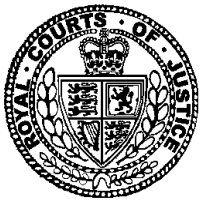

Neutral Citation Number: [2008] EWHC 3170 (QB)

Case No: CO/254/2008 CO/3568/2008

IN THE HIGH COURT OF JUSTICE
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/12/2008

Before :

LORD JUSTICE LATHAM
Mr Justice Underhill
Mr Justice Flaux

- -

Between:

The Queen on the application of F and Angus Aubrey Thompson	**Claimant**
V	
Secretary of State for the Home Department	**Respondent**

- -
- -

Hugh Southey (instructed by **Stephensons solicitors**) **for F**
PeteWeatherby (instructed by **Irwin Mitchell solicitors)** for **Angus Thompson**
Steven Kovats (instructed by Treasury solicitors) for the Secretary of State for Justice

Hearing date: 19 November 2008

- -

Judgment

Lord Justice Latham:

1. These two claimants were sentenced to periods of 30 months detention in the case of F and 5 years imprisonment in the case of Thompson. By reason of the nature of the offences which they have committed and the length of their sentences, they are subject to the notification requirements of Part 2 of the Sexual Offences Act 2003 for an indefinite period as a result of the provisions of s. 82 of the Act. The result is that they will remain on what is commonly known as the Sex Offenders Register for the rest of their lives. There is no statutory mechanism for review. Mr Southey on behalf of F, who was 11 years old at the time that he committed the relevant offences, and is still only 16, submits that one of the consequences of registration is a restriction on travel which is unlawful in that it interferes with rights protected by

Article 4 of the Council Directive 2004/38 ("The Directive"), alternatively that the effect of subjecting him to notification requirements indefinitely without the opportunity for review is a disproportionate interference with his rights under Article 8 of the European Convention on Human Rights, and that, accordingly, this court should make a declaration of incompatibility under s. 4 of the Human Rights Act 1998. Mr Weatherby, on behalf of Thompson, who is an adult, supports Mr Southey's submission that the lack of any mechanism for a review is a disproportionate interference with his Article 8 rights.

2. F was convicted of two offences of rape of a child under 13 and three offences of other sexual activity with a child under 13 on the 26th August 2005. He was sentenced on the 17th October 2005 to 30 month's detention under s. 91 of the Powers of the Criminal Courts (Sentencing) Act 2000 on each count to be served concurrently. He was granted leave to appeal against sentence; but his appeal was dismissed on 2nd February 2006. We have before us at the same time as this claim a further appeal against sentence on a reference by the Criminal Cases Review Commission which we will deal with separately. Thompson was sentenced to 5 years imprisonment in 1996 for, inter alia, two counts of indecent assault on his daughter. He was released on licence on the 10th April 2000 and the licence has expired. We have not been told his age; but he states that he is in poor health, having suffered a series of heart attacks.

Legislative History

3. Notification requirements were first imposed under s. 1(3) of the Sex Offenders Act 1997. The requirements were automatic on conviction, or for existing prisoners such as the claimant Thompson, on commencement; and this has been the uniform feature of the scheme ever since. No court has any power or discretion in regard to the matter. At that time the notification requirements were to inform the police of his name or any other name used, date of birth and home address within 14 days of conviction, to notify any change of the above details within 14 days, and to notify any address at which he will be staying for 14 days or longer, whether consecutively or in two or more visits during any 12 month period. Notification could be in person or in writing to the relevant police station; and breach of the requirements was punishable by a maximum of 6 months imprisonment or a fine.

4. The Criminal Justice and Courts Services Act 2000 reduced the initial notification time to 3 days, to enable the police to take fingerprints and a photograph, and introduced a new requirement that relevant offenders notify police if they intended to travel overseas in accordance with Regulations made by the Secretary of State. The maximum for breach was increased to 5 years.

5. Regulations were made pursuant to that Act which required that notification for travel should be made at least 48 hours prior to departure and must include the identity of the carrier, all points of arrival in destination countries, accommodation arrangements, and return date and point of arrival if known.

6. All these provisions were repealed by the Sexual Offences Act 2003 which replaced them with the scheme which is at present in force. It applies to all those sentenced to relevant offences both before and after its commencement. The present requirements are:

a. The initial notification of name, date of birth and home address or any notification of a change of details has to be completed within 3 days and the offender's National Insurance Numbers must now be given.

b. Notification is required of any UK address in which the person resides for 7 days or more, whether consecutive or not, within a 12 month period.

c. All relevant offenders must confirm their notified details annually.

d. Notification must be given in advance of foreign travel, and return to the United Kingdom in accordance with the requirements of the Sexual Offences Act 2003 (Travel Notification Requirements) Regulations 2004.

e. All notifications have to be made in person at a police station; and police may take fingerprints and photographs at initial notification and at any further notification, annual or otherwise.

7. The Regulations, together with s. 86 of the 2003 Act require an offender who intends to leave the United Kingdom for a period of 3 days or longer to notify the date on which he will leave the United Kingdom, the country to which he will travel and his point of arrival in that country and if more than one country his point of arrival in each such additional country, the identity of any carrier or carriers he intends to use, details of his accommodation for his first night outside the United Kingdom, the date upon which he intends to return and the point of arrival. Unless he has given a date of return and the point of arrival, and returns on that date and to the notified point of arrival, he must give notification of his return within 3 days of his return. If the offender knows more than 7 days before the date of his intended departure the information that he is required to disclose, he should give a notification of that information not less than 7 days before that date. But if he does not know that information more that 7 days before the date of his intended departure, he should give that information not less than 24 hours before he departs.

8. The travel notification requirements are a mechanism whereby the police can determine whether or not they wish to apply for a foreign travel order under s. 114 of the 2003 Act which entitles the Chief Officer of Police to make an order preventing the offender from leaving the United Kingdom, or restricting any destination to which he might go if it is necessary to do so for the purpose of protecting children generally, or any child, from serious sexual harm from the offender outside the United Kingdom.

9. As far as the length of time that notification requirements are to last, the periods are determined by the table in s. 82(1) of the 2003 Act. These claimants were sentenced to detention and imprisonment for terms of 30 months or more. The prescribed notification period is accordingly: "an indefinite period beginning with the relevant date". If the sentence is more than 6 months but less than 30 months, the notification period is 10 years. If the sentence is to imprisonment for 6 months or less the notification period is 7 years. If the person is cautioned for a relevant offence, the period is 2 years. By sub-section 2, where a person is under 18 the notification period of 10 years, 7 years, 5 years or 2 years are halved.

10. So far as F is concerned, it is relevant to note that by s. 5 of the Rehabilitation of Offenders Act 1974, the rehabilitation period is one of 5 years if a sentence does not exceed 30 months. Had he been an adult it would have been 10 years. Because his sentence exceeds 30 months, Thompson does not have the benefit of the provisions of that Act.

Common Ground

11. All counsel agree that the provisions of the 2003 Act of which we are concerned engage Article 8 of the European Convention on Human Rights. The notification requirements are a clear interference with the Article 8 rights of both F and Thompson; and it is agreed that the interference is in accordance with the law and pursues a legitimate aim, namely the prevention of crime and the protection of the rights and freedom of others: see Adamson v United Kingdom (1999) 28 EHRR CD 209. The question, in so far as the court is considering compatibility with the Convention, is whether the measures are proportionate, in other words no more than are necessary to achieve the objective: see R (Daly) v Secretary of State for the Home Department [2001] 2 AC 532, para 27 at page 547. Apart from this, the arguments differ in both claims, and need to be dealt with separately.

F

12. As I have already set out above, F committed the relevant offences when he was very young, and he is still a minor. Apart from the interference and inconvenience which necessarily follows from the notification requirements which I have identified, he makes two specific complaints. First, he complains that the travel notification requirements are unlawful in European Law and have already affected him in relation to a proposed family holiday in Spain. As to this, it should be said that the problem in this regard is more to do with the terms of his licence than the travel notification requirements. But clearly the arguments in relation to the validity of the travel notification requirements must be addressed nonetheless.

13. The second problem which he has had to face is that he wishes to play rugby league football. The Rugby Football League discovered that he had been placed on the Sex Offenders Register, and because of the offence of which he had been convicted, made a temporary suspension order precluding him from attending any training or matches involving children or young people under the age of 18. This is a good example, it is submitted on his behalf, of the very real problems faced by those placed on the Sex Offenders Register. That accordingly is a matter which will have to be considered when assessing the proportionality of the requirement to register indefinitely.

14. The argument relating to European law is one of pure construction. It involves consideration of European Union Directive 2004/38. The preamble makes it clear that the objective of the Directive is to secure the free movement of persons within the internal market, subject only to restrictions expressly provided for in the Directive and in the Treaty. Article 4 of the Directive states:

> "1. Without prejudice to the provisions on travel documents applicable to national border controls, all Union citizens with a valid identity card or passport and their family members who

> are not nationals of a Member State who do hold a valid passport shall have the right to leave the territory of a Member State to travel to another Member State.
>
> 2. No exit visa or equivalent formality may be imposed on the persons to whom paragraph 1 applies."

15. The Directive does, however, permit restrictions to be applied on grounds of public policy, public security and public health. Article 27 provides:

> "1. Subject to the provisions of this Chapter, Member States may restrict the freedom of movement and residence to Union citizens and their family members, irrespective of nationality, on grounds of public policy, public security or public health. These grounds shall not be invoked to serve economic ends.
>
> 2. Measures taken on grounds of public policy or public security shall comply with the principle of proportionality and shall be based exclusively on the personal conduct of the individual concerned. Previous criminal convictions shall not in themselves constitute grounds for taking such measures.The personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Justifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted."

16. Mr Southey's argument is quite simply that the travel notification regulations impose a formality equivalent to an exit visa and are therefore proscribed by virtue of Article 4. And the restrictions cannot be saved by Article 27 as they are not based exclusively on the personal conduct of the individual concerned, but are founded simply on previous criminal convictions, and in the claimant's case could not sensibly be based on any genuine, present and sufficiently serious threat he could be said to pose to one of the fundamental interests of society. He submits that in any event the restrictions are essentially based on considerations of general prevention.

17. I can see the force of the argument that notification requirements do not fall into the category of restrictions which are saved by Article 27. But I cannot accept that the requirement is a formality equivalent to an exit visa. An exit visa is based upon the premise that the person in question needs permission to leave the country. The visa is usually a document establishing that the person has got the necessary permission so that he or she merely needs to show it on departure and does not therefore have to establish his or her right to leave at the border. A person subject to notification restrictions does not require any permission to leave the country. The requirements impose no restriction on his or her leaving the country. The only restriction that could be imposed would be a foreign travel order under s. 114 of the Act which clearly would be a measure permitted by Article 27. I do not therefore consider that the travel notification requirement is unlawful by virtue of being contrary to the provisions of the Directive, and therefore contrary to European Law.

18. It seems to me, however, that the European Convention on Human Rights provides somewhat more fertile ground for the claimant. Mr Southey submits that whilst Adamson could be said to establish that the notification regime is, generally speaking, compliant with the terms of the Convention, and in particular does not breach an offender's Article 3, Article 7 or Article 8 rights, the court was not there concerned with the issues in the present case. The applicant in that case complained that the notification requirements in themselves infringed his human rights. F does not complain about the notification requirements. His complaint is that the requirements are indefinite, so that for crimes committed when he was 11 years of age, he is to be subjected to a regime which, although not punitive, would impinge significantly on his ability to lead a normal life, as exemplified, he says, by what has already happened, this regime will apply for the rest of his life without any opportunity for him to establish that he has changed in a way that means that the rationale for notification no longer applies in his case. That, Mr Southey submits, means that the requirement is a disproportionate interference with his Article 8 rights. That point was not the subject of any argument in Adamson. He points to the further anomaly which is that if F had received a sentence of less than 30 months his youth would have been recognised by a reduction in the notification period from 10 years to 5 years, and the further anomaly that his convictions will become spent in October 2010.

19. The courts have consistently approached consideration of measures which are to be applied to children on the basis that the immaturity of a child offender must be taken into consideration as being of prime importance. This recognises the fact that a child well may change as he or she matures so that any problems or dangers which may have been apparent at the time of the commission of the offence may ultimately no longer be present. That principle was recently applied by the House of Lords in the context of a child offender convicted of murder. The House considered that the tariff set for the period to be served before release on licence necessarily had to be kept under review: R (Smith) v the Secretary of State for the Home Department [2006] 1AC 159. Parliament must have had the same principle in mind in the present context when providing that the determinate notification periods under the Act should be halved in the case of offenders under the age of 18.

20. The analogy with sentences of detention during Her Majesty's pleasure is not exact, because even if the custody period requires review, the licence period is not subject to review. The offender remains subject to licence for the rest of his or her life. But the principle, namely that the measure imposed should reflect the fact that the offender is a child must, in my view apply by analogy to the notification requirements imposed on F. In the absence of authority, it is difficult to see how a lifelong requirement to register is proportionate. An offender who is on licence for life has his or her conditions periodically reviewed as a matter of course, and ultimately may well be on unconditional licence, in other words subject only to the risk of recall. He or she ultimately suffers little if any interference with Article 8 rights. If the question is whether the requirements, at least in the context of a child, are the minimum necessary to achieve the legislation legitimate objective, it seems to me that in the absence of an opportunity for review, the only answer must be no. Mr Kovats, however, on behalf of the Secretary of State submits that that answer is not open to us on the authorities. I turn therefore to those authorities.

21. The first case is Adamson. I already indicated that I do not consider that that case provides an answer. F does not complain about the regime of notification in itself, he complains about the fact that it contains no opportunity for review which, at least in the case of a child, is what renders it incompatible with Article 8. Adamson did not address that issue.

22. As far as cases binding on us are concerned, Mr Kovats has referred us to Forbes v Secretary of State for the Home Department [2006] 1WLR 3075. This case concerned the question of whether or not notification requirements were proportionate in a case involving child pornography. This case certainly established that as a matter of principle, notification requirements were a proportionate response in the case of an offender importing child pornography. Paragraph 15 of the judgment makes it plain that the argument was confined to a narrow point. It did not involve criticism of the notification provisions in appropriate cases, namely those of an offender who was convicted of any sexual offences, but it was submitted that it was disproportionate to apply those provisions to the offence in question. The issue was therefore directed essentially to the question of whether or not the automatic imposition of notification requirements, that is without any analysis of the particular offence or offender, was proportionate. Relying on passages in the judgment of Kerr J in In re an Application by Kevin Gallagher for Judicial Review [2003] NIQB 26 to which I will return, the court held that automatic application of the notification requirements was a proportionate interference with the offender's Article 8 rights.

23. That judgment was followed in a case which has more relevance to the present, H v The Queen [2007] EWCA Crim 2622. This was an appeal against sentence by an appellant who was 17 and a half years old at the time of sentence, which was an extended sentence of 5 years made up of a custodial term of 30 months detention and an extended period of licence of 30 months. Because he was sentenced to a term of 30 months, he was subject to the notification requirements indefinitely. Among the arguments put forward on behalf of the appellant in that case was the argument that the imposition of the lifelong requirement to all those, including those under 18 sentenced to a custodial term of 30 months or more "without differentiation based on gravity of offence, reflection of youth and capacity for change is disproportionate and offends Article 8 of the European Convention on Human Rights" (see paragraph 3). The thrust of the argument is set out in paragraph 19 of the judgment:

> "The alternative argument that Mr Owen advances on this topic is that the statutory length of the notification, in a case such as this, is disproportionate and in breach of Article 8. This time he seeks to challenge in this court the reasoning of the decision of the Court of Appeal Civil Division in Forbes v Secretary of State for the Home Department [2006] 1WLR 3075 which itself adopted the reasoning of Kerr J in In re Kevin Gallagher [2003] NIQB 26. He does not suggest that the court was necessarily wrong to conclude in that case that the measure did not violate Article 8 (accepting that the provision was engaged) but only that it is necessary to consider the individual case before reaching a conclusion on whether the measure is proportionate and so whether it is a violation of Article 8".

24. The court then went on to deal with the facts of the case, and concluded that by reason of the aggravating factors relating to the offence, and the concerns expressed about the risk of re-offending, an indefinite period was not disproportionate in that case.

25. Because of the reliance in both cases on In re Gallagher it is obviously necessary to look with some care at what that case decided. The applicant had been convicted of 3 offences of indecent assault at the Londonderry Crown Court, and was sentenced to a total of 33 months imprisonment. He fell to be dealt with in so far as notification requirements are concerned under the Sex Offenders Act 1997, which applied to Northern Ireland as well as England and Wales. The applicant argued that the notification requirements were in breach of Article 8. The basis of the argument was that the trial judge had no discretion to disapply or to alter the applicable period so that the applicant was prevented from arguing that in the particular circumstances of his offence the Act ought not to apply to him and the trial judge was likewise prevented from disapplying the notification provisions even where it was clear to him that these were unnecessary or inappropriate. Further, it was submitted that the imposition of a lifetime notification requirement without any possibility of a review was not Convention compliant.

26. The judge concluded that the proportionality of the measures had to be judged not by the impact of the measures on a particular individual, but by assessing whether the scheme as a whole went beyond what was necessary to achieve the aim of protecting the public and deterring sex offenders from engaging in further criminal behaviour. He stated that the court had, in answering that question, to recognise that Parliament had determined that the matters in question were indeed necessary to achieve the legislative purpose. The fact that other jurisdictions, and in particular Eire, had similar legislative provisions, but included the opportunity for review, did not help to answer the question. He considered that what he described as the absence of a dispensing provision was a relevant matter to be taken into consideration, but it could not in itself dictate the outcome of the examination of the scheme's proportionality. He went on:

> "23. It is inevitable that a scheme which applies to sex offenders generally would bear more heavily on some individuals than others. But for it to be viable the scheme must contain general provisions that will be universally applied to all who come within its purview. The proportionality of the reporting requirements must be examined principally in relation to its general effect. The particular impact that it has on individuals must be of secondary importance.
>
> 24. The gravity of sex offences and the serious harm that is caused to those who suffer sexual abuse must weigh heavily in favour of a scheme designed to protect potential victims of such crimes. It is important, of course, that one should not allow revulsion to colour ones attitude to the measures necessary to curtail such criminal behaviour. The scheme that interferes with an individual's right to respect for his private and family life must be capable of justification in the sense that it can be

> shown that such interference will achieve the aim that it aspires to and will not simply act as a penalty on the offender.
>
> 25. The automatic nature of the notification requirements is in my judgment a necessary and reasonable element to the scheme. Its purpose is to ensure that police are aware of the whereabouts of all serious sex offenders. This knowledge is of obvious assistance in the detection of offenders and the prevention of crime. If individual offenders were able to obtain exemption from the notification requirements this could – at least potentially - compromise the efficacy of the scheme.
>
> 26. By the same token the fact that the notification requirements persist indefinitely does not render the scheme disproportionate. Whilst this is unquestionably an inconvenience for those who must make the report, that inconvenience must be set against the substantial benefit that it will achieve of keeping the police informed of where offenders are living and of their travel plans so that further offending may be forestalled both by rendering detection easily and deterring those who might be tempted to repeat their offences."

27. It is clear that Kerr J did therefore have in mind the argument that the lack of any opportunity of review rendered the requirements disproportionate, and rejected it. But he was not dealing with a young offender and he was not confronted by the arguments that have been presented to us in the present case based upon the offender's youth. What he undoubtedly rejected was the proposition that the automatic imposition of the notification requirements was disproportionate. In other words, he concluded that Article 8 did not require a consideration of the particular circumstances of each offence and offender. That was the aspect of his decision which was approved by the Court of Appeal in Forbes and was considered by the Court of Appeal Criminal Division in H. But the argument in the present case is not predicated on the fact that the court did not consider the circumstances of the offender or the offence, nor is it predicated upon the absence of the opportunity for any review (which is the case in Thompson) which I deal with below. It is based on the argument that no opportunity for review is provided in the case of young offenders. That issue was not argued in any of the authorities to which we have been referred. It follows that there is, in my judgment, no bar to answering the question posed in paragraph 19 above, in the way that I then answered it. It may well be that any right of review should be tightly circumscribed in the public interest, both in relation to the burden and standard of proof and, maybe the length of time that should pass before any such application can be made. But I am satisfied that the absence of any such right of review amounts in the case of a young offender to a breach of Article 8.

28. Whilst there have been some half hearted attempts to determine whether or not the provisions could be read down so as to be compliant with the Convention, it seemed to me at the end of the argument that it was generally accepted that that could not be achieved without doing unacceptable violence to the statutory words. It follows that the only relief that we can grant is a declaration of incompatibility.

Thompson

29. Thompson's claim is based fairly and squarely on the proposition that the failure to provide a review mechanism in itself renders the statutory scheme incompatible with Article 8. Mr Weatherby accepts that In re Gallagher is persuasive authority to the contrary. But, he submits, we should not follow it, firstly because the notification requirements have become significantly more stringent since the judgment of Kerr J, but more fundamentally because, he submits, it is wrong. His point, put simply and firmly, is that Kerr J was wrong to say that the way the regime impacted on individuals is irrelevant to an assessment of the proportionality of the scheme overall. That, in his submission, negates the purpose of the European Human Rights Convention, and the Human Rights Act 1998. There must, in his submission, at least in some cases come a time when it is clearly disproportionate to subject an offender to the notification requirements. He has referred us to Buckley v United Kingdom (1997) 23 EHRR 101, where, in a different context, the court said at paragraph 76:

> "Indeed it is settled case law that, whilst Article 8 contains no explicit procedural requirements, the decision-making progress leading to measures of interference must be fair and such as to afford due respect to the interests safeguarded to the individual by Article 8."

30. He submits that imported into that principle must be a procedural safeguard to ensure that the notification requirement remains a proportionate response to any danger which the offender may have presented.

31. In this case, the defendant has provided substantial material exhibited to the witness statement of Jenny Cann, a senior research officer at the Ministry of Justice, which supports the view which, it is said, Parliament reflected, that the risk of re-offending over a long period of time is real, but so unpredictable that bearing in mind the serious consequences of the offending, an indefinite notification requirement is justified, and therefore proportionate. That material has been considered by a Doctor Craissati on behalf of the claimant who asserts that some, at least, of the material could justify the conclusion that there may well come a time when an offender poses no greater risk of committing a sexual offence than is presented by the ordinary population.

32. This material, and the views expressed by Jenny Cann and Dr Craissati have helped us to understand the very real problems in this area, and the scope for disagreement. It undoubtedly supports the general proposition that an automatic indefinite notification requirement is justified in the first instance. Indeed Mr Weatherby did not argue to the contrary. And, in my view, it is material which justifies, generally, the continuation of those requirements during the lifetime of an offender. Even if the material did show that there might come a time when offenders are no more liable to commit sexual offences than the general population, the reduction of the risk within that cohort could, in itself, be a proper justification for continuing the notification requirement. The real question, which is the one Mr Weatherby submits we need to answer, is whether an offender who can clearly demonstrate that he presents no risk, or no measurable risk of re-offending, should be precluded from

obtaining a review of the notification requirements. His Article 8 rights, he submits, have clearly been disproportionately affected.

33. The material we have suggests that it may well be very difficult for an offender to establish that he no longer presents any risk of re-offending. But I find it difficult to see how it could be justifiable in Article 8 terms to deny a person who believes himself to be in that position an opportunity to seek to establish it. There will necessarily have to be a debate about what an offender should have to prove in order to enable him or her to be discharged from the notification requirements and when he should be entitled to make any necessary application. Unlike Kerr J, I think, however, that as a matter of principle, an offender is entitled to have the question of whether or not the notification requirement continues to serve a legitimate purpose, determined. As the statutory scheme does not make such provision, I conclude that he also is entitled to a declaration of incompatibility.

Mr Justice Underhill

I agree.

Mr Justice Flaux

I also agree.