INTERNATIONAL SOCIETY FOR THE REFORM OF CRIMINAL LAW

27TH INTERNATIONAL CONFERENCE: CRIME AND PUNISHMENT – BACK TO THE FUTURE FOR SENTENCING AND CORRECTIONS REFORM

THURSDAY 25 JUNE 2014 – VANCOUVER, BC, CANADA

RISK MANAGEMENT IN THE COMMUNITY

"THE LIFELONG RESTRICTION OF SERIOUS OFFENDERS AND THE ROLE OF RISK ASSESSMENT IN SCOTLAND"

LORD CARLOWAY, LORD JUSTICE CLERK OF SCOTLAND[1]

This paper examines the role of risk management in the sentencing of serious offenders in Scotland, specifically in the context of preventative detention.

There is particular focus on the imposition of "orders for lifelong restriction", which have been the subject of recent judicial guidance in Scottish criminal appeal proceedings. Such orders may be imposed only where certain "risk criteria" are met, following a robust risk assessment process, and allow for a flexible approach to the management of offenders according to the level of continuing risk posed by them to the public at large.

The paper also considers the need for risk-based detention of offenders to meet the requirements of "lawful detention" in terms of Article 5 (right to liberty and security of person) of the European Convention on Human Rights.

1. Introduction

The subject of this paper is the lifelong restriction of serious offenders and the role of risk assessment in criminal sentencing in Scotland. It involves consideration of the legitimacy of a system that operates, albeit to a quite limited extent, on a model containing what some might describe as an element of preventative justice, not only in the sense of providing for the preventative detention of offenders after conviction, but also in the imposition of indeterminate sentences such that,

[1] I am grateful to my law clerk Jacqueline Fordyce for her work in preparing the drafts for this paper.

irrespective of an offender's release from detention, lifelong restrictions, including the possibility of recall to prison, may apply to him in the community for the indefinite future.

What is under consideration is the situation where a sentence not only takes into account the crime of which an offender has been convicted, but also anticipates and has regard to other crimes which it is predicted he would commit upon his release from custody were he to receive a conventional prison term. Does the sentence thereby reflect his status as a convicted criminal or as a suspected future criminal, or is it some hitherto unknown hybrid? There may be no difference between the two sentencing methods, since the traditional approach to sentencing does involve consideration of the need to protect the public from the risk of future offending. Nevertheless, this question has occupied the minds of judges in recent years in Scotland following the introduction, in 2003[2], of the "order for lifelong restriction" (OLR) into the range of available disposals.

The context is a jurisdiction involving a population of just over 5 million. There are about 100,000 convictions[3] annually in all courts. There are about 1,300

[2] Criminal Justice (Scotland) Act 2003, amending the Criminal Procedure (Scotland) Act 1995.

[3] See for more precise figures - Scottish Government : *Statistical Bulletin Crime and Justice Series : Criminal Proceedings in Scotland 2012-13* (26 November 2013) available at http://www.scotland.gov.uk/Topics/Statistics/Browse/Crime-Justice/PubCriminalProceedings.

convictions for violent or sexual crimes, including about 110 homicides[4]. Leaving murder out of the equation because it attracts a mandatory life sentence, there are about 300 sentences of four years or more. This is a very broad approximation of the number of convictions for serious violent or sexual crime. Over the last 5 years or so, the incidence of OLRs is about 18 per annum. Again, applying a very broad brush, it can be said that about 6% of serious sex of violent offenders may be given an OLR.

2. Orders for lifelong restriction

The OLR is "a sentence of imprisonment…for an indeterminate period"[5], which may be imposed in respect of persons who have been convicted of a sexual or violent offence. As with a life sentence, if the court does decide to impose an OLR it must fix a period, known as the "punishment part"; being the minimum period which the offender must spend in prison before being eligible for parole. This period is that which the court considers to be appropriate to satisfy the requirements for retribution and deterrence taking into account the seriousness of the offence, the offender's criminal record and but ignoring any period of custody which might be thought necessary for the protection of the public[6]. It will, because of the manner in which parole operates in Scotland, normally be fixed at between one half and two

[4] Murder, culpable homicide (manslaughter) and causing death by dangerous or careless driving

[5] 1995 Act, s 210F(2).

[6] Prisoners and Criminal Proceedings (Scotland) Act 1993, inserted by the 2003 Act, sch 1, para 1

thirds of what would otherwise have been a determinate sentence. About 60% of OLRs result in punishment parts of less than 5 years.

An OLR may be made only by the High Court of Justiciary, which in the superior trial court in Scotland, although this may be following upon a remit from the sheriff court[7]. The conviction need not be of a serious crime. It may be for a relatively minor offence[8] which, of itself, would not merit the imposition of such an order[9]. Recent examples from the full range of relevant offending have included a first offender convicted of stalking where there was no physical harm to the victim[10], theft[11], breach of the peace[12], various charges of assault, abduction and rape[13], offences relating to child pornography and child abuse[14], and attempted murder[15]. The only formal threshold that must be crossed, for an offender to become liable to a

---

[7] The sheriff may sit with a jury and has the power to sentence an offender to up to 5 years imprisonment. He may, if he thinks that his powers are inadequate, remit the offender for sentence in the High Court; eg if he considers that an OLR may be appropriate.

[8] *McCluskey v HM Advocate* 2013 JC 107, [2012] HCJAC 125, Lord Carloway, delivering the Opinion of the Court, at para 15. See, however, *James v United Kingdom* (2013) 56 EHRR 12, at para 195, regarding the need for a relationship of proportionality between the grounds relied upon and any sentence requiring detention.

[9] *McFadyen v HM Advocate* 2011 SCCR 759, [2010] HCJAC 120, Lord Reed, delivering the Opinion of the Court, at para 13.

[10] *Johnstone v HM Advocate* 2012 JC 79, [2011] HCJAC 66A.

[11] *McFadyen v HM Advocate* (*supra*).

[12] *M v HM Advocate* 2012 SLT 147, [2011] HCJAC 96.

[13] *Liddell v HM Advocate* 2012 SCL 846, [2013] HCJAC 86; *GWS v HM Advocate* 2012 JC 69, [2011] HCJAC 45; *MacLennan v HM Advocate* 2012 SCCR 625, [2012] HCJAC 94; *Haggerty v HM Advocate* 2013 JC 75, [2012] HCJAC 111; *Foye v HM Advocate* 2012 JC 190, [2011] HCJAC 94; *D v HM Advocate* 2014 SCL 352, [2014] HCJAC 17; *Munro v HM Advocate* [2014] HCJAC 40.

[14] *McCluskey v HM Advocate* (*supra*); *Strachan v HM Advocate* 2011 SCL 347, [2011] HCJAC 3; *McMillan v HM Advocate* 2011 JC 138, [2010] HCJAC 103.

[15] *Ross v HM Advocate* 2013 SCL 1054, [2013] HCJAC 111.

possible disposal by way of an OLR, is that he be sentenced in respect of a crime, other than murder[16], which is a sexual, violent or life endangering offence, *or* an offence "the nature of which, or circumstances of the commission of which, are such that… the [offender] has a *propensity* to commit any such offence" [17]. If either of the conviction or propensity criteria is met, the court is required to consider whether a "risk assessment order" (RAO) should be made in respect of the offender. The RAO is the gateway to the OLR regime. Just under 70% of cases, in which a RAO is made, culminate in a OLR.

A RAO *must* be made where the court considers that certain statutory "risk criteria" *may* be met[18]. The criteria are that:

> "the nature of, or the circumstances of the commission of, the offence of which the convicted person has been found guilty either in themselves or as part of a pattern of behaviour are such as to demonstrate that there is a likelihood that he, if at liberty, will seriously endanger the lives, or physical or psychological well-being, of members of the public at large" [19].

If, after the risk assessment process has been completed, those conditions are found to be met, then the court *must* impose an OLR[20].

The introduction of the OLR followed a review by the MacLean Committee[21] of the legislative framework for sentencing "serious violent and sexual offenders

---

[16] where a life sentence is mandatory.
[17] Criminal Procedure (Scotland) Act 1995, s 210B.
[18] *ibid* s 210B(2).
[19] *ibid* s 210E.
[20] *ibid* s 210F.

who may present a continuing danger to the public" and the range of disposals available to cater for the future management of such offenders. The Committee recommended the creation of a new sentence which provided for the "lifelong control" of such offenders, based on risk assessment, in order to establish a comprehensive sentencing framework which met the requirements of public safety[22]. It was recognised that some offenders may be regarded as "serious", although they had not yet been convicted of a serious act of violence or sexual crime, but that equally some offenders who had committed a serious offence may be at no higher risk of committing further offences than others who had not yet offended[23]. The gravity of the conviction was therefore only one factor which ought to be taken into account in the assessment of risk to public safety. A pattern of less serious offending could be equally relevant to establishing a risk of serious offending in the future[24]. On that basis, it was recommended that special sentencing considerations were necessary for persons "whose offence(s) or antecedents or personal characteristics indicated that they are likely to present particularly high risks to the safety of the public" [25]. The central question, however, was the extent to which it was possible to know which offenders presented a high risk of committing a serious offence[26]; the

---

[21] Report of the Committee on Serious Violent and Sexual Offenders laid before the Scottish Parliament by the Scottish Ministers, June 2000 (SE/2000/68)
[22] MacLean Committee Report (*supra*), p 2.
[23] *ibid,* paras 1.5 and 1.8.
[24] *ibid,* para 2.7.
[25] *ibid*, recommendation 1.
[26] *ibid*, para 2.1.

words "high risk" indicating both the severity and the likelihood of the future offending.

The MacLean Committee was particularly concerned to address the discretionary nature of life sentences for crimes other than murder. It was considered unsatisfactory that the court was not *required* "to impose on exceptional individuals an exceptional sentence which both marks the gravity of what they have done and provides an appropriate level of public protection, having regard to the risk that such individuals pose" [27]. The Committee recommended, therefore, that additional legislative provision should be made "for the lifetime control of serious violent and sexual offenders who present a high and continuing risk to the public" – that is, the "order for lifelong restriction" [28]. There was therefore to be no discretion afforded to the court once that level of risk was established.

Whilst it was recommended that there should be provision for offenders to be made "subject to the control of the State for the remainder of their lives"[29] where appropriate, it was also recognised that the scope of risk assessment was restricted to an offender's propensity to engage in certain types of offending behaviour in the future[30]. It was not possible to predict future acts with unerring accuracy.

---

[27] *ibid*, para 5.1

[28] *ibid*, recommendation 12. To give full effect to the proposed introduction of the OLR, the discretionary life sentence would no longer be competent in respect of offenders who met the criteria for sentencing by OLR (Report, para 6.18).

[29] *ibid*.

[30] *ibid*, para 2.2 and recommendation 16.

Nevertheless, what could be determined was whether there were reasonable grounds for believing that an offender presented "a substantial and continuing risk to the safety of the public *such as requires his lifelong restriction*" [31].

The application of the test justifying the imposition of an OLR, as it came to be formulated in the statutory risk criteria, presents significant challenges to any sentencing judge. It is for the judge to determine whether there is a *likelihood* that an offender will seriously endanger the public, as a question of fact, in light of judicial experience[32]. Taking a step back from the point of sentencing, then, the crucial procedural stage that informs the sentencing decision, namely the risk assessment, merits attention in greater detail.

3. The risk assessment process

The making of a RAO is a necessary, though not a sufficient, precursor to the imposition of an OLR. Given that the RAO is not, of itself, determinative of the sentence to be imposed thereafter, there is no right of appeal against the making of the order[33]. The RAO simply prompts the compilation of "a report as to what risk [the offender] being at liberty presents to the safety of the public at large" [34]. The risk assessment report must give the risk assessor's opinion on whether, in accordance

---

[31] *ibid*, para 6.5 and recommendation 17 (emphasis added).
[32] *Ferguson v HM Advocate* 2014 SLT 431, [2014] HCJAC 19, LJC (Carloway) at para 92.
[33] 1995 Act, s 210B(6). See, also, *Ferguson v HM Advocate* (*supra*), LJC (Carloway) at paras 85 – 90; *O'Leary v HM Advocate* [2014] HCJAC 45, LJC (Carloway), delivering the Opinion of the Court, at para 25.
[34] *ibid*, s 210B(3)(a).

with detailed guidelines, the risk of the offender being at liberty is classified as "high, medium, or low" [35]. In the end, however, it is the judge who must be satisfied, on the balance of probabilities, not that a particular level of risk is made out but that the risk criteria are met. There is no statutory requirement that only "high risk" offenders, as assessed in the report, meet the risk criteria[36]. The absence of such a requirement may not have been what members of the Scottish Parliament had envisaged when examining the legislation[37], but it is the import of the statutory provisions as enacted. An OLR may therefore be imposed upon an offender who is classified by the risk assessor as posing only a medium risk, if the judge takes a more pessimistic view of the prospects of reform. The same could not apply where there is a low risk categorisation, if the judge accepts the essence of the report that the offender has no long term or persistent propensity to endanger the public[38]

Before imposing an OLR the judge must have regard not only to the risk assessment report, together with any evidence given in support of the offender's

---

[35] *ibid* s 210C(3). See, also, the Risk Management Authority *Standards and Guidelines for Risk Assessment* (RMA Scotland, 2006, updated to 1 March 2013) published in terms of Criminal Justice (Scotland) Act 2003, s 5.

[36] *Ferguson v HM Advocate (supra),* LJC (Carloway) at paras 105 – 108; see, also, *M v HM Advocate* (*supra*).

[37] See *Ferguson v HM Advocate (supra),* LJC (Carloway) at para 17: "The statutory provisions (s 210B *et seq* of the [Criminal Procedure (Scotland) Act 1995], as introduced by the Criminal Justice (Scotland) Act 2003, s 1(1)) do not reflect the terms contemplated by either the MacLean Committee or the [Scottish Executive's] White Paper [Serious Violent and Sexual Offenders, 2001]. The statutory language is not the same as that used to explain the provisions in the course of the Parliamentary debates."

[38] *M v HM Advocate* (*supra*), Lord Carloway at para 11.

position if he challenges the content of that report[39], but also to any other information presented[40].

The compilation of the report is a significant undertaking, in terms of time taken to carry out the necessary investigations, the report's ultimate volume and the financial cost to the court service in meeting the professional fees of the forensic psychologists and psychiatrists who are accredited by the Risk Management Authority (RMA) to undertake such work. Taking a random sample of reports in the last few years, risk assessors have spent an average of 130 hours in the research and preparation of each report, at a cost of between £10,000 and £20,000, including travelling and other expenses. A completed report may be expected to run to some 40 or 50 pages, with a statutory *pro forma* title page[41]. The sentencing process itself requires several months from conviction to final disposal at a sentencing diet.

Ultimately, the risk assessor must simply conclude whether the offender is a high, medium or low risk to the public. However, the required depth of analysis is apparent from the RMA's definition of the relevant risk categories, and the wider standards and guidelines promulgated by the RMA in terms of its statutory duties to

---

[39] 1995 Act, s 210C(7).

[40] *ibid*, s 210F. The word "shall", which was contained in the original provision and deleted in error by the Management of Offenders etc (Scotland) Act 2005, is deemed still to exist by virtue of *Johnstone v HM Advocate* (*supra*).

[41] Act of Adjournal (Criminal Procedure Rules) 1996, Sch 2, Rule 19C.2 and Form 19C.2 (Form of report under Section 210C of the Criminal Procedure (Scotland) Act 1995).

promote effective practice, to prepare and issue guidelines, and to set and publish standards in respect of the assessment and minimisation of risk[42].

The relevant risk definitions, formulated by the RMA[43], are detailed and lengthy, but, for present purposes, they may be summarised. A "high risk" requires that the offender's behaviour indicates an "enduring propensity" seriously to endanger the lives or physical or psychological well-being of the public, with "problematic, persistent, pervasive characteristics" relevant to risk. The offender is "not likely to be amenable to change" or the potential for change with time and/or treatment is significantly limited, and there are few, if any, protective factors to counterbalance the offender's characteristics. A "medium risk" offender will display a "propensity" for similar endangerment of the public, with "problematic and/or persistent and/or pervasive characteristics" but there is reason to believe that he may be manageable or amenable to change. There is some evidence of protective factors and the offender has the capacity and willingness to engage in appropriate treatment. He may be sufficiently amenable to supervision, or has "other characteristics that indicate that measures short of lifelong restriction may be sufficient to minimise the risk of serious harm to others". A "low risk" offender "suggests a capacity" so to endanger the public, but there is "no apparent long term or persistent motivation or propensity to do so". The offender does not require

---

[42] Criminal Justice (Scotland) Act 2003, ss 4 and 5.

[43] The risk definitions are reproduced in the RMA's *Standards and Guidelines for Risk Assessment* (*supra*), Appendix A.

"long-term restrictions" in order to minimise the risk of serious harm to others. He can be adequately addressed by existing or available routine services or measures.

The current standards for risk assessment require, *inter alia*: a review of a wide range of relevant documents concerning the offender's social, criminal and medical background; the use of approved structured risk assessment tools; and the analysis of a multi-disciplinary collection of information from relevant professionals engaged in the management of the offender, whether in custody or in the community. The risk assessor will be provided with all relevant material from the trial proceedings, and may also consult other available psychological and social enquiry reports, prison and hospital or other medical records and education reports[44]. The risk assessor will spend a recommended minimum of 6 hours in face-to-face contact with the offender, on at least 3 occasions spanning several weeks. He has a discretion on whether it is appropriate to arrange interviews with the offender's friends and family, or with victims or witnesses. The final report requires to be prepared in accordance with a prescribed structure[45]. In advance of completion, the risk assessor should have arranged a final meeting with the offender in order to check the draft report for any factual inaccuracies[46].

The completed risk assessment report will comprise: an executive summary, the risk assessor's opinion on risk level (high, medium or low); a main body

[44] *ibid*, pp 16 – 17.
[45] *Standards and Guidelines for Risk Assessment* (*supra*), p 7.
[46] *ibid*, pp 12 – 13.

containing the wider context, analysis, conclusions and reasoning; and a supporting note of the underlying evidential bases[47]. The sentencing judge ought therefore to be able to approach his task of determining whether or not, ultimately, the statutory risk criteria are met and that an OLR must therefore be imposed with the benefit of a thorough analysis and explanation of the offender's risk profile[48].

4. Risk assessment and offender-focussed sentencing

The principle of risk-based sentencing is not new to Scotland. Since 1967, there has been provision for the supervision of offenders following release from prison on parole[49]. This came to be developed some years later into a system of conditional release and parole[50]. The new system introduced the "supervised release order" in respect of short term[51] prisoners, which allowed the court to specify a period of compulsory supervision upon release, if it was considered "necessary to do so to protect the public from serious harm" [52]. The maximum period of supervision for short term prisoners, however, was (and is) 12 months, irrespective of any predicted continuing risk of serious harm.

---

[47] *ibid,* pp 25 – 34.
[48] See, however, *Ferguson v HM Advocate (supra),* LJC (Carloway) at para 104.
[49] Criminal Justice Act 1967, Part III.
[50] Prisoners and Criminal Proceedings (Scotland) Act 1993; see, also, the Kincraig Committee Report on Parole and Related Issues in Scotland (February 1989, Cmnd 598).
[51] Less than 4 years
[52] *ibid*, s 14.

The introduction of the "extended sentence"[53] for long term prisoners[54] and all sexual offenders represented a significant development in the sentencing of serious sexual or violent criminals. The extended sentence allows for the imposition of a discretionary period of post-release licence, for up to 10 years beyond the custodial term in the case of a sex offender and up to 5 years in the case of a violent offender, where the court considers that "the period (if any) for which the offender would, apart from this section, be subject to a licence would not be adequate for the purpose of protecting the public from serious harm" [55]. By imposing an extended sentence, which has a minimum custodial element, the court can increase the period during which an offender might otherwise be on parole, and thus subject to supervision, with the prospect of his licence being recalled in the event of further offending or a breach of the licence conditions.

The reference to the prospect of "serious harm" is consistent in both the supervised release order and the extended sentence regimes. It came to be carried through into the provisions for OLR assessment , albeit in the slightly altered form of "serious endangerment" of the public[56].

There has undoubtedly been a shift of emphasis in recent times in the application of fundamental sentencing principles where serious future offending is predicted. In the modern sentencing process, there is unquestionably an increased

[53] 1995 Act, s 210A, introduced by the Crime and Disorder Act 1998, s 86.
[54] Four years or more
[55] *ibid*, s 210A(1)(b).
[56] *ibid*, s 210E.

focus on the assessment of the risk of such offending. This has two important consequences. First, the adoption of a risk-focused approach to sentencing inevitably leads to a greater concentration on the characteristics of the individual offender. The risk-focused approach in the particular circumstances of serious criminality thus coincides with the "offender-focused"[57] approach that is increasingly required of judges in the Scottish criminal courts. From the imposition of community payback orders[58] in respect of relatively minor offending, to the imposition of OLRs in respect of predicted serious offending, the range of available sentences is designed to be adaptive to the needs of the individual offender, assessed in the context of the interests of the wider community, with the courts operating alongside other mechanisms in the criminal justice system[59].

The purpose of sentencing is not only to secure the offender's rehabilitation, although that may be an important factor where a particular disposal might be thought to prevent or reduce the risk of re-offending. There is the critical need for the courts to afford adequate protection to the community against the risk of future serious recidivist behaviour. However, that need will be best served in the long term by concentrating on the needs of the offender. This offender focused approach merely recognises that tailoring sentencing to meet the needs of individual offenders

---

[57] See, for example, the MacLean Committee Report, para 1.5.

[58] 1995, s 227A. These are non-custodial disposals involving offender supervision (formerly probation) usually combined with conditions such as the payment of compensation, unpaid work/activity in the community, the attendance at programmes or for mental health, drug or alcohol treatment and residence.

[59] See, generally, the Management of Offenders etc (Scotland) Act 2005.

(the needs which should be addressed *in order to stop him offending*) also means meeting the need of the community *to stop him offending*. It is at the point of this coincidence of interests where the truly appropriate sentence can be most effective. In practice, this has come to include increasing recognition that imprisonment for a determinate period is often not the appropriate sentence in many cases. It is certainly not the only focus of sentencing in serious cases[60].

The second consequence of adopting a risk-focused approach to sentencing is the diminished concentration on the nature of the offence of which the offender has been convicted. Whilst not insignificant, the relative unimportance of the terms of the conviction broadens the range of disposals that may be open to the sentencing court. In the context of serious criminality, or rather *the risk of* serious criminality, the pool of offenders who may be eligible for disposal by way of indeterminate or lifelong sentences will differ from those previously made the subject of a discretionary life sentence. It is therefore vital, where an indeterminate or lifelong sentence may be imposed, to achieve clarity on the legal and evidential bases underpinning this type of sentencing disposal.

The proper application of OLRs in Scotland came to be analysed in some detail by the High Court of Justiciary, sitting as the criminal appeal court[61], a few

---

[60] See, for example, imprisonment of first offenders and young offenders as a last resort (Criminal Procedure (Scotland) Act 1995), ss 204(2) and 207(3), and the general presumption against short periods of imprisonment (*ibid*, s 204(3A)).

[61] The High Court is the only appellate court for criminal cases in Scotland except where a breach of the European Convention is alleged, in which case there may be a further appeal, with leave, on a

months ago. There having been no previous comprehensive analysis of the relevant statutory provisions, the court addressed two areas of potential ambiguity in the application of the risk criteria.

At the outset, it is crucial to appreciate that an OLR will not necessarily result in lifelong imprisonment[62]. It is not essential for the court to determine, before imposing an OLR, that an offender should be locked away permanently in order to avoid serious endangerment of the public[63]. This is so even although experience has taught that very few persons who are made the subject of an OLR are recommended for release by the Parole Board[64]. The "risk criteria" require only that there be a "likelihood" that the offender "if at liberty" will seriously endanger members of the public. In issuing its guideline judgment, therefore, the court's fundamental concern was the proper interpretation of the both concept of "likelihood" and the phrase "if at liberty" in the phraseology of the risk criteria.

The court emphasised that the likelihood of serious endangerment had to be assessed as at the time of sentencing, but that the assessment had to look forward to the point at which the offender would, *but for* the imposition of an OLR, be "at liberty". It would not do for a court to consider simply whether, at the point of

---

point of general public importance to the United Kingdom Supreme Court, on which two Scottish judges sit.

[62] See the analysis of statistical material in *Ferguson v HM Advocate (supra),* LJC (Carloway) at paras 25 – 26, in respect of rates of release from detention.

[63] cf Criminal Justice Act 2003, s 269(4); *Attorney General's Reference No 69 of 2013 (Ian McLoughlin)* [2014] HRLR 7, [2014] EWCA Crim 188 ("whole life orders").

[64] The offender in *M v HM Advocate* (*supra*) being a rare exception

sentencing, the offender would seriously endanger the public if he were to be immediately set at liberty. Were that to be the test, the incidence of OLRs would increase sharply[65]. Furthermore, it is necessary to distinguish the circumstances in which an OLR must be imposed from those situations in which a determinate or extended sentence[66] is appropriate. The application of the risk criteria, leading to the mandatory imposition of an OLR, must not circumvent the application of the broader sentencing regime in respect of those offenders who pose a continuing, but not an indefinite, risk to public safety.

The risk criteria contemplate the imposition of an OLR only where the offender, on the face of it, requires monitoring, of one sort or another, for the rest of his life. Given that the statutory context is liberty of the person, the court determined that the meaning of likelihood should be probability, in the sense of more likely than not[67]. Thus, the court must be satisfied, before imposing an OLR, not just that there is a substantial or real chance of serious endangerment of the

---

[65] *James v United Kingdom* (*supra*), para 9: "The consequence of the entry into force of the legislative provisions introducing IPP [imprisonment for public protection] sentences was that a large number of individuals were sentenced to an IPP sentence. Although it had been intended that the new provisions would be resource-neutral, it soon became clear that existing resources were insufficient and the large number of IPP prisoners swamped the system in place for dealing with those serving indeterminate sentences. 10…The IPP scheme was subsequently amended…to deal with the problems encountered."

[66] Criminal Procedure (Scotland) Act 1995, s 210A.

[67] In this context it was defined as "something that is likely; a probability"; following *Liddell v HM Advocate* (*supra*), Lady Paton, delivering the Opinion of the Court, at para [52].

public, but that such endangerment is more likely than not to happen or, put another way, that it will occur[68].

What the court has to determine, therefore, is whether it is likely that the offender will seriously endanger the public once at liberty, were he to be sentenced otherwise than by the imposition of an OLR. What the OLR legislation contemplated, when it was introduced, was the point at which an offender might be predicted to be "at liberty" under the pre-existing regime. The judge has to consider whether there is likely to be serious endangerment of the public at the hands of the offender at that future point. This anticipates the period after he would otherwise have been released from prison, albeit possibly subject to parole licence or extended sentence supervision. It also has firmly in mind the time at which the offender would have ceased to be the subject of such licence or supervision. This approach does not require a precise calculation of when the offender would have been likely to have been released, but for the imposition of an OLR, or an accurate prediction of his state at that time. Rather, it envisages the court assessing the *existing* risk posed *at the time of sentencing* and determining whether any custodial or post-release regime, short of an OLR, will have any material impact on that risk. If the judge considers that no material reduction of the risk will occur over time, he would be entitled to find that any likelihood of serious endangerment at the time of sentencing will, for practical purposes, be the same as that which will exist on release from custody.

---

[68] *Ferguson v HM Advocate* (*supra*), LJC (Carloway) at para 98.

Putting matters in a slightly different manner, the judge contemplating making an OLR is looking at the likelihood of serious endangerment when the offender is at liberty, but taking into account what he might achieve by way of rehabilitation whilst in custody and the predicted effects of post-release supervision. He has to bear in mind that, under standard (non OLR) sentencing regimes: first, rehabilitation programmes, including courses and treatment, cannot be forced upon an offender; and, secondly, any determinate period of post-release supervision will inevitably expire. If serious endangerment is regarded as likely at any point in what, but for the imposition of an OLR, would have been the offender's post-release future, an OLR *must* be made.

In arriving at his decision, the judge will, from his knowledge and experience, have in mind such general elements as the effects of maturity on recidivist conduct, the prospects of reform or rehabilitation as a result of programmes in prison and the effectiveness of post-release supervision under parole licence. The judge will also have the specific predictions and recommendations of the risk assessor in relation to the particular offender. However, the risk assessor's categorisation of an offender's risk profile as high, medium or low remains only as a tool for use by the sentencing judge. The judge may disagree with the risk assessor's categorisation, having regard to his own knowledge and experience or because he does not consider that the risk assessor's conclusion is supported by his analysis of the facts. Ultimately, the decision on whether the statutory test has been met remains that of the judge alone.

5. Public protection and the right to liberty – indeterminate sentences and the European Convention on Human Rights

The imposition of an OLR is necessarily subject to Article 5 of the European Convention on Human Rights, which enshrines, for Council of Europe countries, the right to liberty and security of the person and provides that no one shall be deprived of his liberty except in certain specified situations and in accordance with a procedure prescribed by law[69]. When it was recommending the introduction of the OLR, the MacLean Committee "firmly rejected the proposition of *pre-offence* preventative detention" [70]. It was noted that "the identification of people…currently at liberty but who, at some time in the future, might commit a crime of a serious violent or sexual nature" implied that "it might be followed by some form of preventive detention", with "profound" implications.[71] The Committee was addressing the prospect of people being so identified on the basis of personality disorders, and, quite understandably, rejected preventative detention on the basis of personality disorder alone[72].

It may be difficult to reconcile the rejection of preventative detention in those circumstances, with a recommendation in respect of others who may not have

---

[69] Art 5(1).

[70] MacLean Committee Report *(supra)*, para 10.36 (emphasis added), addressing the issue of personality disordered offenders.

[71] *ibid*.

[72] *Kalyanjee v HM Advocate* [2014] HCJAC 44, LJC (Carloway), delivering the Opinion of the Court, at para 82: "The appellant may have a PPD [Paranoid Personality Disorder]... However, many persons functioning in society have such a disorder yet they do not commit crimes of extreme violence. Its existence is not at all determinative of the critical issue of causality."

committed a serious offence. The only difference justifying risk assessment (and, potentially, indefinite detention) may be that an individual has entered the criminal justice system for other reasons. However, preventative detention as an element of sentencing is not unlawful as a generality. Article 5 of the European Convention permits "the lawful detention of a person after conviction by a competent court"[73].

(i) OLRs and the European Convention

So far, all appeals against OLRs have failed insofar as they have sought to argue that the relevant legislation contravenes Article 5. In a recent appeal[74], the offender argued that an OLR was "tantamount to a form of 'preventive detention'"[75] and, whilst such detention could be considered lawful in terms of the Convention, the relevant legislation was not sufficiently predictable to allow a potential offender to foresee that the offence could entail his preventive detention for an unlimited period of time[76]. The imposition of an OLR thereby contravened the offender's Article 5 rights. The court rejected this argument.

An order for preventative detention was regarded by the court as permissible under Article 5[77] subject to four important qualifications. First, there had to be a sufficient causal connection between the conviction for a specific criminal offence

---

[73] Art 5(1)(a).
[74] *Johnstone v HM Advocate* (*supra*).
[75] *Ibid*, Lord Drummond Young delivering the Opinion of the Court at para 11.
[76] *ibid* at para 20, citing *M v Germany* (2010) 51 EHRR 41 at para 104.
[77] *ibid* at para 21, citing *M v Germany (supra), Van Droogenbroeck v Belgium* (1982) 4 EHRR 443, and *R (James) v Secretary of State for Justice* [2010] 1 AC 553 (formerly known as *R (Walker)*).

and the deprivation of liberty by virtue of the order[78]. Secondly, any sentence amounting to preventative detention had to be in accordance with rules of domestic law that were sufficiently accessible, precise and foreseeable in their application to avoid all risk of arbitrariness[79]. Thirdly, the continuation of preventative detention required that the original objective of the sentencing court in securing public protection continued to apply following expiry of the minimum term of imprisonment fixed by way of a punishment part[80]. It was thus imperative that any element of preventative detention should be reviewed regularly by a body, such as the Parole Board, to ensure that the safety of the public continued to require detention of the prisoner. Fourthly, there had to be courses and training available to enable the prisoner to address, if he could, the risk factors that led to the sentence and to provide the Parole Board with evidence of the prisoner's developing condition. In the absence of any challenge under the first and second principles, the court held that the law provided sufficient protection under the third and fourth principles in the form of the application of the "risk criteria", the need for expert risk assessment, and the provision for regular review of the offender's continuing detention by the Parole Board.[81]

---

[78] *ibid* at para 21, citing *M v Germany (supra)* at paras 86 – 88, and *Van Droogenbroeck v Belgium (supra)* at para 39.
[79] *ibid* at para 22, citing *M v Germany (supra)* at para 90.
[80] *ibid* at para 22, citing *R(James) v Secretary of State for Justice (supra),* Lord Hope at para 12, Lord Brown at para 26, Lord Judge at para 121.
[81] *ibid* at para [24].

In England and Wales, analogous legislation has been the subject of a successful human rights challenge before the European Court of Human Rights[82]. In 2003, legislation was introduced, which took effect in 2005 subject to significant amendment in 2008, to provide for the sentence of imprisonment for public protection (IPP) [83]. The express priority was the protection of the public above all other traditional sentencing objectives, including the rehabilitation of offenders[84]. However, the decision of the European Court demonstrated that there remains a need to have regard to rehabilitation in the context of indeterminate sentencing. Following severe criticism of the IPP regime by the English courts in the same case[85], the sentence was abolished from December 2013[86]. Nevertheless, it remains instructive to consider the circumstances of its demise and the consequences, if any, for the ongoing OLR regime in Scotland and similar schemes elsewhere.

(ii) IPP and the European Convention

[82] *James v United Kingdom* (*supra*).
[83] Criminal Justice Act 2003, section 225, effective from 4 April 2005, and subsequently amended by the Criminal Justice and Immigration Act 2008, section 13.
[84] The prioritising of public protection in the sentencing of serious violent and sexual offenders appears to have followed the prevailing trend amongst jurisdictions furth of the UK at around that time – see the MacLean Committee Report *(supra)*, Annex 3.
[85] *R (James) v Secretary of State for Justice* (*supra*).
[86] Legal Aid Sentencing and Punishment of Offenders Act 2012, s 123; see the UK Government's standard note (SN/HA/6086) The abolition of sentences of Imprisonment for Public Protection.

Like the OLR, IPP was a sentence of imprisonment for an indeterminate period[87]. Unlike the OLR, IPP was to be imposed only following conviction of a serious offence[88]. The court had to impose IPP where "there [was] a significant risk to members of the public of serious harm occasioned by the commission …of further specified offences"; that is certain sexual and violent offences[89]. "Serious harm" meant "death or serious personal injury, whether physical or psychological" [90]. The assessment of the risk, or "dangerousness" as it was referred to elsewhere in the statute[91], involved very little by way of formal risk assessment. Rather, the court was expected to "assume"[92] the requisite level of risk from the terms of the conviction, unless it was "unreasonable"[93] to make such an assumption. The courts appear to have proceeded on the basis of standard pre-sentencing reports prepared by the Probation Service[94].

As a consequence of the amendments introduced in 2008, IPP ceased to be mandatory. The court was given a discretion on whether or not to impose such a sentence. It was entitled to do so only where the offender had previously been

---

[87] Criminal Justice Act 2003, s 225.
[88] *ibid*.
[89] *ibid*, s 225, unless imposing a life sentence.
[90] *ibid*, s 224(3).
[91] *ibid*, see cross-heading to s 229.
[92] *ibid*, s 229.
[93] *ibid*.
[94] The author must add the caveat that he is not qualified in English practice and procedure and this, and other parts of this section, may be inaccurate.

convicted of certain specified serious offences[95]. Significantly, the criteria for the assessment of dangerousness were amended by the removal of the presumption of risk. The IPP regime became subject to the general sentencing objectives, from which it had previously been excluded; that is to say the statutory requirement that the courts in England and Wales must have regard to certain particular factors, notably: punishment of offenders; deterrence; reform and rehabilitation; protection of the public; and reparation[96].

Ultimately, the success of the human rights challenge resulted from a perceived "lack of resources" within the prison system in the context of what was seen as "the introduction of draconian measures for indeterminate detention without the necessary planning and without realistic consideration of the impact of the measures" [97]. Following unsuccessful petitions for judicial review[98], three offenders applied to the European Court on the grounds that their continued detention under IPP orders, beyond the expiry of the designated punishment parts, was arbitrary and violated their rights under Article 5. The offenders were incarcerated in local prisons, where they could not obtain access to the necessary rehabilitative courses. Consequently, the Parole Board did not have the necessary up-to-date information on their level of risk to enable a proper assessment of whether their continued

[95] *ibid*, s 225(3A), as inserted by Criminal Justice and Immigration Act 2008, s 13(1).
[96] 2003 Act, s 142(1), as amended by the 2008 Act, Sch 26, para 64.
[97] *James v United Kingdom* (*supra*), at para 220.
[98] *ibid*, at para 210.

detention was justified[99]. The offenders were without an effective remedy in respect of the Article 5 violations, contrary to Article 13 of the Convention.

The European Court agreed that there had been a violation of Article 5(1) as a result of the detention of the offenders without any steps being taken to progress them through the prison system towards their release. Where detention was based solely on the risk to the public, it could be arbitrary, in the absence of special measures to seek to reduce the risk and thereby to limit the period of detention to that strictly necessary to prevent further offending[100]. A reasonable balance had to be struck between the applicant's right to liberty and the availability and efficient management of public funds[101].

The European Court was satisfied that "in cases concerning indeterminate sentences of imprisonment for the protection of the public, a real opportunity for rehabilitation is a necessary element of any part of the detention which is to be justified solely by reference to public protection" [102]. In the case of IPP sentences, specifically, the legislation was premised on the understanding that rehabilitative treatment would be made available to IPP prisoners, whether or not it was an express objective of the legislation.

6. Future human rights challenges?

[99] see Crime (Sentences) Act 1997, s 28.
[100] *James v United Kingdom (supra),* at para 194.
[101] *ibid.*
[102] *ibid,* at para 209.

Whilst there has been no successful challenge to the Convention-compliance of the OLR regime in Scotland, there may be further challenges in the future[103]. For example, the legislation provides not only for the offender's previous convictions to be taken into account in sentencing but also for the existence of "any allegation that [he] has engaged in criminal behaviour (whether or not that behaviour resulted in prosecution and acquittal)"[104] to be considered in the preparation of the risk assessment report. Where such allegations are taken into account, the report must specify each allegation, any additional evidence which supports the allegation, and any explanation of the extent to which the allegation and the evidence about it has influenced the risk assessor's opinion[105].

In another recent appeal[106], the High Court of Justiciary emphasised that there is no delegation of the sentencing task to the risk assessor; sentencing remaining a function of the court. The risk assessor's reliance on unproven allegations does not inevitably affect the sentence ultimately imposed by the court. In addition, the

---

[103] *Johnstone v HM Advocate (supra),* Lord Drummond Young, delivering the Opinion of the Court, at para 23: "…The decision in [*R (James) v Secretary of State for Justice* (*supra*)] makes it clear that the English equivalent of an order for lifelong restriction, an indeterminate sentence for public protection (imposed pursuant to section 225 of the Criminal Justice Act 2003), is capable of complying with article 5(1) provided that resources are made available to enable the prison authorities and the Parole Board to fulfil their responsibilities. The same approach would in our opinion apply to a Scottish order for lifelong restriction."

[104] *ibid*, s 210C(1).

[105] 1995 Act, s 210C(2).

[106] *O'Leary v HM Advocate* (*supra*), LJC (Carloway), delivering the Opinion of the Court, at para 23.

offender has the opportunity to challenge any unproven allegations[107]. Nevertheless, the court expressly reserved its position on the extent to which a judge may be entitled to take account of unproven allegations of criminal conduct in the sentencing process. Fortunately, that is an argument for another day.

It may also be necessary to give further consideration to the absence of provisions for the effective review of OLRs[108]. Whilst both an OLR and IPP constitute indeterminate sentences, only the OLR is intended to have effect, as the name suggests, for the remainder of the offender's life[109]. Provision was made for an IPP to cease to have effect[110], but no similar provision is made in respect of the OLR. Concerns were expressed, in response to the public consultation on the MacLean Committee's recommendations[111], about "the lack of effective procedures for challenging the ongoing validity of OLRs". It was suggested that "there should be a review mechanism with the possibility of the [OLR] being lifted if the person is no

---

[107] 1995 Act, s 210C(7).

[108] See, for example, *Ferguson v HM Advocate (supra),* Lord Drummond Young at para 135: "…the punishment parts have expired in a substantial number of cases. In these circumstances it is perhaps worth emphasizing that prisoners subject to OLRs must have their cases reviewed regularly, to ensure that continued custody is necessary to meet the objectives of the OLR. That is clearly contemplated by the terms and structure of the governing legislation, and it is … essential to ensure that the OLR does not become an unjustified form of preventive detention."

[109] *Ferguson v HM Advocate (supra),* LJC (Carloway) at para 94.

[110] Crime (Sentences) Act 1997, s 31A, (imprisonment or detention for public protection: termination of licences), inserted by Criminal Justice Act 2003, Sch 18. See commentary on section 225, Criminal Justice Act 2003 in Current Law Statutes, p 44 -221: "An offender sentenced to a term of imprisonment for public protection will remain on licence on release for at least the qualifying period of 10 years (see Sch.18), after which he may apply to the Parole Board for an order directing that his licence should cease to have effect."

[111] MacLean Committee Report on Serious Violent and Sexual Offenders, *Consultation Analysis* (June 2001), paras 62 and 64.

longer a serious risk" [112]. It was observed, however, that such measures would "significantly alter the purpose and form of the OLR, which was designed for lifetime control (although not necessarily lifetime detention)" [113].

There may be a degree of circularity in seeking to justify the lifetime control of offenders on the basis that the risk posed by them is such as requires lifelong restriction[114]. After all, even high risk offenders, as defined by the RMA[115], require a need only for "concerted long-term measures" and "long term monitoring and supervision" to manage the risk. This may be somewhat different from a predicted need for lifelong restriction. What must be considered is whether satisfaction of the risk criteria at the point of sentencing, albeit looking to the future, is sufficient to justify "life-long supervision"[116] of offenders irrespective of the outcome of any subsequent rehabilitation and review of custody by the Parole Board[117]. Whether or not it may be assumed that an offender's risk profile will diminish over time as a generality, the argument is that there may be a future point at which an individual offender will be subject to an OLR, and will remain so irredeemably,

---

[112] *ibid.*

[113] *ibid.*

[114] MacLean Committee Report *(supra)*, para 5.1 and recommendations 12 and 17.

[115] Risk Management Authority *Standards and Guidelines for Risk Assessment* (*supra*), Appendix A.

[116] MacLean Committee Report *(supra),* para 9.1.

[117] See, for example, the MacLean Committee Report, which recommended that a properly co-ordinated risk management process should be "dynamic" (para 2.39). At para 2.44: "The dynamic approach, continuing over time, assumes that a decision about risk should not be seen as a 'once and for all' event. Risk requires to be assessed at many stages… It is also important to be able to assess what may have changed in the presenting risk…"

notwithstanding that he presents no continuing risk to public safety. Of course, the OLR may have little or no practical effect in such circumstances. Nonetheless, the licence in terms of which he may be released from prison remains in force until his death[118]. The lack of any power to release the offender unconditionally[119], irrespective of his rehabilitation, may yet be the subject of criticism[120]. However, the obvious counter argument is that, were any such rehabilitation to have been considered a possibility, there ought not to have been an OLR in the first place.

7. Conclusion

The use of detailed risk assessment in the sentencing of serious offenders, such as has been developed and continues to develop in Scotland, is key to devising the most appropriate sentence for offenders and maintaining the most effective protection for the community. Significant resources are required to sustain extensive formal risk assessment procedures, such as those required under the OLR regime. However, such expenditure may well be justified in order to avoid significant future harm. That aside, there is much that can be done in the ordinary process of sentencing at the hands of experienced and open-minded judges. The future of

---

[118] Prisoners and Criminal Proceedings (Scotland) Act 1993, s 11(2): "Where a life prisoner is so released [on licence], the licence shall (unless revoked) remain in force until his death." By virtue of section 27(1) of the 1993 Act, "life prisoner" includes "a person…in respect of whom there has been made an order for lifelong restriction".

[119] cf 1993 Act, s 17(6): "A licence…,other than a licence of a life prisoner, shall be revoked by the Secretary of State if all conditions in it have been cancelled; and where a person's licence has been revoked under this subsection the person shall be treated in all respects as if released unconditionally."

[120] See, for example, *James v United Kingdom (supra)*, at paras 209, and 229 – 232.

sentencing and the safety of the community lies, in part, not with the risk assessors, but the judges, who must be encouraged to take the broadest possible view of the purposes of the sentencing process. The future of offenders lies, too, in the education and support of first instance judges, to enable informed and effective decision-making at the point of sentencing.

With the courage to contemplate the position of the individual offender, and the willingness to apply the knowledge increasingly gained from individual risk assessment, the courts might aspire to discovering the truly appropriate sentence in every serious case, for the benefit of all.

Lord Carloway
Lord Justice Clerk, Scotland
25 June 2014