: not least, a fear of inconsistent sentencing. However, most of the discussion focuses on the purposes of punishment at the first sentencing stage, what might be called ‘front door’ sentencing – there has been little debate on the philosophical justifications for early release and control in the community post-sentence. When it comes to preparing prisoners for release, the uncertainties make ‘progress’ through the system more difficult to achieve. Is public protection more important than rehabilitation? Until we give rehabilitation a greater priority, people will continue to get ‘stuck’ in the system.

Interestingly, the concept of rehabilitation seems to be more often discussed in the context of the many appeals against deportation imposed on foreign nationals who have served lengthy custodial sentences, than in the sentencing cases themselves.¹¹ I would argue that rehabilitation is highly relevant to the reduction in the risk of re-offending: if a person is rehabilitated, the public are safer. Rehabilitation and public protection march together more easily than often assumed.

9. This has been stated to me several times at judicial training conferences; the reality may be more dangerous – does the legislation perpetuate certain myths? For example, severe sentences do not themselves deter offenders: more important is the certainty, or subjective assessment of the likelihood, of being arrested and prosecuted.

10. See e.g. A. von Hirsch, *Past or Future Crimes: Deservedness and Dangerousness in the Sentencing of Criminals* (1987) or A. von Hirsch, *Censure and Sanctions* (1996).

11. See e.g. *Taylor v. Secretary of State for the Home Department* [2015] EWCA Civ 845, where the Court of Appeal (Civil Division) upheld the deportation of a Colombian woman. Moore-Bick concluded, ‘I would certainly not wish to diminish the importance of rehabilitation in itself, but the cases in which it can make a significant contribution to establishing the compelling reasons sufficient to outweigh the public interest in deportation are likely to be rare. The fact that rehabilitation has begun but is as yet incomplete has been held in general not to be a relevant factor ... rehabilitation is relevant primarily to the reduction in the risk of re-offending. It is less relevant to the other factors which contribute to the public interest in deportation’ (at para. 21).

3 Legal Frameworks for Indeterminate Supervision: Evaluation of Proportionality

What is meant by indeterminate supervision? Most serious sex offenders who are convicted serve lengthy custodial sentences, and it is essential to understand the mechanisms whereby they find themselves in due course ‘supervised’ in the community. This ‘supervision’ may be indeterminate, via a number of different routes.

3.1 The Sentencing Framework

3.1.1 Life Sentences

Many sex offenders in England receive an indeterminate sentence. This was particularly common between 2003 and 2012, when the option of IPP existed. From April 2005 to July 2008, IPP was more or less mandatory for a repeat rapist or indeed for anyone convicted of one of many sex offences who in the eyes of the court posed a ‘serious risk of serious harm’. There are therefore many sex offenders serving IPP in prison (and some in the community), and it will remain a relevant sentence for the rest of their lives. (After ten years on licence post-release, an IPP prisoner may apply to have his licence conditions lifted, but no one has yet been in a position to do this.) There is also a ‘discretionary life sentence’ that is imposed on very serious offenders. For example, in May 2015, the Court of Appeal upheld four life sentences imposed on the four men convicted in the ‘Oxford’ sex ring case mentioned in the Introduction: see *Karrar* [2015] EWCA Crim 850.¹² The Court of Appeal held that life sentences, with minimum terms ranging from seventeen to twelve years, were appropriate for these men who had been involved in the serious sexual exploitation of vulnerable young teenage girls over a number of years. A little guidance on when a life sentence is appropriate was given by the Court of Appeal in *PG* [2104] EWCA Crim 1221, updating earlier guidance given by Bingham LJ in *AG’s Reference No. 32 of 1996 (Whittaker)* [1997] 1 Cr App R(S) 261. The case of *PG* involved a 64-year-old policeman who had abused his position as a scuba-diving instructor over ten years to lure young boys into sexual activity and then abused his position as a police officer to hide what he had done. He was also convicted of the anal rape of his wife. The Court, led by the current Lord Chief Justice, substituted a determinate sentence of twenty years for the trial judge’s life sentence, with a minimum term of twelve years. But it is a difficult case from which to draw clear guidance as there had been procedural errors at trial and the Court held that it would, on the basis of this, be

‘unfair, unsafe and unjust’ for the Court of Appeal to set about making the finding of ‘dangerousness’ on the material available to them, which should have been done by the trial judge. But the Court did repeat the words of Lord Bingham that discretionary life sentences should be passed only in the most exceptional circumstances and that there should be good grounds for believing that the offender may be a serious danger to the public for a period that cannot be reliably estimated at the date of sentence.

3.1.2 Extended Sentences

Many of those who might well have received an indeterminate IPP between 2003 and 2012, when it was abolished, now receive an ‘extended sentence’. The current style of extended sentence was introduced in the Criminal Justice Act 2003 but these sentences did not become common until 2008, as ‘dangerous’ offenders were until then likely to fall foul of the draconian IPP provisions and to receive a truly indeterminate sentence. The Criminal Justice and Immigration Act 2008 made IPP much more discretionary – and judges were then able to impose an extended sentence rather than one that was totally indeterminate on many offenders who they considered ‘dangerous’. With an extended sentence, the judge imposes the ‘appropriate custodial term’, but then adds an extended supervision period of up to five years for violent offenders and up to eight years for sexual offenders.

The Legal Aid, Sentencing and Punishment of Offenders Act 2012 abolished both IPP and the 2003-style Extended Sentence (now known within the prison world as an EPP, an extended sentence for public protection) and replaced them with a new form of Extended Determinate Sentence (now known as an EDS). The main change concerned release, as we will see later. But the EDS is becoming common as judges will frequently consider a sex offender to pose a serious risk of serious harm, the current test of ‘dangerousness’. A recent and interesting example is the case of the Cambridge doctor who pleaded guilty to many sex offences committed against boys under his professional care in hospital (unnecessary genital examinations): see *Bradbury* [2015] EWCA Crim 1176. The trial judge imposed a total sentence of twenty-two years, stating that he was satisfied that this offered sufficient protection for the public such that he did not need to impose an extended sentence. He also imposed a lifelong SOPO.¹³ But the Court of Appeal decided to ‘restructure’ the sentence so that the ‘custodial element’ would be sixteen years, and added to the total term an extension licence period of six years. There is much that can be said of this case,¹⁴ but for our purposes, it serves as an example of the lengthy sentences imposed on sex offenders. Bradbury will not be considered for release until he has served over ten years.

12. The trial judges sentencing remarks are available at: <www.judiciary.gov.uk/judgments/dogar-and-others-sentencing-remarks/>. The judgement of the Court of Appeal is available free of charge on <www.bailii.org>. Most academics and law students rely on the commercial providers of law reports: mainly Westlaw and LexisNexis.

13. See later.

14. See N. Padfield, ‘Bradbury: A Tangle of Extended Sentences?’ *Current Sentencing Practice News* 2, at 5-8 (2015).

3.1.3 *Determinate Sentences*

All those sex offenders who the court decides do not require life or an extended sentence, but who cross the so-called ‘custody threshold’ will receive a determinate sentence, fixed in line with guidelines published by the Sentencing Council, in particular the *Definitive Guideline on Sexual Offences*,¹⁵ and with reference to the guidance from the Court of Appeal. The most serious rapes involve a starting point of fifteen years custody, within a category range of thirteen to nineteen years. The least serious (itself a contentious area) involve a starting point of five years, in a category range of four to seven years’ custody. The guidelines identify many aggravating and mitigating factors that, in seeking to control judicial discretion, have turned sentencing law into a particularly complex area. See, for a recent example, *AG’s Reference Nos. 2 and 13 of 2015 of 2015 (McClaren and Whitelaw)* [2015] EWCA Crim 1223 where the Court of Appeal held that sentences of nine years’ imprisonment were neither unduly lenient nor manifestly excessive for two offenders, both aged twenty-one, who had raped an intoxicated 18-year-old woman in an alleyway outside a nightclub (the main argument at trial had turned on whether she was capable of giving consent). The Court held that it had been appropriate not to impose a consecutive sentence for digital anal penetration by one of the offenders (this was a prosecution appeal). They were young men with no previous convictions: the judgement focused on where they should be placed on the guideline (in Category 2A) – there is no discussion of ‘dangerousness’ or SOPOs. Nine years was an appropriate sentence.

3.2 Release from Prison

As this article requires a debate of supervision in the community, we will move swiftly over the way sex offenders progress (or do not progress) through the prison system, although it is well worth noting the fact that now there are so many sex offenders in the system, many spend much of their time in specialist prisons and they are not simply segregated as ‘vulnerable offenders’ in separate wings in mainstream prisons. The prison system is under extraordinary pressure as the Government works hard to ‘save’ huge sums of money in the criminal justice system.¹⁶ There has been little research

specifically on the perceptions of sex offenders in prison, although Iewins’ work stands out.¹⁷ It would be useful to know much more about the delays faced by sex offenders hoping to be transferred to prisons of lower levels of security and about the damage caused by the fact that many wait for years to take courses that have been deemed essential. But we focus here on the release and supervision of offenders in the community.¹⁸

3.2.1 *Supervision in the Community for Those Still Serving a Sentence of Imprisonment, or for Those Serving Community-Based Punishments*

Those serving life (which includes IPP prisoners) are only released from prison following the direction of the cautious Parole Board.¹⁹ They are considered for release once they have served their minimum term. They are unlikely to be released unless they have progressed through the prison system satisfactorily, completing relevant courses, and have spent time in an ‘open’ prison. They will also need the support of their Offender Manager (a probation officer) who will have prepared a release plan.

The rules on release of extended sentence prisoners have changed extraordinarily frequently, which makes it difficult for staff and prisoners to understand the rules and, of course, leads to feelings of injustice: over the past ten years, some extended sentence prisoners have been eligible to be released automatically at the halfway point in their sentence (which is the rule for those serving determinate sentences); some have been released at the discretion of the Parole Board, considered first when they had reached the halfway point. The current position is that most will not be considered for release until they have reached the two-thirds point. They are not to be released unless the Parole Board is satisfied that ‘it is no longer necessary for the protection of the public’ that they should be confined (s. 246A(6) of the Criminal Justice Act 2003, as amended). This reverse burden seems to imply that more EDS prisoners (such as Bradbury, discussed earlier) will stay in prison for the whole of the custodial part of the sentence.

All prisoners, whenever released, will be subject to licence conditions. One of the most worrying aspects of supervision in the community is the rate at which it fails, and offenders are recalled to prison. The recall rate

15. See ‘Sexual Offences Definitive Guideline’, available at: <www.sentencingcouncil.org.uk/wp-content/uploads/Final_Sexual_Offences_Definitive_Guideline_content_web1.pdf>.

16. See HM’s Chief Inspector of Prisons *Annual Report 2014-15*, available at: <www.justiceinspectorates.gov.uk/hmiprison/inspections/annual-report-2014-15/#.VcDNEqbbn0d>. It makes grim reading. ‘Assessed outcomes in the prisons we reported on in 2014-15 fell sharply across all areas and, overall, the outcomes we reported on in 2014-15 were the worst for 10 years’ (at page 10). The Report speaks of rising levels of violence: ‘more prisoners were murdered, killed themselves, self-harmed and were victims of assaults than five years ago. There were more serious assaults and the number of assaults and serious assaults against staff also rose’ (page 8). Particularly worrying is the ‘dismal picture’ of purposeful activity and of staff shortages: as the Inspector says ‘It is hard to imagine anything less likely to rehabilitate prisoners than days spent mostly lying on their bunks in squalid cells watching daytime TV’ (page 13).

17. See A. Iewins, ‘Living Among Sex Offenders: Identity, Safety and Relationships at Whatton Prison’ (2015), available at: <https://d19ylpo4aovc7m.cloudfront.net/fileadmin/howard_league/user/pdf/Publications/Living_among_sex_offenders.pdf>, which explores experiences related to safety, the management of identity, the development of hierarchies and the formation and maintenance of friendships within a prison that only holds sex offenders.

18. For European comparisons, see N. Padfield, D. van Zyl Smit & F. Dünkel (eds.), *Release from Prison: European Policy and Practice* (2010).

19. For annual statistics, see the Parole Board’s annual reports, the most recent of which is available at: <www.gov.uk/government/publications/the-parole-board-for-england-and-wales-annual-report-2014-to-2015>; and N. Padfield (ed.), *Who to Release? Parole, Fairness and Criminal Justice* (2007); N. Padfield, ‘Sanctions against Dangerous Offenders in England and Wales: Does More Mean Better?’ in C. Villacampa (ed.), *Protección jurídico-penal de la libertad e indemnidad sexual de los menores* (2015), at 481-511.

has been rising for years, and the latest statistics state that the recall population has increased by 17% in the past twelve months.²⁰ It is not at all clear why this happened. Certainly, there are huge changes going on with the fragmentation of the National Probation Service and the recent creation of Community Rehabilitation Companies, which now carry out 70% of the work previously done by probation service staff.²¹ And the Offender Rehabilitation Act (ORA) 2014 has expanded licence supervision so that anyone sentenced to more than a day in prison will receive at least twelve months supervision on release. But this came into effect only for those who were sentenced after 1 February 2015. Accordingly, on 30 June 2015, 157 prisoners were recorded as being recalled under ORA 2014, representing only 3% of the recall population. Offenders may be recalled not only because they are alleged to have re-offended, but also if there is any deterioration in behaviour that leads the National Offender Management Service (NOMS) to decide that there is an increased risk of the offender committing further offences. Figures on sex offenders recalled are difficult to identify: but on MAPPA figures (see next section), we learn that in 2013/2014, 850 Level 2 and Level 3 MAPPA eligible offenders (*i.e.* higher risk sex offenders) were returned to custody for breach of their licence, a decrease of 6% from the previous year. This continues the overall downward trend since 2007/2008 and is consistent with the reduction in the number of offenders managed at this level, not necessarily reflecting an overall reduction in numbers. But at the same time, it would appear that there has been a sharp increase in the sentencing of sex offenders in the community for breach of SOPOs (see the following). Supervisors and managers are likely to be particularly 'risk averse' when it comes to sex offenders, and the subject has not received adequate academic or other scrutiny. Research could usefully explore when and how sex offenders are dealt with under MAPPA, SOPO or on licence.²² What the official licence statistics reveal is a priority concern that those who are recalled are returned swiftly to prison and are not 'lost' to the system:

Between April 1999 and March 2015, 190,714 of those released on licence were recalled to custody for breaching the conditions of their licence, e.g. failing to report to their probation officer. Of all those recalled over the period, 99.4% were returned by the end of June 2015. In the latest quarter there were 4,240

recalls, which included the recall of 112 offenders who were serving custodial sentences of less than twelve months. The ORA expanded licence supervision meaning that it is now possible to recall these offenders to custody.

Of all those released on licence and recalled to custody between April 1999 and March 2015, there were 1,135 who had not been returned to custody by the end of June 2015. This includes 4 people who had been recalled after a sentence of less than 12 months. The proportion of prisoners not returned to custody over this period is 0.6% and this is a relatively constant figure when compared to previous years. A further 18 offenders had not been returned to custody as of 30 June 2015 after recall between 1984 and April 1999, meaning the total number of offenders not returned to custody at the end of June 2015 was 1,153. These figures include some offenders believed to be dead or living abroad but who have not been confirmed as dead or deported.

Of the 1,153 not returned to custody by 30 June 2015, 147 had originally been serving a prison sentence for violence against the person offences and a further 40 for sexual offences.²³

Thus, the focus of the official statistics is on the 'success' of recall. But more relevant may be studies of how difficult it can be for sex offenders to 'succeed' on licence.²⁴ The reality of living life on licence has been discussed in a few academic research projects. Clearly, many offenders struggle to live with their stigmatisation as sex offenders, and complying with the demands of a licence is a significant challenge.²⁵ As we shall now see, life on licence may be made even more challenging by the constraints also imposed by MAPPA (see next section).

3.2.2 Post-Sentence Supervision under MAPPA

MAPPA exist in each of the forty-two criminal justice areas in England and Wales. These are extraordinary bodies, legally speaking: simply 'arrangements' designed to help protect the public from serious harm by sexual and violent offenders. They require local criminal justice agencies and other bodies dealing with offenders to work together in partnership in dealing with these

20. Offender Management Statistics Bulletin, England and Wales Quarterly January to March 2015, Ministry of Justice, Statistical Bulletin, 30 July 2015, available at: <www.gov.uk/government/uploads/system/uploads/attachment_data/file/449528/offender-management-statistics-bulletin-jan-mar-2015.pdf> (last visited 27 May 2016).

21. See N. Padfield, 'The Magnitude of the Offender Rehabilitation and "Through the Gate" Resettlement Revolution', *Criminal Law Review* 99 (2016).

22. See final section, and my study of recalled offenders, N. Padfield, 'Understanding Recall 2011', University of Cambridge, Faculty of Law Research Paper No. 2/2013. Available at SSRN: <<http://ssrn.com/abstract=2201039> or <http://dx.doi.org/10.2139/ssrn.2201039>>.

23. Ministry of Justice (2015), above n. 20, at 12.

24. N. Padfield, 'Recalling Conditionally Released Prisoners in England and Wales', 4 *European Journal of Probation* 34, at 34-45 (2012); Editorial to that special issue, available at: <www.ejprob.ro/index.pl/recalling_conditionally_released_prisoners_in_england_and_wales>.

25. See C. Appleton, *Life after Life Imprisonment* (2010); L. Digard, 'When Legitimacy Is Denied: Offender Perceptions of the Prison Recall System', *Probation Journal* 57, at 43-61 (2010), Padfield, above n. 22.

offenders. The ‘responsible authorities’ of the MAPPA include²⁶

- The National Probation Service
- Her Majesty’s Prison Service
- Police forces.²⁷

MAPPA, which are coordinated by the Public Protection Unit of NOMS within the Ministry of Justice, were introduced by Criminal Justice and Court Services Act 2000 and strengthened by Criminal Justice Act 2003. They evolved from professional practice during the 1990s, which recognised that there should be more ‘joined-up’ work with dangerous offenders. The MAPPA process involves an assessment of risk posed by an offender, upon which a risk management plan is subsequently based. Offenders posing the highest risk are referred to a Multi-Agency Public Protection panel meeting, where the offender’s risk and management plan is discussed with the participating agencies.²⁸ Although each area is required to publish an annual MAPPA Report, it is difficult to know how effective they are in practice. For example the most recent report from Cambridgeshire provides two case studies.²⁹ The first is that of a man serving a life sentence for committing a sexually motivated murder: ‘Whilst he remains monitored, his motivation to lead a law abiding life offers the best protection the community can have’. The second was the story of a man released at the end of his sentence, having been recalled to prison when he was on a licence:

He continues to pose a high risk of harm to the public, particularly children and the vulnerable. He has to abide by a Court imposed Order that prohibits him from having contact with potential victims. To help him avoid offending after many years in prisons and hospital, Mr F was given substantial support by the NPS, Housing and other agencies. At the same time, the police worked with probation to monitor his progress. Mr F broke the Order, was arrested and is now serving a further substantial prison sentence.

These are not, I suspect, untypical stories of ‘success’ and ‘failure’. But what we do not have is any real evi-

dence that MAPPA work ‘properly’. There has been some research.³⁰ Peck’s study showed a reduction in reconviction rates among sexual and violent offenders released between 2001 and 2004 compared to 1998–2000, which coincided with the introduction of MAPPA in 2001. But of course this cannot evaluate the specific impact of MAPPA on reconvictions. In any case, reconviction is a blunt measure of re-offending. And, more importantly from our perspective, is MAPPA supervision ‘proportionate’?

A huge number of offenders are monitored under MAPPA. On 31 March 2014, there were 65,083 MAPPA-eligible offenders, of whom 71% were registered sex offenders.³¹ They are divided into one of three levels:

- Level 1 – Ordinary Agency Management (information will usually be exchanged between relevant agencies, especially between police and probation, but formal multi-agency meetings will not be held to discuss the offender’s case).
- Level 2 – Active Multi-Agency Management (the risk management plans for these offenders require the active involvement of several agencies via regular multi-agency public protection meetings).
- Level 3 – Active Multi-Agency Management (as with offenders managed at Level 2, the active involvement of several agencies is required; however, the risk presented by offenders managed at Level 3 means that the involvement of senior staff from those agencies is additionally required to authorise the use of additional resources, such as for specialised accommodation).

The majority of sex offenders are managed at Level 1. In 2013/2014, there were 2,238 sex offenders being managed at Level 2, and only 244 being managed at Level 3. All sex offenders are nowadays on the sex offender register, *i.e.* they are required to notify the police of certain details, with further notification required if any of those details change. A breach of this notification requirement is itself a criminal offence and can lead to a caution or conviction. The number of category 1 offenders who were cautioned or convicted for breaches of their notification requirement was 2,057 in 2013/2014, or 4.5 offenders cautioned or convicted per 100 offenders. This is a 31% rise from 2012/2013 when there were 1,576 offenders who were cautioned or convicted, and is the highest level for up to eight years.

The notification requirements are seriously enforced: the number of sex offenders who were cautioned or convicted for breaches of their notification requirement was 2,057 in 2013/2014, or 4.5 offenders cautioned or convicted per 100 offenders. This was a surprising 31% rise from 2012/2013 (and as we shall see later, the number of people sent to prison for breaching SOPOs is also rising sharply). Thus, MAPPA and the notification requirements would seem to be used by managers to control sex offenders in the community. We turn now to

26. The published guidance is dated: the latest version is called 2012, version 4, updated from the 2009 version. See <www.justice.gov.uk/downloads/offenders/mappa/mappa-guidance-2012-part1.pdf>. This does not take into account recent changes in the law and practice of supervision since the ORA 2014. Some insights can be gained by reading the annual reports of different MAPPA in the country: see <www.gov.uk/government/collections/multi-agency-public-protection-arrangements-mappa-annual-reports>.

27. A number of other agencies are under a duty to co-operate with the ‘Responsible Authority’. These include Children’s Services, Adult Social Services, Health Trusts and Authorities, Youth Offending Teams, UK Border Agency, local housing authorities and certain registered social landlords, Jobcentre Plus and electronic monitoring providers.

28. A useful summary is found in M. Peck, *Patterns of Reconviction among Offenders Eligible for Multi-Agency Public Protection Arrangements (MAPPA)*, Ministry of Justice Research Series 6/11 (2011).

29. See ‘Cambridgeshire-MAPPA Annual Report 2013-14’, available at: <www.gov.uk/government/uploads/system/uploads/attachment_data/file/368913/Cambridgeshire_-_MAPPA_Annual_Report_2013-14.pdf>.

30. J. Wood and H. Kemshall, *The Operation and experience of MAPPA* (Home Office Online report 12/07, 2007); Peck, above n. 28.

31. Ministry of Justice (2014), above n. 6.

a closely related regime: the use of civil orders, breaches of which are criminal offences.

3.2.3 Civil Preventative Orders

Part II of the Sexual Offences Act 2003 introduced SOPOs (which were not restricted only to sex offenders).³² They could be imposed by a sentencing judge as a consequence of conviction, or the police could apply separately to a court for a SOPO in relation to anyone convicted of over 200 offences listed in Schedules 3 and 4 of the Act. Before making a SOPO, the court had to be satisfied that it was necessary to protect the public or any particular member of the public from serious sexual harm. This was defined as protecting the public in the UK or any particular members of the public from serious physical or psychological harm, caused by the defendant committing any of the offences listed in Schedule 3 of the Act – section 106(3) Sexual Offences Act 2003. Breach of the requirements attached to a SOPO is a criminal offence. As we shall see, in 2015 SOPOs were replaced by similar, but broader, SHPOs (Sexual Harm Prevention Orders). But let us look first at some data on SOPOs.

In 2013/2014, the courts imposed 3,243 SOPOs, compared to 3,064 in 2012/2013. This was an increase of 6%, which continued the year on year rise, reflecting the increased use of SOPOs by police. There were 178 Level 2 and Level 3 MAPPA offenders sent to custody for breach of their SOPO. This was a sharp increase of 34% from 133 in 2012/2013. In 2013/2014, there were 7.2% of Level 2 and Level 3 offenders sent to custody for breach of their SOPO, which is a significant increase from 2012/2013 when the figure was 4.8%.³³

There has been a significant amount of litigation surrounding SOPOs: largely in connection with appeals against sentence, and focused on questions of proportionality and the reasonableness and clarity of individual conditions. Useful guidance was given in *Smith* [2015] EWCA Crim 1772, where the Court of Appeal considered four separate cases and gave guidance for future cases. Thus, they say that those sentenced to an indeterminate sentence do not need a SOPO, unless there was some very unusual feature that meant that such an order could add something useful and did not run the risk of undesirably tying the hands of the offender managers later (since the offender will be on indeterminate licence).

By contrast, a SOPO may plainly be necessary if the sentence is a determinate term or an extended term. In each of those cases, whilst conditions may be attached to the licence, that licence will have a defined and limited life. The SOPO by contrast can extend beyond it and this may be necessary to protect the public from further offences and serious sexual harm as a result.

The same is true, only more clearly, where the sentence is a suspended sentence. The SOPO serves a different purpose from the suspension of the sentence, and its duration is certain to be longer, since it cannot be made unless prohibitions for at least five years are called for: s 107(1)(b) (paras. 14-15).

In terms of specific conditions, the Court of Appeal said that

A blanket prohibition on computer use or internet access is impermissible. It is disproportionate because it restricts the defendant in the use of what is nowadays an essential part of everyday living for a large proportion of the public, as well as a requirement of much employment. Before the creation of the internet, if a defendant kept books of pictures of child pornography it would not have occurred to anyone to ban him from possession of all printed material. The internet is a modern equivalent (para. 20).

Thus, it is now recognised that a total, blanket, ban on computer use is disproportionate. Another common term prevents offenders from socialising or working with children. But such a term must be justified as required beyond the restrictions anyhow placed upon sex offenders working with children. The Disclosure and Barring Service (DBS) carries out criminal record checks for specific positions, professions, employment, offices, works and licences included in the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 and those prescribed in the Police Act 1997 (Criminal Records) regulations.³⁴ Sex offenders are thus in any case banned from engaging in any form of teaching, training or instruction of children, and any form of care, advice, guidance or therapy, and from acting as a driver for children's activities. The Court of Appeal suggested that judges should ordinarily require the Crown to justify an application for a SOPO term relating to activity with children by demonstrating the risk that is not already catered for by the wider DBS law.

A recent example is *Gass* [2015] EWCA Crim 579. A 28-year-old man, convicted of offences of sexual activity with a 14-year-old female family friend and sentenced to seven years' imprisonment, challenged an indeterminate order that included the following terms, prohibiting him from:

- a. 'seeking or undertaking employment including voluntary work, whether for payment or otherwise which is likely at some time to allow him unsupervised access to a child under the age of 16 years (where that contact is more than transient and a child or a young person's parents or guardian is absent)';
- b. 'seeking the company of or being inadvertently in the sole company of any person under the age of 16 years

32. S. Shute, 'The New Civil Preventative Orders', *Criminal Law Review* 417 (2004).

33. Ministry of Justice (2014), above n. 6, at 15.

34. The DBS replaced the Independent Safeguarding Authority that had been created by the Safeguarding Vulnerable Groups Act 2006 – see the Protection of Freedoms Act 2012. Those who wish to work with children are required to have a DBS check: see <www.gov.uk/government/publications/dbs-check-eligible-positions-guidance>.

in the absence of that child or young person's parents or guardian'. The Court of Appeal removed (a) and reformulated (b) to read:

having unsupervised contact of any kind with any female under 16 other than (i) such as is inadvertent and not reasonable avoidable in the course of lawful daily life or (ii) with consent of the child's parents or guardian who has knowledge of his conviction and the terms of this order. (This prohibition was not to apply to one named child).

What is a suitable punishment for a man who repeatedly breaches a SOPO? In *Cooper* [2015] EWCA Crim 684, the Court of Appeal had to consider the case of a man who had repeatedly broken the terms of his SOPO, which included prohibitions on him having 'any unsupervised contact of any kind with any male or female under the age of 16 other than such as is inadvertent and not reasonably avoidable' and 'initiating contact or seeking to communicate with any female who is alone in a public place other than such as is inadvertent and not reasonably avoidable'. He had initiated conversations with a boy and a lone woman in a public place – for which he received a four-year sentence. The Court of Appeal reduced this to three years, but clearly agreed that a significant sentence was required on a man who was considered to be posing a very high risk of re-offending and a very high risk of serious harm to members of the public. But a three-year sentence for breach of a 'civil' order puts the lie to the distinction between civil and criminal sanctions.

The Sexual Offences Act 2003 also introduced foreign travel orders and risk of sexual harm orders.³⁵ These have been less used than SOPOs and can be glossed over here because all these were replaced from 8 March 2015 by a new pair of preventative orders: SHPOs and Sexual Risk Orders. Why were these new orders required? The changes have arisen largely out of a review of the previous orders commissioned by the police (the Association of Chief Police Officers (ACPO) Child Protection and Abuse Investigation Working Group), led by Hugh Davies QC, which was published in May 2013.³⁶ The focus of that review was the sexual exploitation of children internationally. They resisted the term 'serious', borrowed from existing legislation, 'since it pre-supposes that there is some category of sexual harm that may be caused to a child that is not intrinsically serious or that is not worthy of prevention' (p. 3). But the changes of the Anti-Social Behaviour, Crime and Policing Act 2014 go further than the ACPO Review suggested and are not limited to offences against children.

SHPOs can be imposed on someone convicted or cautioned for a relevant offence and who poses a risk of sexual harm to the public in the UK or children or vulnera-

ble adults abroad. It may impose any restriction that the court deems necessary for the purpose of protecting the public from sexual harm, and makes the offenders subject to notification requirements for the duration of the order. The SHPO is available at the time of sentencing for a relevant offence, or on free-standing application to the magistrates' court by the police or National Crime Agency after the time of the conviction or caution.

A Serious Risk Order can be made by a court in respect of someone who has done an act of a sexual nature and who, as a result, poses a risk of harm to the public in UK or children or vulnerable adults abroad. They do not need to have been convicted of an offence. A court may impose any restriction that it deems necessary for the purposes of protecting the public from harm (this includes harm from the defendant outside the UK, where those to be protected are children and vulnerable adults), and requires the individual to notify the police of his/her name and address, including where this information changes. As with the SHPO, a Serious Risk Order is available on a free-standing application to a magistrates' court by the police or the National Crime Agency.

Finally, we should note that Notification Orders can now be made by a court, on the application by a chief officer of police, in relation to someone who has been convicted, cautioned or had a relevant finding made against them for specified sexual offences in a country outside the UK. In effect, this broadly makes those convicted abroad subject to the notification requirements of Part II of the 2003 Act as if they had been convicted of or cautioned for a relevant offence in the UK.

An emerging issue is the question of costs. In an interesting recent example (*Chief Constable of Warwickshire v. MT* [2015] EWHC 2303 (Admin)), the chief constable of Warwickshire won his appeal against a court order that he should pay a sex offender £3,189.60 after he had withdrawn his application for a SOPO. Following the offender's release from a thirteen-year sentence, the chief constable became concerned that the offender was acting in breach of his licence conditions and applied for a SOPO. The chief constable withdrew his application when he learnt that the offender was moving away from his administrative area. The original court had ordered the chief constable to pay the offender's costs associated with this application but on appeal it was held that because the chief constable had not acted dishonestly or unreasonably in bringing the application, the appropriate order was no order as to costs. Doubtless questions of cost are vitally important in relation to much decision making in relation to MAPPA/SOPO by the authorities. The costs to the offender may be less obvious.

4 Evaluation

How do we evaluate English law? Clearly, the 'mainstream' sentencing regime is punitive: sex offenders face lengthy custodial sentences, and release is always sur-

35. Shute, above n. 32.

36. See H. Davies QC, 'Civil Prevention Orders Sexual Offences Act 2003', available at: <www.ecpat.org.uk/sites/default/files/the_davies_review.pdf> (last visited 27 May 2016).

rounded by complex licence conditions. These licence conditions may run in parallel with, or be followed by, other burdensome requirements, imposed under MAP-PA or the civil orders. A key question is proportionality – are the measures imposed on offenders (ex-offenders) too burdensome, too onerous and too intrusive? What is ‘intrusive’ or less ‘intrusive’, of course, depends on the perception of the person subject to the relevant measure. And the level of intrusion will depend on the precise conditions attached – whether this is a licence condition or a civil order.

It is clear that, in theory, in English law civil preventative orders are not formally part of the ‘sentence’ of a court imposed as a punishment for a crime. These are independent measures, civil in nature (even though breach of one is a criminal offence). There has been little discussion as to the ways in which the ‘main’ sentence might be modified because of the availability of other sanctions. It seems to me that the distinction between ‘civil’ and ‘criminal’ makes little sense. Of course, the fact that a measure is labelled as civil lowers the burden of proof, so it makes it easier for the police to obtain. But the outcome will undoubtedly feel punitive, and criminal in nature, to the offender.

There are also other routes to ‘punishment’, certainly to non-consensual detention and to other restrictions on liberty, under the Mental Health Acts 1983 (as amended). People can seek voluntary help with psychiatric services, and they may also be detained involuntarily for treatment. But this would be rare in the case of non-convicted sexual abusers. Psychiatric services are hard-pressed, and often are reluctant to intervene when their intervention is not obviously therapeutic. They tend to be only marginally involved in working with sex offenders, and mental health issues relating to individual sex offenders are often overlooked.³⁷ It may well be that there are those who have expressed serious interest in sex abuse have been detained under the Mental Health Act, but no data on this are available.

Perhaps the most important and currently unanswered questions surround the interplay between the different measures:

1. Should a judge when sentencing consider the availability of SOPOs when deciding whether to give an indeterminate, an extended or a determinate sentence to an offender who stands at the threshold of being ‘dangerous’?
2. Should the licence conditions take into account a possible SOPO? Should offenders released from prison face one set of conditions and not two?
3. Who should set the conditions, and who should monitor them? In England at the moment, as we have seen, as well as MAPP, the Parole Board and the prison authorities have a significant role in identifying relevant licence conditions.

37. See e.g. J. Borrill, *The Multi-Agency Management of Sex Offenders in the Community – The Mental Health Foundation* (2000).

Judges have been persuaded that it is unhelpful for them to suggest licence conditions at the point of sentence. These are imposed in the name of the prison governor at the time of release. It would be timely to review the supervision of sex offenders in the community in order to see whether the system might be better ‘joined up’. Whether the advantages of judicial involvement in sentence supervision and implementation, as seen in other jurisdictions, would transfer to the English context should be explored.³⁸

4.1 A Human Rights Perspective

The European Convention on Human Rights (ECHR) was not incorporated into domestic law until the Human Rights Act 1998. This statute, recognising the supremacy of Parliament, does not give the judges the power to strike down legislation, but merely to issue a declaration where any statutory provision is incompatible with the European Convention. The Government will usually then act on the ruling and change the law – but not always. But the common law continues to flow strongly in parallel with the European jurisprudence. Lord Cooke put the point well in the prisoners’ rights case of *R (Daly) v. Home Secretary* [2001] 2 AC 532:

The truth is, I think, that some rights are inherent and fundamental to democratic civilised society. Conventions, constitutions, bills of rights and the like respond by recognising rather than creating them.... The point that I am emphasising is that the common law goes so deep (at para. 30).

A recent example is *Abedin v. Secretary of State for Justice* [2015] EWHC 782 (Admin), which involved a challenge by a prisoner who had been recalled to prison while on licence. The frustration for Abedin was that, once recalled to prison when on licence, the law had been changed and as a recalled offender his fixed release date became the end of his full term of imprisonment, rather than at the three-quarter stage. He challenged this under Articles 5 and 7 of the ECHR. Laws LJ, giving the judgement of the High Court, carefully reviewed a host of European and domestic precedents. The Court held that there was no violation of Articles 5 and 7 of the ECHR despite the decision of the *European Court of Human Rights in Del Rio Prada v. Spain* [2014] 58 EHRR 37. The relevant European and English authorities showed that there had been no erosion in principle of the well-established distinction between the penalty imposed, and the means of its enforcement or execution: Abedin lost on both common law and ECHR principles. Much of the litigation concerns the period that the offender serves in prison. It is scandalous that many sex offenders ‘queue up’ to do the courses required of them before the Parole Board will direct their release. There have also been lengthy delays in moving them to open

38. M. Herzog-Evans and N. Padfield, ‘The JAP: Lessons for England and Wales?’ *Criminal Justice Alliance* (2015), available at: <http://criminaljusticealliance.org/wp-content/uploads/2015/04/cja_policy-briefing3_200315.pdf> (last visited 27 May 2016).

conditions, and many delayed Parole Board hearings. The prison authorities were unprepared for the surge of IPP cases after 2005, and hundreds of IPP prisoners have got ‘stuck’ in the system. In *Secretary of State for Justice v. Walker and James* [2008] EWCA Civ 30, the Lord Chief Justice did not mince his words:

This appeal has demonstrated an unhappy state of affairs. There has been a systemic failure on the part of the Secretary of State to put in place the resources necessary to implement the scheme of rehabilitation necessary to enable the relevant provisions of the 2003 Act to function as intended (para. 70).

The case went to the House of Lords in *Wells v. Parole Board* [2009] UKHL 22, and then to the ECtHR in *James, Lee and Wells v. UK* [2013] 56 EHRR 12, which held that there was a breach of Article 5(1).

Recently, in *R (Kaiyam) v. Secretary of State for Justice* [2014] UKSC 66, the Supreme Court declined to follow the decision of ECtHR in *James*: although it was implicit in the scheme of ECHR Article 5 that the state had a duty to provide a reasonable opportunity for a prisoner subject to an indeterminate sentence to rehabilitate himself and to demonstrate that he no longer presented a danger to the public, that was an ancillary duty that could not be brought within the express language of either Article 5(1)(a) or Article 5(4), and did not therefore affect the lawfulness of detention, just the possibility of damages. On the facts follow:

- The delay for H in being transferred to open conditions had deprived him, contrary to Article 5, of a reasonable opportunity to demonstrate that he was no longer a danger to the public, an opportunity that the Secretary of State himself had said that he should have. There had been though no breach of Article 14 in discriminating between pre- and post-tariff prisoners.
- Similarly, for M, the delay in being able to commence an extended SOTP until nearly three years after the expiry of his ‘tariff’ period (and after the Secretary of State had provided for a timetable that was not fulfilled) had deprived him of the reasonable opportunity to demonstrate that he was no longer a danger, in breach of Article 5.
- The delay for K, however, in being able to commence various rehabilitative treatment programmes did not breach his Article 5 rights. He had been provided with a reasonable opportunity to demonstrate that he was no longer a risk to the public through courses on enhanced thinking, drug awareness and victim awareness, but his responses to those programmes had been poor.
- In *R*, Lord Hughes (for the majority) held that the delay in being able to commence an extended SOTP until nearly nine months after the expiry of his ‘tariff’ period did not breach his Article 5 rights. The question was not whether he had been deprived of access to a particular course, but whether he had been given a reasonable opportunity to demonstrate that he was

no longer a danger to the public. Lord Mance (dissenting) considered that Article 5 required that R be given a reasonable degree of access to the extended SOTP, which he had not been given in the circumstances of the present case.

What does this case tell us? First, some sorry examples of the delays inherent in the system. Secondly, it illustrates the parallel lives of the common law and the ECHR. There is at the moment in England a growing (?) political resentment of the European Union, and this overflows into a wariness of the European Court of Human Rights and its ‘liberal Judges’. It seems clear that as we enter a political period when it is possible that the Government may talk seriously of withdrawing from a number of European institutions, the judiciary will make it increasingly clear that prisoners’ rights are as protected by a dynamic common law as well as by the ECHR. Both the common law and the ECHR are living and evolving. In any case, the ECHR itself provides merely a low threshold of minimum rights, common law judges, quite as much as European court judges, can be expected to develop equal if not stronger protections. What is clear is that the domestic lower courts always assess SOPOs against principles of certainty and proportionality. The higher courts spend much legal energy on applying (and distinguishing) both ECtHR and domestic jurisprudence.

6 Conclusion

How ‘dangerous’ are sex offenders? The number of MAPPA eligible offenders charged with Serious Further Offences (SFO) in 2013–2014 was 174. This was a 14% rise from 2012/2013 when there were 149 offenders charged with an SFO. But, of the 174 offenders charged with an SFO in 2013/2014, 143 were being managed at Level 1, 28 at Level 2, and 3 at Level 3.³⁹ The fact that only three of these were ‘Level 3’ offenders reminds us that predicting rare events remains, as ever, difficult.⁴⁰ We have noted the huge numbers of sex offenders in the community, many of whom are of course ex-offenders.

There are evident tensions between security and justice, and between public protection and rehabilitation. Despite attempts in the past decade to ‘join up’ the prison and community parts of sentences, there continues to be little continuity in ‘management’. Once sex offenders

39. MAPPA data in this article come from the Ministry of Justice, *Multi-Agency Public Protection Arrangements Annual Report 2013/14* (2014), available at: <www.gov.uk/government/uploads/system/uploads/attachment_data/file/369414/mappa-annual-report-2013-14.pdf> (last visited 27 May 2016).

40. J. Craissati and O. Sindall, ‘Serious Further Offences: An Exploration of Risk and Typologies’, 56 *Probation Journal*, 9–27 (2009); N. Padfield, *The Sentencing, Management and Treatment of ‘Dangerous’ Offenders* (2010), available at: <[www.coe.int/t/dghl/standardsetting/cdpc/PC-GR-DD/PC-CP\(2010\)10rev5_E_vs260111_-THESENTENCINGMANAGEMENTANDTREATMENTOFDANGEROUSOFFENDERS.pdf](http://www.coe.int/t/dghl/standardsetting/cdpc/PC-GR-DD/PC-CP(2010)10rev5_E_vs260111_-THESENTENCINGMANAGEMENTANDTREATMENTOFDANGEROUSOFFENDERS.pdf)>.

are released, the authorities appear to monitor sex offenders closely, under both licence conditions and MAPPA, often indefinitely. It is already extraordinarily difficult for sex offenders to reintegrate, and the pressures of supervision and monitoring can be counterproductive. As Craissati writes:

...really thoughtful risk management does not always consist of rights and wrongs, but of dilemmas ... there is a fine line between control and persecution, one that is difficult to detect at times, and that social exclusion – in the current climate – seems to be an unavoidable consequence of rigorous risk management.... The possibility that stringent risk management approaches embodied within the MAPPA recreates – for some offenders – the disturbing experiences of their early lives seems absolutely clear. That it may paradoxically result in triggering greater levels of offending is an uncomfortable idea, as is the suggestion that in order to reduce risk, sometimes professionals and agencies may need to take risks.⁴¹

More intensive monitoring can have negative as well as positive results. Digard concluded that

disregard for procedural fairness may decrease offender's levels of mental well-being, engagement in their management, motivation to forge new lives, and respect for authorities and the civic values they represent. It may inhibit the maintenance of an effective probation/client relationship and increase resistance.⁴²

66

Yet the 'control' exercised over sex offenders appears to be getting ever-tighter: for example by the lowering of the threshold for the new SHPO (as we have seen, where it used to be that a court had to be satisfied that an order was necessary to protect the public from 'serious' sexual harm, now it is simply that the court is satisfied that the order is necessary to protect from sexual harm).

Much of what appears to go under MAPPA is 'characterised by the use of restriction, surveillance, monitoring and control, compulsory treatment and the prioritisation of victim/community rights over those of offenders'.⁴³ It seems unlikely that the 'fear' and public fascination with the sorts of sexual offending outlined in the Introduction will disappear. Lengthy sentences will continue to be the norm. It is vital that the courts remain vigilant, whether it is under the umbrella of the

common law or the ECHR, to safeguard the rights of offenders.

It is extraordinary that the subject has not had more scrutiny from academic criminologists and lawyers: the extent of post-custodial and post-sentence supervision has not caught the attention of academics as it should have done. Academic criminologists⁴⁴ and lawyers have failed to engage policy makers, particularly in underscoring the difficulties faced by sex offenders in their attempts to leave their criminal pasts behind them, especially in the current climate, and in questioning the weight and burdens of disproportionate monitoring. Ironically, it may be the cost of controls and supervision in the community that effect more changes in the future.⁴⁵ Politicians may start to worry about the costs of MAPPA, ViSOR and the widespread use of civil protective orders and to question their effectiveness. Then it may not be a culture of 'human rights' that protects sex offenders from disproportionate restriction and surveillance, but simply a financial calculation.

41. J. Craissati, 'The Paradoxical Effects of Stringent Risk Management: Community Failure and Sex Offenders' in N. Padfield (ed.), *Who to Release? Parole, Fairness and Criminal Justice* (2007), at 227; see also N. Padfield, 'Discretion and Decision-Making in Public Protection', in M. Nash and A. Williams (eds.), *The Handbook of Public Protection* (2010).

42. See Ministry of Justice (2015), above n. 20, at 60.

43. H. Kemshall, 'MAPPA, Parole and the Management of High-Risk Offenders in the Community', in N. Padfield (ed.), *Who to Release? Parole, Fairness and Criminal Justice* (2007), at 206; see also H. Kemshall, 'Risk, Rights and Justice: Understanding and Responding to Youth Risk', 8 *Youth Justice* 21-37 (2008).

44. An honourable exception is S. Maruna and T. LeBel, 'Welcome Home? Examining the "Re-Entry Court" Concept from a Strengths-Based Perspective', 4 *Western Criminology Review* 91 (2003).

45. Between 2010-2011 and 2014-2015, the NOMS saved almost £900 million, a reduction of nearly a quarter against its 2010-2011 baseline. It has a savings target of a further £91 million for 2015-2016: see National Offender Management Service, 'Annual Report and Accounts 2014/15' (2015).