Neutral Citation Number: **[2020] EWHC 1053 (Admin)**

Case No: CO/2916/2019

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 01/05/2020

Before :

THE RT. HON. LORD JUSTICE HADDON-CAVE
and
THE HON. MR JUSTICE HOLGATE

- -

Between :

THE QUEEN on the application of SIMON HALABI	**Claimant**
- and -	
THE CROWN COURT AT SOUTHWARK	**Defendant**
-and-	
COMMISSIONER OF POLICE OF THE METROPOLIS	**Interested Party**
-and-	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Intervener**

- -
- -

Chris Daw QC and Alexander dos Santos (instructed by **Hempsons**) for the **Claimant**
Jason Beer QC and Alice Meredith (instructed by **Directorate of Legal Service, MPS**) for the **Interested Party**
Hanif Mussa (instructed by **Government Legal Department**) for the **Intervener**

Hearing dates: 25th – 26th February 2020

- -

Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, released to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 14:00 on the 01st May 2020.

Lord Justice Haddon-Cave and Mr Justice Holgate:

INTRODUCTION

1. This is the judgment of the court.
2. This case raises a question as to whether the imposition of a Notification Order ("N/O") under section 97 of the Sexual Offences Act 2003 ("SOA 2003") was disproportionate and breached Article 8 of the European Convention on Human Rights ("ECHR").
3. The Claimant, Simon Halabi, challenges by way of judicial review the decision of the Defendant, Southwark Crown Court, dated 3rd May 2019 dismissing his appeal against the imposition of a N/O upon him by Westminster Magistrates' Court on 3rd September 2018 ("the Decision"). The Commissioner of Police of the Metropolis ("the Commissioner") appears as an Interested Party, and the Secretary of State for the Home Department ("SSHD") appears as an Intervener.
4. The Claimant also filed separate judicial review proceedings challenging the earlier decision of the Commissioner dated 28th February 2019 to maintain her opposition to the Claimant's appeal against the N/O to the Crown Court, naming Southwark Crown Court as an Interested Party. Permission to apply for judicial review was refused by Mr Justice Kerr on 4th September 2019 in respect of these proceedings (see further below).
5. The Claimant seeks to adduce further expert evidence, namely a statement from a French lawyer (dated 10th February 2020) on the effect of a decision of the Court of Appeal in France on 2nd October 2019.

FACTUAL AND PROCEDURAL BACKGROUND

6. The Claimant was born in Syria on 2nd August 1958 and given the name Simon Halabi. The Claimant alleges that when he was 15 years old, his family (which were Jewish) changed his name to Mohamed Basam Halabi in order to make it easier for him to leave Syria.
7. On 30th April 1998, the Claimant was convicted in France, under the name 'Mohamed Halabi', of rape and obtaining and possessing controlled drugs. These offences had been committed 2½ years earlier in September 1995 when he was 37 years old. The circumstances of the rape as summarised in the Commissioner's section 97 application were as follows: "The victim [a woman] aged 22 willingly went to [the] home of [the Claimant]. He took her to his bedroom and started to undress, tore off her top and asked her to fellate him but she refused. He grabbed her by the hair and dragged her to the bed where he pinned her down. He then slapped, punched and attempted to strangle her. She tried to leave but the gate could only be activated from the house. He then inserted a finger into her anus and forced sodomy on her threatening her with death if she were to report it. She was then allowed to leave…".
8. The Claimant was sentenced to a total period of 3 years' imprisonment (less 6 months' time served) suspended for 5 years. The suspension period expired in 2003.
9. In 2003, the Claimant changed the name in his British passport to 'Simon Halabi'.
10. In 2005, 2010 and 2014, the Claimant made applications in the name 'Simon Halabi' to the UK Metropolitan Police Service ("MPS") for a firearms licence. On each occasion, he failed to disclose his previous convictions or his previous name.

11. In 2012, the fact of the Claimant's conviction for rape was notified by the French authorities to the UK Association of Chief Police Officers' Criminal Records Office ("ACRO"), under the name 'Mohamed Halabi'. ACRO did not immediately connect the conviction with the Claimant because he was using a different name.

12. On 19th October 2017, the French authorities notified ACRO that the Claimant was also known as 'Simon Halabi'. ACRO recorded the Claimant's conviction on the Police National Computer under the name 'Simon Halabi', and notified his local police force, the MPS.

13. On 29th October 2017, UK Border Force officials spoke to the Claimant on his return to Heathrow from the United States ("US"). He confirmed his previous name had been 'Mohammed Halabi', his UK address, and the fact that he was a frequent traveller to the US.

14. On 17th November 2017, UK Border Force officials spoke to the Claimant on his return from France. The Claimant confirmed that he had been convicted of a sexual offence in France in 1998.

15. On 23rd November 2017, the Claimant met with MPS officers by arrangement. He told officers that he travelled frequently to the US and had always ticked the 'No Convictions' box on his landing cards and Electronic System for Travel Authorisation ("ESTA") application knowing that he was misleading the US authorities by doing so.

Magistrates' Court proceedings

16. On 28th November 2017, Detective Constable Alan Morgan of the MPS (who has since retired) lodged an application for a N/O against the Claimant under section 97 of the SOA 2003 before the Magistrates. A hearing before the Magistrates' Court was adjourned twice, and then listed on 21st May 2019.

17. Prior to the hearing on 21st May 2019, the Claimant served a skeleton argument supported by a witness statement from a member of the Bar then instructed alleging that DC Morgan had, outside court and whilst giving evidence, accepted that the Claimant presented no risk to the public. The MPS denied this and highlighted that the Claimant's level of risk could not be fully assessed unless and until he was the subject of an order.

18. On 3rd September 2018, the matter came back before Westminster Magistrates' Court. District Judge Snow found that the statutory test under section 97 of the SOA 2003 was satisfied and the N/O was made.

19. On 20th September 2018, the Claimant lodged an appeal against the N/O to Southwark Crown Court. Before that appeal was heard, the Claimant on 18th January 2019 requested that the MPS reconsider the decision to apply for a N/O and agree to withdraw its opposition to his appeal.

20. Detective Constable Jenny Rudd (the new Officer in the Case), reviewed the relevant material and completed a witness statement (dated 28th February 2019) that confirmed the MPS' continued intention to oppose the Claimant's appeal to the Crown Court. That decision is the subject of a related judicial review claim (see below).

Crown Court proceedings

21. On 25th April 2019, the Crown Court (HHJ Hehir, sitting with two lay magistrates) heard the Claimant's appeal. A written judgment was handed down on 3rd May 2019 dismissing the appeal.

22. The court rejected the assertion that the N/O constituted a disproportionate interference with the Claimant's Article 8 rights [13-16], or amounted to an abuse of process [17-23]. With regard to the former, the court found that the question of risk and personal impact is irrelevant to the granting of a N/O under section 97 of the SOA 2003 [21]. Accordingly, although DC Morgan had provided a witness statement contradicting the allegations about what he was supposed to have said, the court did not find it necessary to hear evidence on the point [20]. The proportionality of notification requirements had to be judged primarily by reference to their general effects, as opposed to the effects on the individual subject to them [13].

23. On 24th May 2019, the Claimant then applied to the Crown Court to state a case for the High Court, which was refused by HHJ Hehir on 5th June 2019.

The first judicial review proceedings

24. On 30th May 2019, the Claimant filed a claim by way of judicial review ("the first judicial review proceedings") challenging the Commissioner's decision of 28th February 2019 to maintain her opposition to the Claimant's appeal against the N/O to the Crown Court. By this claim, the Claimant sought a declaration of incompatibility in respect of Part 2 of the SOA 2003.

25. On or about 29th July 2019, HHJ McKenna, sitting as a Judge of the High Court refused permission to bring the first judicial review proceedings. On 4th September 2019, Kerr J refused the Claimant's renewed application for permission and the Claimant's application to join the first judicial review proceedings with the second judicial review proceedings (see below).

26. The Claimant applied to the Court of Appeal for permission to appeal Kerr J's refusal to grant permission. On 7th November 2019, on the Claimant's application, the application was stayed until 16 March 2020.

The second judicial review proceedings

27. On or about 25th July 2019, the Claimant filed the present claim for judicial review ("the second judicial review proceedings") challenging Southwark Crown Court's decision dismissing the Claimant's appeal against the grant of the N/O (see above). On 4th September 2019, Kerr J granted permission for judicial review proceedings and gave permission for the SSHD to appear at the substantive hearing. By this claim, the Claimant also sought a declaration of incompatibility in respect of Part 2 of the SOA 2003.

28. By letter of 24th October 2019, the Claimant notified the MPS that his conviction had been deleted from certain French records and he was no longer registered on the French Register of Sexual Offenders. As ACRO noted, however, the Claimant had not successfully appealed his conviction. His conviction stands and remains on the UK Police National Computer as recorded by ACRO.

THE LAW

Statutory Framework

Sexual Offences Act 2003

29. Part 2 of the SOA 2003 creates a notification regime for those convicted of relevant sexual offences. The aim was to set up a system with essentially the same provisions to cover offending of the same nature committed either in the UK or overseas.

30. Section 80 provides that a person is subject to the notification requirements of Part 2 for the relevant notification period specified in s. 82 if (*inter alia*) he is convicted of an offence listed in schedule 3.

31. Section 81 provides that offenders in respect of a schedule 3 offence, who were subject to the notification requirements under Part 1 of the Sex Offenders Act 1997 at the commencement of Part 2 of the SOA 2003, continue to be subject to the notification requirements, including the revised requirements, provided their notification period had not ended before commencement.

32. Where an offender falls within either s. 80 or s. 81, the notification requirements set out in ss. 83 to 87 are essentially the same. They cover initial notification, notification of changes in relevant details (*e.g.* name, address and prescribed information), annual re-notification, and notification of travel outside the UK. Notification is required to be given at an appropriate police station.

33. Section 82 provides the notification period for persons within ss. 80 and 81. So for a person sentenced to life imprisonment or imprisonment for 30 months or more, the notification period is "indefinite", for imprisonment for more than 6 but less than 30 months, the period is 10 years, and for imprisonment for 6 months or less the period is 7 years.

34. Section 97 enables a chief officer of police to apply to a magistrates' court for the making of a N/O in respect of offending outside the UK where three conditions mirroring the triggers and notification periods in ss. 80, 81 and 82 are satisfied. The application may be made against someone residing in the police area for which that officer is responsible (or whom he believes is in or intends to come to that area). Where those conditions are all met, the court has no discretion in the matter; it must make the order (s. 97(5)). At that point the making of the order becomes "automatic".

35. The first condition, read together with s. 99, requires that the offence committed outside the UK would have constituted a schedule 3 offence if it had been committed in any part of the UK. Section 98(1)(b) provides that a person against whom a N/O is made is subject to the same notification requirements for the notification period as a person falling within ss. 80 or 81.

36. Section 97 provides:

> "(1) A chief officer of police may, by complaint to any magistrates' court whose commission area includes any part of his police area, apply for an order under this section (a "notification order") in respect of a person ("the defendant") if—
>
> (a) it appears to him that the following three conditions are met with respect to the defendant, and
>
> (b) the defendant resides in his police area or the chief officer believes that the defendant is in, or is intending to come to, his police area.
>
> (2) The first condition is that under the law in force in a country outside the United Kingdom—
>
> (a) he has been convicted of a relevant offence (whether or not he has been punished for it),

(b) a court exercising jurisdiction under that law has made in respect of a relevant offence a finding equivalent to a finding that he is not guilty by reason of insanity,

(c) such a court has made in respect of a relevant offence a finding equivalent to a finding that he is under a disability and did the act charged against him in respect of the offence, or

(d) he has been cautioned in respect of a relevant offence.

(3) The second condition is that—

(a) the first condition is met because of a conviction, finding or caution which occurred on or after 1st September 1997,

(b) the first condition is met because of a conviction or finding which occurred before that date, but the person was dealt with in respect of the offence or finding on or after that date, or has yet to be dealt with in respect of it, or

(c) the first condition is met because of a conviction or finding which occurred before that date, but on that date the person was, in respect of the offence or finding, subject under the law in force in the country concerned to detention, supervision or any other disposal equivalent to any of those mentioned in section 81(3) (read with sections 81(6) and 131).

(4) The third condition is that the period set out in section 82 (as modified by subsections (2) and (3) of section 98) in respect of the relevant offence has not expired.

(5) If on the application it is proved that the conditions in subsections (2) to (4) are met, the court must make a notification order.

(6) In this section and section 98, "relevant offence" has the meaning given by section 99."

37. Sections 91A to 91F provide a mechanism for an individual made subject to notification requirements for an indefinite period (on domestic conviction or by N/O) to seek a review after 15 years have elapsed as to whether he should remain subject to those requirements. This was inserted into the Act to address the declaration of incompatibility made by the Supreme Court in *R (F and Thompson) Secretary of State for the Home Department* [2011] 1 AC 331 (SC) (see further below). These are the only provisions in Part 2 of the SOA 2003 which require an assessment of the risk of a person causing sexual harm (see *e.g.* ss. 91B(4), 91C(2) and 91D(1)).

38. Although the imposition of notification requirements on a qualifying domestic offender or on a person against whom a N/O is made does not depend upon an assessment of the risk of that individual causing sexual harm, he or she does as a consequence become subject to multi-agency public protection arrangements ("MAPPA") under ss. 325-7 of the Criminal Justice Act 2003 ("CJA 2003"). They enable designated experts to undertake a thorough assessment of risk, to share relevant information concerning the offender and to make risk management plans and carry out interventions as appropriate. The notification requirements under the SOA 2003 facilitate the operation of MAPPA. The guidance produced by the National MAPPA Team explains that, following risk assessment, offenders are managed at one

of three levels (1 to 3). The large majority are managed at the lowest level, level 1, which involves ordinary agency management.

ECHR and HRA

39. Article 8 of the ECHR 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."

40. Section 3(1) of the Human Rights Act 1998 ("HRA 1998") requires that "so far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights".

41. Section 4 of the HRA 1998 provides for specified higher courts to be able to grant a declaration of incompatibility:

> "(1) Subsection (2) applies in any proceedings in which a court determines whether a provision of primary legislation is compatible with a Convention right.
>
> (2) If the court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of that incompatibility."

42. Similarly, section 6 of the HRA 1998 provides for the duty of public authorities to act compatibly with Convention rights:

> "(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.
>
> (3) Subsection (1) does not apply to an act if—
>
> (a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or
>
> (b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions."

ISSUES

43. The Claimant's case comprised three main contentions. First, the Decision was disproportionate and contravened Article 8 of the ECHR. Second, section 97(5) of the SOA 2003 should be read in a way that is compatible with Article 8 of the ECHR. Third, if that is not possible, a declaration of incompatibility should be made.

44. The Commissioner resisted all three propositions. The SSHD resists the Claimant's primary argument, but asserted that if a violation of Article 8 were to be found, then no declaration of incompatibility should be granted as section 97(5) can be made to operate compatibly with the Convention.

45. Thus the Claimant says that there are three issues to be determined in this case:

(1) Whether the Decision was disproportionate and violated Article 8 of the ECHR;

(2) Whether, by reason of section 3 of the HRA 1998, section 97(5) of the SOA 2003 can be read so as so as to include the qualification "except in so far as such an order would be disproportionate and thus a breach of article 8"; and

(3) If it cannot, whether the court ought to make a declaration of incompatibility pursuant to section 4 of the HRA 1998.

Issue (1): Has there been any breach of the Claimant's Article 8 ECHR rights?

Claimant's submissions

46. The Claimant contends that the imposition of the relevant N/O constituted a disproportionate interference with his Article 8 rights. This was because, in accordance with section 6(1) of the HRA 1998, a proportionality analysis was required by law but was not conducted by either the Magistrates' Court or the Crown Court when respectively imposing and then upholding the N/O. Instead, the making of the N/O by the lower courts was "automatic", in that they applied the statutory criteria in a mechanical way, without regard to the individual circumstances of the Claimant.

47. Counsel for the Claimant, Mr Daw QC, submits that the following individual circumstances of the Claimant suffice to demonstrate disproportionality:

(1) The low risk of re-offending. This was demonstrated by evidence before the Commissioner, and positive evidence of his lack of risk in the 21 years since his conviction. He had not been convicted in relation to any sexual conduct occurring since September 1995; over 23 years ago.

(2) The length of time between the conviction and the N/O. Had a N/O followed his conviction, a 15 year period would have elapsed by 29th April 2013, nearly 6 years ago. The statutory scheme permits a review only after 15 years have passed from the date that the N/O is first made, rather than from the date of conviction. Thus, the Claimant would not be eligible for a review for 15 years from now, by which time he would be 75 years old, many years after the offence and conviction in question.

(3) The fact that the Claimant was already subject to "equivalent" notification requirements in France. This meant that the current N/O was unnecessary and duplicative. It also resulted in the Claimant being treated disadvantageously by comparison with an individual convicted before the domestic courts.

(4) The fact that the conviction had now been deleted from French records. This would create practical barriers to a review, as there would be no evidence of a conviction and the records available to the MPS would no longer demonstrate a valid conviction for the purposes of section 97.

Commissioner's submissions

48. Counsel for the Commissioner, Mr Beer QC, submitted that there are three necessary stages to the Claimant's assertion of a breach of his Article 8 rights:

(1) First, that prior to a N/O being made, the risk that the Claimant posed should have been assessed by the courts below through balancing the

proportionality of any interference with his Article 8 rights with the level of risk he is judged to pose.

(2) Second, that had those risks been assessed, the conclusion would necessarily have been that he posed no risk.

(3) Third, that making a N/O without those two steps being taken constituted a breach of Article 8 rights, since the interference could not have been proportionate as the Claimant posed no risk.

49. On the first stage, Mr Beer QC submitted that the Claimant has fundamentally misunderstood the purpose of the legislation. Risk assessment is not legally required *prior* to the imposition of a N/O. The very purpose of imposing a N/O is to allow those very risks to be assessed and managed. This was evidenced by: the pre-legislative history of the SOA 2003; the SOA 2003 itself; the interaction of notification requirements with Multi-Agency Public Protection Arrangements ('MAPPA'), as provided for in the CJA 2003; and the existence of more intrusive protective orders in the SOA 2003 which, by contrast to N/Os, explicitly require the police to prove that there is a risk. Further, Mr Beer QC submitted that it is not possible or realistic to expect the police to undertake a sufficiently reliable assessment of risk of any offender prior to the stage of applying for a N/O.

50. On the second stage, Mr Beer QC disputes that the conclusion of a risk assessment would necessarily have been that the Claimant posed no risk, for three reasons. First, the nature of the offence and the circumstances under which it was committed were severe. Second, the Claimant changed his name which had the effect of rendering him invisible to the police. Third, the Claimant failed to declare his previous convictions when travelling to the United States, and failed to declare his previous convictions, or his previous name, when applying for a firearms licence to the MPS on three occasions. Irrespective of whether that constituted a criminal offence, the refusal to cooperate with the law was concerning behaviour that was relevant to the assessment of risk.

51. Furthermore, it is now common ground between the parties that the only requirement in France with which the Claimant had to comply over a period of 23 years was notification to the police of an address there once a year. It is not suggested that any risk assessment was carried out during that period. There was nothing equivalent to the review which could have taken place in the UK after 15 years. The MPS objects to the admissibility of the new evidence produced at a late stage and which substantially post-dates the decision under challenge. But in any event, it does not materially assist the Claimant. The decision of the Court of Appeal in Aix-en-Provence merely treated the conviction in 1998 as rehabilitated for the purposes of certain records. It has not been quashed. A psychiatric report only appears to conclude that the Claimant is not suffering from a psychiatric disorder and is not "particularly dangerous". The "Liberty and Custody" judge was not impressed by the report in view of the Claimant's continuing denial of the offence. The Court of Appeal in France made no finding on risk or the report.

52. On the third stage, and for the above reasons, Mr Beer QC asserts that the Claimant fails at the first hurdle since no violation of Article 8 could be established. He also relies upon *R (Chester) v Secretary of State for Justice* [2014] AC 271 at [102] and *Secretary of State for Defence v Nicholas* [2015] 1 WLR 2116 at [19-24] and [28] for the proposition that the court should not address broader or "macro" issues, such as

whether a declaration of incompatibility is justified, unless the individual claimant demonstrates that he has suffered, or would suffer, a breach of the relevant human right himself.

SSHD's submissions

53. Counsel for the SSHD, Mr Mussa, supported the Commissioner's argument that the Claimant had failed to demonstrate a violation of Article 8, and had misunderstood the purpose of notification requirements.

54. Mr Mussa further cited a line of authorities that, in his submission, demonstrated that Article 8 does not require the consideration of the individual circumstances of a sexual offender before the imposition of notification requirements: *R (Forbes) v Secretary of State for the Home Department* [2006] 1 WLR 3075 (CA) at [17]; *Thompson* at [64]; and *Minter v United Kingdom* (2017) 65 EHRR SE6 at [51]-[58].

55. Mr Mussa confirmed that the ARMS risk assessment assessed the Claimant as having low risk and not no risk. The judgment reached was that the Claimant should be managed under MAPPA at level 1 (see paragraph 38 above).

Analysis

56. The main question raised by the Claimant is whether the automatic effect of s. 97(5) is contrary to Article 8 of the ECHR. It is common ground between the parties that Article 8 ECHR is engaged, and that the imposition of a N/O constitutes an interference with that right. The issue is as to breach.

57. In arguing that there has been a breach of Article 8 ECHR, the Claimant challenges the 'automatic' approach required of the magistrates' court when imposing N/Os, and the lack of attention to his particular circumstances. He seeks to persuade the court to answer two questions. First, before imposing a N/O, were the courts below required to conduct a proportionality analysis under Article 8 of the ECHR, that takes into account the individual circumstances of the sexual offender, in order to be compliant with the duty under section 6(1) of the HRA 1998. Second, if a proportionality analysis was conducted in the present case, which took into account the individual circumstances of the Claimant, would it have been disproportionate to impose an N/O?

58. The answer to the first question is no. The second question does not arise.

59. The Claimant's argument is circular. The Claimant seeks a proportionality assessment; however, a proportionality assessment would necessarily involve a risk assessment to be conducted by the court before the imposition of a N/O. As Mr Daw QC conceded in oral argument, the risk cannot be properly assessed unless and until a N/O is imposed.

60. The precautionary principle is engaged. By its very nature, a risk assessment - particularly in relation to sexual offending - involves a degree of uncertainty and a precautionary approach is justified. As Lord Malcolm in *Main v Scottish Ministers* [2015] CSIH 41; [2015] S.C. 639 explained when addressing a challenge to the lack of a review earlier than 15 years where notification requirements are imposed for an indefinite period;

> "It is apparent from Lord Phillips' discussion in *R (F (A Child))* that he recognised the uncertainties involved in risk assessments of serious sex

> offenders. This did not stop a declaration of the need for a review, but it remains a factor which supports the review being timed so as to allow consideration of the offender's behaviour over a substantial period while living in the community. In other words, a precautionary approach is appropriate."

61. As the Crown Court correctly pointed out at [13], the proportionality of notification requirements "must be judged primarily by reference to their general effects, rather than those on individuals". In *Re Gallagher* [2003] NIQB 26 (QBD), Kerr J, sitting in the High Court of Justice in Northern Ireland, rejected arguments that the automatic imposition of notification requirements breached Article 8. He said:-

> "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 those 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.
>
> 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."

62. The Court of Appeal in *Forbes* adopted Kerr J's analysis of what Lord Judge referred to as "the principles which underpin and justify the notification requirements" (see [17]).

63. Section 97(5) of the SOA 2003 makes it plain that "[i]f on the application it is proved that the conditions in subsections (2) to (4) are met, the court must make a notification order". This leaves no discretion for the lower courts to consider the individual circumstances of the sexual offender if the three conditions are satisfied, or to conduct a proportionality analysis.

64. The often-cited test for assessing whether an interference with a Convention right is justified was outlined by Lord Sumption at [20] in *Bank Mellat v HM Treasury (No 2)* [2014] AC 700. The four considerations in relation to the measure are "(i) whether its objective is sufficiently important to justify the limitation of a fundamental right; (ii) whether it is rationally connected to the objective; (iii) whether a less intrusive measure could have been used; and (iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community".

65. There is no dispute between the parties as to (i)-(iii). As Lord Phillips highlighted in *Thompson* at [18], "[t]he prevention of sexual offending is of great social value" and "has never been in doubt" (see also *Main* at [38]). Imposing notification requirements is also rationally connected to that objective: see *Thompson* at [18] and *Main* at [38].

66. With regard to a less intrusive measure, none was suggested by Mr Daw QC in oral submissions. Some system of monitoring and risk assessment is required, even after a sentence has been served, if potential victims are to be protected by the state: see *M v Chief Constable of Hampshire* [2012] EWHC 4034 (Admin) at [47]; and *Main* at [37]. It is worth highlighting, as the Lord Justice Clerk did at [37] in *Main*, that notification requirements "ought to be seen as the third, and lowest, level of general measures

applicable to this category of convicted offender". The statutory measures are "not uniform or 'blanket'" [38].

67. For the N/O in the present case, section 82 of the SOA 2003, read in conjunction with section 98, determines the length of the notification period. The length of the notification period is dependent on the length of the sentence imposed, and therefore, the seriousness of the crime. Further, the details of the notification requirements are limited to notification of certain specific information necessary to enable risk assessment and relevant action to be taken in response to identified risk.

68. Therefore, the essential issue to be determined concerns (iv): whether the 'automatic' imposition of a N/O strikes a fair balance. The case law which addresses the compatibility of notification requirements with Article 8 of the ECHR is clear that it does.

69. The case of *Thompson* (see above), which Mr Daw QC relies on, does not assist the Claimant. On the contrary, it supports the Commissioner's case. At [24] Lord Phillips said this:-

> "24. An appropriate starting point when considering the Strasbourg jurisprudence is the following statement of the Strasbourg court in *Stubbings v United Kingdom* (1996) 23 EHRR 213, 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."

70. The Supreme Court held that the absence of provision for a review of indefinite notification requirements, provided for in Part 2 of SOA 2003, was disproportionate and therefore gave rise to unjustified interference with Article 8 ECHR. However, as Lord Phillips emphasised at [41], the issue before the court was "a narrow one"; the challenge was "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".

71. In *Main*, the Lord Justice Clerk stated at [37] to [38]:-

> "37. ….. The notification requirements apply automatically on the occurrence of a specific judicially monitored event (i.e. conviction), but, once triggered, there is no judicial control until a review is due to take place. Lack of periodic review is not, however, unusual in relation to the imposition of penalties generally. In the absence of any prescribed procedure for an earlier review and, given the involvement of a court in the triggering event, there is no breach of Art 8 by reason of any lack of participation in the process of applying the requirements. They are either Art 8 compliant, on account of the prescribed review periods, or they are not.
>
> 38. ……In any event, the legislature is entitled to impose a general measure which applies to a pre-defined situation regardless of individual variations in circumstances (*Animal Defenders International v UK* (p 607), paras 106–110,

> Judge Bratza (concurring), para OI-4). The fact that hard cases are thereby created does not imply a violation of Art 8 (ibid). There is no basis for concluding that a less drastic measure would have the same impact than that selected in terms of reducing reoffending."

72. Lord Malcolm stated at [65]:-

> "The above factors justify not only the indefinite nature of the notification requirements for serious crimes, but also a 15-year delay in their review. The lifetime requirements are a tool for managing sex offenders, not for managing sex offenders whom the state can prove to be a risk to the public. For the person involved, it is the commission of a serious sexual offence which has triggered the consequences. The court has said that there is a need for a review bringing his or her particular circumstances into focus, but it by no means follows that a right of review must be exercisable at will, and as often as requested; this being the logical outcome of counsel for the reclaimer's submission that the requirements are incompatible with Art 8 if an individual is able to show that he poses no material risk."

73. Lord Drummond Young made observations to the same effect at [54] to [56].

74. We also note that in *R (M) v Chief Constable for Hampshire* [2015] 1 WLR 1176 at [28], the Court of Appeal agreed with the Divisional Court that the notification requirements and the provisions for assessing continuing risk form part of a single scheme for the protection of vulnerable persons from sex offenders and proportionality should be considered in relation to that scheme as a whole.

75. Following *Thompson* and the amendment of SOA 2003, the courts have held that where a person has committed a serious sexual offence so as to be subject to indefinite notification requirements, the continuation of such notification requirements, and of processes of monitoring, assessment and management, for a minimum period of at least 15 years without review, will not be disproportionate. This is despite the regime being 'automatic': as held in *Main* (see above).

76. The Strasbourg Court reached the same view in *Minter* at [51]-[58]. The court held at [56] that, having regard to "the recently added mechanism for reviewing the indefinite notification requirements after fifteen years", the interference with rights under Article 8 of the ECHR was justified.

77. For these reasons, in our judgment, the law is clear: the automatic imposition of N/Os by the courts is proportionate to the legitimate aims sought, and there is no breach of the rights enshrined in Article 8 of the ECHR by virtue of their automatic nature.

78. The same reasoning applies to s. 97 which mirrors the provisions dealing with domestic offences (ss. 80-82) for like offences committed abroad and which gives rise to the same requirements for notification and the MAPPA regime.

79. Sections 80-82 apply to "historic" sex offences, where a prosecution is not brought and a conviction obtained until many years later. The offender may sometimes be able to say that he has led a blameless life since the offending took place, in that he has not been convicted of any other sexual offences in the meantime, or even that none have been alleged. But the code laid down by the SOA 2003 is that the notification requirements shall apply nevertheless. The same holds good under s.97 for a person in the UK where the offence committed abroad was historic and the conviction recent.

80. For these reasons, we reject the Claimant's case that the notification requirements and the MAPPA arrangements for assessing and managing risk should not apply without there being an assessment of each individual's risk before he becomes subject to that regime. The requirement that he should become subject to notification so that (*inter alia*) ongoing monitoring and MAPPA risk assessment can take place involves the striking of a fair balance between, on the one hand, the Article 8 rights of the individual and the impact of the statutory requirements on him, and on the other, the state's obligation to protect vulnerable individuals and potential victims in society.

81. That balance is not materially altered by the point that if the conviction had been obtained many years ago, the notification period would already have expired. That argument completely overlooks the precautionary principle and the fact that the offender has not been subject to assessment and management in the community under the UK regime for a period determined by the seriousness of the offence.

82. The Claimant says that cases such as his are different because the offence occurred many years ago, this was an "historic" conviction and he has led a "blameless" life ever since. These points are of no substance. The authorities do not justify the drawing of any distinction between historic and recent convictions for historic offending as regards the lawful automatic operation of the notification regime. Nor logically could they, given the precautionary principle, the need to protect society from sexual offenders and the other matters to which we have referred.

83. In our judgment, therefore, the courts below were correct in their approach to s. 97 of the SOA 2003 and, having satisfied themselves that the statutory conditions were met, were right to order the imposition of a N/O on the Claimant without conducting a proportionality analysis, or further consider the individual circumstances of the Claimant. Indeed, it would have been contrary to the will of Parliament to have done so.

84. In the light of our conclusions on the law above, the second question posed by the Claimant does not arise. We would simply observe that the matters relied upon by the Claimant do not begin to justify even a *prima facie* argument that he must be considered as someone who it can be assumed represents no risk. On the contrary, his conduct in deceiving both the UK and US authorities over many years as to his lack of any notifiable convictions suggests the opposite. Further, and in any event, we agree with the submissions made on behalf of the MPS and the SSHD in so far as they are relevant to this aspect.

Other issues

85. For the same reasons, the Claimant's further arguments under ss. 3 and 4 of the HRA 1998, issues 2 and 3, do not arise

CONCLUSION

86. For the reasons above, this claim must be dismissed.