Neutral Citation Number: [2013] EWHC 2492 (Admin)

Case No: CO/8641/2011

**IN THE HIGH COURT OF JUSTICE**

**QUEEN'S BENCH DIVISION**

**ADMINISTRATIVE COURT**

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 09/08/2013

**Before** :

**MR JUSTICE CRANSTON**

- - - - - - - - - - - - - - - - - - - - -

**Between :**

|  |  |  |
| --- | --- | --- |
|  | **R (on the application of Hassan Tabbakh)** | **Claimant** |
|  | **- and -** |  |
|  | **The Staffordshire and West Midlands Probation Trust****Secretary of State for Justice** | **Defendants** |
|  | **- and –** |  |
|  | **The London Probation Trust** | Interested Party |

- - - - - - - - - - - - - - - - - - - - -

- - - - - - - - - - - - - - - - - - - - -

**Phillippa Kaufmann QC and Ruth Brander** (instructed by **Birnberg Peirce**) for the **Claimant**

**Conrad Rumney** (instructed by **Staffordshire and West Midlands Probation Trust**) for the **First Defendant**

**James Strachan QC** (instructed by **Treasury Solicitors** ) for the **Second Defendant**

Hearing dates: 11 and 19 July 2013

- - - - - - - - - - - - - - - - - - - - -

**JudgmentMr Justice Cranston:**

Introduction

1. 1. This claim concerns a challenge to the process by which additional licence conditions were attached to the claimant’s licence on his release from prison. He is serving the non-custodial part of a seven year sentence imposed for an offence of preparing a terrorist act. He was released automatically on licence on 23 June 2011, having served half his sentence. The claimant contends that he had no meaningful opportunity to participate in the process when his licence conditions were determined and that this constitutes a breach of the procedural guarantees under Article 8 of the European Convention on Human Rights (the “ECHR” or “the Convention”). The claim was presented as a test case.
2. 2. The additional licence conditions imposed on the claimant’s licence were formally imposed by the Secretary of State for Justice (“the Secretary of State”), the second defendant, upon the recommendation of the Staffordshire and West Midlands Probation Trust (“the Probation Trust), the first defendant. In accordance with standard practice, the claimant’s offender manager while he was in prison proposed the conditions and provided these to the Governor of the prison as the representative of the Secretary of State. In deciding on conditions the Governor is guided by the Probation Trust, since it is responsible for undertaking the risk assessment which informs the licence conditions. The Governor does not normally add licence conditions beyond those requested by the Probation Trust or change the wording other than to ensure that the standardised wording from the prison and probation instructions is followed. If the Governor or other prison staff have information related to risk or specific concerns regarding the offender’s release into the community, this will be shared with the offender manager prior to the initial drafting of the conditions. Given his offending and the risks he posed, the claimant was one of the relatively small number subject to the Multi-Agency Public Protection Arrangements (“MAPPA”). His licence conditions were discussed at MAPPA meetings.
3. 3. This judicial review has been transformed since it was originally lodged in September 2011. As well as the procedure by which the licence conditions came to be imposed, which was Ground 4 of the claim, the claim as lodged challenged the licence conditions themselves. In particular, the claimant was objecting to conditions of residence in a probation hostel in Birmingham; electronic tagging; and reporting at 11am and 3pm every day, in addition to a curfew from 7pm to 7am. It was the claimant’s case that these conditions prevented him from accessing his preferred treatment for his post traumatic stress disorder, which was available in London but not in Birmingham. In addition, the claimant perceived his electronic tagging device to be monitoring his conversations, telephone calls and contacts. In the intervening period these conditions have either been removed or varied: the electronic tag was removed on 9 February 2012, and since 29 October 2012 the claimant has been able to travel to London to receive treatment from his preferred therapist. In light of these developments, the claimant no longer pursues his challenge to the original conditions. However, the claimant maintains his procedural challenge, Ground 4, by reference to Article 8 of the Convention. He has abandoned a similar claim under Article 6 of the Convention in the light of R (on the application of King) v Secretary of State for Justice [2012] EWCA Civ 376; [2012] 1 WLR 3602.

Background

1. 4. The claimant came to this country from Syria. He displayed symptoms of post traumatic stress disorder resulting from reported persecution and torture there. In 2008 he was convicted in the Crown Court at Birmingham of preparing a terrorist act contrary to section 5(1) of the Terrorism Act 2006. Three plastic bottles containing explosive materials were found at his flat along with handwritten notes in Arabic containing instructions for their use as improvised explosive devices. Translated lines in the Arabic notes with the bottles included statements such as “I pray that Allah would keep you safe and grant you success in your work for the sake of Allah”. When he was arrested he had recorded speeches of persons such as Osama Bin Laden. His defence at trial was that he had been preparing a firework. The jury clearly rejected that. As it turned out the standard of the chemicals which the claimant had obtained was not sufficient to make an improvised explosive device but was capable of making an incendiary device. In sentencing him the judge said that “the fault was in the quality of the materials and not the concept”.
2. 5. In prison the claimant was allocated an offender manager, Stephen Carmen, who is with the Probation Trust. (Mr Carmen was transformed into his probation supervisor after his release from prison). In mid October 2010 Mr Carmen completed an OASys risk assessment explaining that the claimant refused to address his offending behaviour and would not accept responsibility for it. He posed a high risk in the community and the risk was likely to be greatest if he were released without stringent supervision. The risk remained the same that it was at the point he was arrested. If he could not get his own way, or if he felt staff treated him inappropriately, he threatened self harm or suicide. He was not prepared to take medication for his psychiatric condition. He had a history of poor behaviour. The claimant was given a copy of this OASys assessment.
3. 6. Soon after the OASys assessment the claimant was referred to a Multi-Agency Public Protection Arrangements (“MAPPA”) meeting for management at level 3, which is the highest level of risk management. That was the first of sixteen meetings of the MAPPA panel held in Birmingham in October 2010 – May 2011 to discuss the claimant. MAPPA is explained further below but at this point it should be noted that the claimant’s offender manager, Mr Carmen, attended the meetings. There are executive summaries of those meetings. These show, first, that the claimant and his offending were considered. It was reported to the meeting that the claimant denied any terrorist activity. A diagnosis of emotionally unstable disorder was canvassed. At one point it was thought that the claimant would be deported, subject to his immigration appeal.
4. 7. Secondly, the MAPPA summaries show that there was discussion in the meetings in advance of his release on 23 June 2011 of the licence conditions which would apply to him. The claimant had expressed his wish to reside in London to be near a particular therapist at the Helen Bamber Foundation (“the Foundation”). That was reported at the MAPPA panel, which inquired whether the Foundation could supply him with accommodation. The Foundation failed to provide timely information and so inquiries were made about the availability of a specialist therapy service in the West Midlands. The panel noted that the claimant was continuing to self harm but that it was superficial and had decreased as his release date approached.
5. 8. It is evident from the executive summary that the claimant knew about the MAPPA process and made representations accordingly.

“It was evident that the prison staff had made [the claimant] aware of the fact he was discussed at MAPPA panel and [he] had asked staff about the MAPPA process. [The claimant] relayed to the panel in February [2011] that he wanted the panel to be aware he can become agitated. It was reported and noted that [he] was paranoid about being released to an Approved Premises as he thinks he will be killed by the Government. [He] is upset he is assessed as a risk to the community.”

It was confirmed to the May 2011 panel meeting that the claimant was aware of the MAPPA discussions about the release plans being made for him. At that meeting the impracticability of release to London was discussed in the light of the failure of the Foundation to provide information. Licence conditions for the claimant on his release were canvassed and agreed. In particular the panel considered that the licence conditions it agreed were necessary and proportionate to the level of risk of serious harm which the claimant posed. A smaller professional meeting of the panel was held in June when licence conditions were discussed again. That meeting noted that the claimant had been advised of the licence conditions and that a chaperone had been appointed for him on his release. In the latter part of May the UK Border Agency said that it would not attempt to deport the claimant.

1. 9. The visiting psychiatrist at HMP Woodhill, where the claimant was detained, Dr Jonathan Shapero, attended three of these MAPPA meetings. At the meeting on 23 May 2011 Dr Shapero said that the claimant would struggle with life in a hostel. Dr Shapero says that he also informed that meeting that if the claimant were required to wear an electronic tag as one of the licence conditions, it would probably be detrimental to his mental health. The chair of the MAPPA meeting recalls that Dr Shapero did raise the issue of the electronic tag, but only to comment that the claimant would not like having to wear it. The hostel where the claimant was to live was not fully secure, which was an important reason for the electronic tag. I note in passing that neither the Probation Trust nor the West Midlands MAPPA has an inflexible approach in relation to electronic tagging as a condition of a person’s licence.
2. 10. On 6 June 2011 Mr Carmen, the claimant’s offender manager, saw him at HMP Woodhill and discussed his release plans, in the event that he was not deported to Syria. (Mr Carmen says that he also explained that the claimant would be required to wear an electronic tag but the claimant asserts that he was not told this for another 10 days. In my view this factual dispute is of no relevance in the context of this claim). The following day, 7 June 2011, Dr JP Kenney-Herbert, a consultant forensic psychiatrist at the Birmingham and Solihull NHS Mental Health Trust, visited the claimant at the request of the Probation Trust to assess his potential mental health needs upon release. He reported his findings on 20 June 2011. He was likely to feel isolated in a hostel which would increase the risk of self harm. Meanwhile, on 14 June 2011 the Secretary of State had received confirmation that the Governor of HMP Woodhill had agreed the licence conditions which the Probation Trust recommended. The claimant’s licence thus included the following conditions:

“xvi Confine yourself to an address approved by your supervising officer between the hours of 7pm and 7am daily unless otherwise authorised by your supervising officer. This condition will be reviewed by your supervising officer on a monthly basis and may be amended or removed if it is felt that the level of risk that you present has reduced appropriately.

xvii Report to staff at Carpenter House, 33 Portland Road, Edgbaston, Birmingham at 11:00am and 3:00pm daily unless otherwise authorised by your supervising officer. This condition will be reviewed by your supervising officer on a monthly basis and may be amended or removed if it is felt that the level of risk you present has reduced appropriately.

xviii You must comply with such arrangements as may reasonably be put in place and notified to you by your supervising officer so as to allow for your whereabouts and your compliance with the curfew condition to be monitored (whether by electronic means or otherwise …

xix You must comply with such arrangements as may be reasonably put in place and notified to you by your supervising officer so as to allow for your whereabouts and your compliance of the electronic monitoring condition to be monitored....

xxiii Permanently reside at Carpenter House, 33 Portland Road, Edgbaston, Birmingham B16 9HS and must not leave to reside elsewhere, even for one night, without obtaining the prior approval of your supervising officer; thereafter must reside as directed by your supervising officer.”

On its face the licence provided for a variation or cancellation of the conditions.

1. 11. The day before his release from prison, 22 June 2011, the claimant’s solicitor, Sally Middleton, wrote requesting that the licence conditions be reconsidered. (She practices in the Prison Law department of Birnberg Peirce and has known the claimant since 2008 from his criminal trial.) They would increase the risk of self harm and violate his Article 8 Convention rights. In particular the condition requiring an electronic tag was not necessary or proportionate to manage the claimant’s risk (he could be monitored by hostel staff) and would cause his mental health to deteriorate and increase his risk of self-harm. The curfew would be monitored by staff at the hostel and so the electronic tag was wholly unnecessary. Its imposition seemed to be a policy decision without consideration whether it was necessary and proportionate. It would make it more difficult to develop an open relationship with his offender manager and his ability to associate in the community. The solicitors’ letter was accompanied by a letter from Dr Michael Korzinski of the Foundation, who said that the electronic tag would seriously affect the therapeutic process since the claimant would see it as a device to persecute him and listen to his conversations.
2. 12. On 8 July 2011 the Probation Trust replied that the licence conditions had been regularly reviewed by MAPPA and were considered to be proportionate for the early stages of the claimant’s release. The conditions would be reviewed at regular intervals, taking into account the risk that the claimant presented and also his health. The letter acknowledged the concerns raised about his mental state and the impact which the electronic tag would have on it. A transfer to London was possible, but reports from Dr Korzinski were still awaited. The claimant had been seen by local mental health services.
3. 13. The claimant was released from prison on 23 June 2011. At the time of his release he signed a form confirming that the licence conditions had been provided to him and the requirements explained. As a condition of his licence he lived in Carpenter House, which are approved premises.
4. 14. There was an OASys update of the claimant on 30 June 2011. Amongst other things it referred to the claimant’s inquiry on release whether he could have contact with two persons who had been convicted of terrorist offences. He had been an inmate with them at HMP Woodhill. His supervisor, Mr Carmen, explained to him that he could not, since a condition of his licence was that he should not knowingly contact anyone arrested or convicted of terrorism. Mr Carmen told the claimant that he had to be careful of those he associated with since he might place himself in breach of his licence. The claimant was also informed that the spirit of the condition was that he must not associate with people who had politically extreme views. The claimant was asked why, if he had no interest in terrorism or Islamic extremism, he was wishing to associate with people convicted of terrorist offences.
5. 15. Before the MAPPA meeting in July 2011 were reports on the claimant’s mental health, from West Midlands mental health services. There had been minor self harm. The meeting was told that the chaperone had gone well. However, the claimant did not like the electronic tag and believed that it was a bugging device. His long term aim was to relocate to London. A source of therapeutic advice in Birmingham had been identified.
6. 16. Dr Shapero had seen the claimant in mid-July. His medical report was dated 10 August 2011. The Secretary of State was sent a copy with the letter before claim dated 10 August 2011. Dr Shapero explained that the claimant suffered from post-traumatic stress disorder and that the only therapist the claimant trusted was Dr Korzinski. The claimant was severely troubled by the electronic tag, which he believed not only monitored his position but also his conversations. As a result he was in a state of constant anxiety which increased the likelihood of self-harm. “If matters remain unchanged, particularly in respect of the requirement for electronic tagging, I would have concerns that the risk of serious self harm or a suicidal attempt may rapidly escalate.”
7. 17. On 22 August 2011 the claimant’s supervisor, Mr Carmen, met him at Carpenter House - the hostel where he was living as one of his licence conditions - together with the hostel manager. Mr Carmen had been receiving regular reports from the hostel. In particular Mr Carmen wished to discuss Dr Shapero’s report. The claimant was asked about suicidal feelings and the extent of any self-harm. While initially the claimant would not cooperate, he did discuss the issues once it was explained to him that if the risk increased consideration would need to be given to placing him under increased observation. The claimant stated that his self-harm was superficial and he showed Mr Carmen that he had no visible cuts to his arms. He explained that his mood was variable but he was not feeling suicidal. He was happier in the community and was looking forward to a move to London. His faith was strong so that he would not kill himself.
8. 18. Amongst other topics the 9 September 2011 meeting of the MAPPA panel reviewed the claimant’s licence conditions. The panel agreed that the electronic tag was not indefinite but that it could not see any reduction in the risk he posed. He was still not engaging with local mental health services. The panel considered that the tag was required, given the high level of risk of further serious harm. The tag was an additional level of monitoring and also addressed the continued risk of the claimant absconding. However, the panel agreed that one of the daily curfews imposed on the claimant could be removed in order to test his compliance and responsibility for his own actions. The meeting noted that a request had been made to London Probation to see if they would consider a possible transfer. Inquiries had been made of the claimant’s preferred therapist in London, who had failed to reply with a treatment plan.
9. 19. That same day, 9 September 2011, these judicial review proceedings were issued in the Administrative Court.
10. 20. The October 2011 meeting of the MAPPA panel reviewed the requirement for an electronic tag but decided that it should remain. Dr Kenney-Herbert assessed the claimant again in November 2011. The claimant told him that he preferred Dr Korzinski as a therapist because of his political and human rights beliefs. Dr Kenney-Herbert considered that the claimant would benefit from counselling but that, in the absence of any detailed treatment programme from Dr Korzinski, services in the Midlands should be explored. The Probation Trust continued to seek further information from Dr Korzinski. On 13 December 2011 Dr Korzinski detailed his views about the claimant’s condition and treatment needs. He recommended two two hour sessions of therapy per week.
11. 21. The claimant was permitted to travel to London on 19 December 2011 to visit his solicitors. His reporting restrictions that day were relaxed. Ms Grewal replaced Mr Carmen as his offender supervisor in early January 2012 and from that time his engagement with the probation service seemed to improve. Following a MAPPA meeting on 13 January 2012, and in consultation with Dr Kenney-Herbert, the Probation Trust agreed to recommend that the claimant be permitted to visit London for the purpose of an assessment by Dr Korzinski. Permission was given but was later rescinded.
12. 22. A further OASys assessment in 19 January 2012 noted that the claimant had not made any further requests to contact the persons he had mentioned in the earlier assessment. However he still “denied committing his index offence and does not consider his lifestyle or associates to be a risk factor despite the above. Risk in this regard remains unchanged.” As well as maintaining his innocence, he refused to engage with local mental health services and did not take medication. He managed his self harm, which was not as frequent as in prison. The electronic tag he regarded as a bugging device. His risk in the community was still high.
13. 23. A MAPPA meeting in late January 2012 received information that the claimant was still discussing with his probation supervisor making fireworks/explosives. In February 2012 the MAPPA panel agreed to the gradual amendment of the curfew and to the electronic tag being removed. There had been no decrease in the claimant’s risk. However, these steps were to acknowledge that the claimant had complied with his licence conditions and were designed to test and monitor his risk. Moreover, he still denied his offending. At this point the claimant’s Risk Management Plan was outlined as follows:

“Continue to encourage [the claimant] to engage with local mental health and specialist providers; To explore assessment for Healthy Identity Programme; Licence conditions reviewed weekly; Request solicitors to encourage [the claimant] to engage in local treatment; Liaise with local housing providers; Continue to liaise with London Probation; Identify who will be in attendance at assessments at Helen Bamber Foundation; Complete ERG assessment.”

1. 24. As well as removal of the tag, the claimant began visiting Dr Korzinski in London. In late 2012 he said that he no longer wished to move to London. From January 2013 curfew conditions were removed, apart from a minimal night time curfew. In April 2013, with the assistance of the Probation Trust, the claimant moved from approved premises into a council flat in Birmingham. Conditions in respect of internet use were released after discussion by the MAPPA panel. In late April the claimant was warned after becoming abusive during a probation appointment.

The legal and policy framework

(a) Legislation

1. 25. Section 244 of the Criminal Justice Act 2003 (“the 2003 Act”) imposes a general duty to release fixed-term prisoners at the half-way point in their sentence. There are exceptions but none are relevant in this case. Release is automatic and not subject to a determination by the Parole Board. Under section 250 of the 2003 Act the licence for those released in this manner must be on the standard conditions prescribed by the Secretary of State. It may also include additional conditions of a kind prescribed. In exercising the power to prescribe standard conditions or additional conditions, section 250(8) provides that the Secretary of State must have regard to the following purposes of supervising offenders on licence: (a) protection of the public; (b) prevention of re-offending; and (c) securing the successful re-integration of the prisoner into the community.
2. 26. The standard and additional conditions the Secretary of State can specify are set out in the Criminal Justice (Sentencing) (Licence Conditions) Order 2005, 2005 SI No 648. Article 2 contains the standard conditions, Article 3 the additional categories of conditions which can be imposed. These additional categories are:

(a) a requirement that he/she reside at a certain place;

(b) a requirement relating to his/her making or maintaining contact with a person;

(c) a restriction relating to his/her making or maintaining contact with a person;

(d) a restriction on his/her participation in, or undertaking of, an activity;

(e) a requirement that he/she participate in, or co-operate with, a programme or set of activities designed to further one or more of the purposes referred to in section 250(8) of the Act; (f) a requirement that he/she comply with a curfew arrangement;

(g) a restriction on his/her freedom of movement (which is not a requirement referred to in sub-paragraph (f));

(h) a requirement relating to his/her supervision in the community by a responsible officer.

1. 27. Section 325 of the 2003 Act addresses the arrangements for assessing and dealing with the risks posed by certain offenders. This is the statutory basis for MAPPA. Under subsection 2 the responsible authority for each area has to establish arrangements for the purpose of assessing and managing the risks posed, inter alia, by persons who, by reason of offences committed by them, are considered to be persons who may cause serious harm to the public. The responsible authority for an area is defined as the chief officer of police, the local probation service and the Minister of the Crown exercising functions in relation to prisons, acting jointly: s. 325 (1). Under the section other relevant authorities join in, such as NHS Trusts. The Secretary of State may issue guidance to responsible authorities on the discharge of their functions under the section and responsible authorities must have regard to it: ss. 325 (8)-(8A).
2. 28. The Offender Management Act 2007 provides for the establishment of Probation Trusts. Section 9(2) spells out how individuals – such as an offender manager – are authorised to act on behalf of a Trust.

(b) Policy

1. 29. The first of three relevant policies (“the policy”) is contained in guidance to the probation service. At the relevant time Probation Instruction PI 07/2011 dealt with licence conditions. (Subsequently this was replaced by PI 20/2012.) PI 07/2011 was issued by the National Offender Management Service on 21 April 2011 and directed to Probation Trust contract managers, including offender managers. It reiterated the statutory aims of the licence period set out above and added that licence conditions should be preventive rather than punitive, and proportionate, reasonable and necessary. How they were to be monitored and enforced must be evident: [1.2].
2. 30. Under the heading “Mandatory Actions”, the Instruction stated that offender managers had to ensure that all licence conditions were necessary and proportionate to manage and/or reduce the risk of further offending of any nature. This would be determined by the offender’s identified risk factors, which in turn would be based upon previous offending: [1.5]. In MAPPA cases, six months prior to release offender managers had to contact the local police and the relevant victim unit and take into account discussions at MAPPA meetings, where applicable, to establish if there was a case for additional conditions to be inserted in the prisoner’s licence: [1.5]. Final responsibility for recommending licence conditions remained with Probation. A further mandatory action in paragraph [1.5] was as follows:

“Offender managers must explain each condition of the licence and consequences of the breach on the first occasion the offender reports following release from custody.”

1. 31. Under the instruction consideration had to be given to using the additional conditions including those in annex B for extremist offenders, if an offender manager concluded that the standard conditions were not sufficient to assist the offender’s successful integration into the community to prevent further re-offending and to ensure the protection of the public: [2.13]. Paragraph 2.14 of the Instruction explained that additional licence conditions might sometimes be proposed at meetings of the Multi-Agency Public Protection Arrangements (“MAPPA”) panel. It was for the offender manager to make requests for additional licence conditions as part of the risk management plan. An offender manager had then to decide, in consultation with senior probation colleagues, if the request for additional licence conditions was both necessary and proportionate to manage the offender’s risk: [2.15]. MAPPA meetings did not have the authority to set licence conditions, but their role was to make recommendations based on previous offending behaviour, criminal associations, victim considerations and any other community risk factor: [2.19].
2. 32. In respect of extremist offenders, paragraph 2.26 stated:

“Pre-release planning for extremist offenders should start with a multi-agency meeting at least six months before release. The MAPPA panel may recommend certain conditions based on the information that they have on the offender but it is up to the Offender Manager to decide, in consultation with senior probation staff, what conditions are necessary to manage the risk posed. Annex B sets out examples of the type of conditions that can be used to manage specific risk factors associated with extremist offending. They must not be used for other types of offenders.”

Extremist offenders included all those convicted of offences under terrorism legislation and those whose offending was known to be linked to extremist organisations or causes including, but not limited to, Al Qaida: [1.5]. As with additional conditions generally, the Annex B conditions were to be used only where they were necessary and proportionate. The Annex B condition included requirements prohibiting contact with particular persons, banning association (for example, attending particular meeting), restrictions on activity and supervision (notification of passports held and of an intention to apply for a new passport).

1. 33. Paragraphs 2.37-2.39 dealt with electronic monitoring. It was only available to those offenders who were considered a MAPPA level 3 case or a Critical Public Protection Case. Paragraph 2.40 was headed “Explanation of Licence Conditions”. It read as follows:

“2.40 When explaining licence conditions to offenders prior to release, staff must ensure that the offender understands any such conditions, this is particularly important with additional and bespoke conditions as they may contain complex or detailed requirements. In addition, staff must take into account any issues such as English as a second language, or learning disabilities that may prevent the offender from understanding completely what is required of them.”

1. 34. The second relevant guidance is for the prison service. In April 2011 the National Offender Management Service issued Prison Service Instruction PSI 34/2011 for staff in prison establishments dealing with release on licence. It was intended to ensure that prison staff were aware of standard licence conditions and the menu of additional licence conditions available to facilitate the effective management of risk in respect of offenders on licence. Governors were not to insert any additional conditions which had not been approved by an offender manager: [1.5].
2. 35. Thirdly, there is the guidance in relation to MAPPA issued under section 325(8) of the 2003 Act. In 2009 the National Offender Management Service issued version 3 of this Guidance. Section 4.8 referred to the offender’s role in the setting of licence conditions. The Guidance identified the critical contribution which offenders made to changing their behaviour. Measures which imposed external controls and prohibitions could provide an offender with clear and partly self-policing behavioural boundaries. Those boundaries could increase therapeutic benefits. The Guidance asserted that the human rights of offenders could never take priority over public protection. The Guidance continued:

“In particular, it is considered that the presence of an offender at a MAPP meeting could significantly hinder the core business of sharing and analysing information objectively and making decisions accordingly. Offenders and their representatives should therefore be excluded from MAPPA meetings. The offender should however be allowed the opportunity to present written information to the MAPPA meeting through their offence/case manager or for this person to provide information on their behalf. Offenders … should not become abstracted from the process of assessing and managing the risks they prevent. It is good practice for offenders to know that they are being managed through MAPPA, what MAPPA is and what this means for them.”

1. 36. Section 4.8 continued that engaging the offender in the reality of risk management could be very productive although that was not appropriate for every offender. Offenders should not only be seen as part of the problem but they could be a very important part of the solution in protecting the public. The responsible authority should ensure that

“there is a clearly stated mechanism for informing offenders, both before and after MAPPA meetings and that the information shared is fully recorded in minutes and case records.”

1. 37. Chapter 16 dealt with terrorist offenders. They should be considered for active management at levels 2 or 3 (see below). At least six months before release there had to be a MAPPA meeting to devise a risk management plan. Actions in the plan had to be proportionate to the level of the risk identified. There were relatively few terrorist offenders in the criminal justice system but their risks to the community were serious. The sharing of information between agencies was vital.
2. 38. The replacement MAPPA guidance in 2012, version 4, sets out the three levels of management: level 1, for the great majority of offenders, where information is shared, but MAPPA meetings are not required; level 2, where an active multi-agency approach and MAPPA meetings are required; and level 3, where senior representatives of the relevant agencies with authority to commit resources must also attend: [1.12] and [7.1-7.18]. As at 31 March 2012, 55,002 offenders were at level 1, 2123 at level 2 and 150 at level 3.
3. 39. Chapter 12 of the Guidance deals with risk management plans, which all MAPPA offenders must have and is a core function. All agencies must share relevant information: [12.1]. Crucial is what staff do with an offender. Risk management is not an exact science and it is not possible to eliminate risk entirely. Thus decisions have to be defensible and a risk management plan implemented and monitored through regular reviews and adjustments made to the plan as necessary: [12.2]. When an offender is identified as a MAPPA offender, the responsible authority has a duty to ensure that any identified risks are managed robustly and at the appropriate level: [12.3]. The Guidance provides:

“[12.16] … It is good practice for offenders to know that they are being managed through MAPPA, what MAPPA is and what this means for them … [12.7] It may be helpful to invite the offender to write down, or pass on, information for discussion at a level 2 or level 3 meeting, if he or she is aware of being managed at that level.”

1. 40. MAPPA meetings are dealt with in chapter 13. The Probation Trust must attend all level 2 and 3 meetings. In addition, where the Probation Trust manages the case, the offender manager responsible for the case must attend or, if unable to do so, must be represented: [13.3]. Under the National Offender Management Service “Offender Management Model”, the offender manager is the person with the overall operational responsibility for the offender and assesses the person’s risks, needs and potentials.

“[W]herever possible this should be done with the offender”.

The offender manager draws up the sentence plan.

“The process of formulating the plan should engage the offender as an “active collaboration… In collaboration with offender and resource providers, [the offender manager must] draw together assessment of individual, offending history, requirements of sentence, relevant policy priority requirements and resources available into single sentence plan.”

The offender manager ensures that arrangements are in place to deliver the plan, puts in place the punitive elements of the sentence and evaluates impacts. The offender manager will often become the offender’s probation officer on the offender’s release from prison.

1. 41. Under chapter 13 of the Guidance all agencies have to have a procedure for dealing with requests for the disclosure of the minutes of MAPPA meetings. No individual MAPPA agency has the authority to release confidential information at MAPPA meetings: [13.38]. Each request is to be considered on its merits: [13.39]. There are also restrictions on disclosing information to others under the Data Protection Act 1998, the Human Rights Act 1998 and European case law: [13.40].

Challenge to policy: the law

1. 42. The authorities recognise three bases on which a court can conclude that a government policy is unlawful. First, it is well established that a policy which, if followed, would lead to unlawful acts or decisions, or which permits or encourages such acts, will itself be unlawful: Gillick v West Norfolk and Wisbech Area Health Authority [1986] AC 112, esp. at 177E, 181F, per Lord Scarman, 193G-194B, per Lord Bridge. In his speech in that case Lord Bridge acknowledged that the decision constituted an extension of the court’s supervisory jurisdiction. Where, as in that case, a non-statutory publication was interwoven with questions of social and ethical controversy, Lord Bridge said that the jurisdiction should be exercised with caution: at 194B. Lord Templeman, in dissent, agreed: at 206F-G.
2. 43. Secondly, the House of Lords established in R (Munjaz) v Mersey Care NHS Trust [2005] UKHL 58; [2006] 2 A.C. 148 that in article 3 ECHR cases the test is whether a policy exposes a person to a significant risk of the treatment prohibited by the article (torture or inhuman or degrading treatment or punishment). That was a case where the policy in question operated in a high security hospital. Lord Bingham set out the significant risk test but said that he did not find it necessary to discuss the extent or probability of the risk or the extent to which it must be foreseen: [29]. He agreed with the judge at first instance that the policy had to be considered as a whole; that the policy, properly operated, would be sufficient to prevent any possible breach of the article 3 rights of a patient secluded for more than seven days; and that there was no evidence to support the proposition that the frequency of medical review provided in the policy risked any breach of those rights. Lord Hope approached the issue by asking himself whether the hospital’s policy gave rise to a significant risk of ill-treatment of the kind falling within the scope of the article, and if there was any such risk whether it would impose a disproportionate burden for the hospital to be forced to abandon its policy so as to eliminate it: [80]. Lord Scott agreed with Lords Bingham and Hope: [101].
3. 44. The House of Lords also held that the policy, properly applied, did not permit a patient to be deprived of any residual liberty to which he was properly entitled within article 5(1) of the Convention: [30], [86]. As to article 8, seclusion under the policy could not be said to involve an interference with a person's right to respect for his private and family life within it if it were properly used as the only means of protecting others from violence or intimidation and for no longer than necessary. In any event, the hospital's policy would be justified under article 8(2) as being in accordance with the law.
4. 45. The third basis on which a court can declare a policy unlawful is that laid down in R (Refugee Legal Centre) v Secretary of State for the Home Department [2004] EWCA Civ 1481; [2005] 1 WLR 2219. That was the challenge to a scheme for the fast-track adjudication of asylum applications at removal centres. In giving the court’s judgment Sedley LJ said that potential unfairness was susceptible to judicial intervention “to obviate in advance a proven risk of injustice which goes beyond aberrant interviews or decisions and inheres in the system itself”: [7]. The court then held that the fast track scheme was not inherently unfair or unlawful. Unacceptable risks of unfairness could be avoided if it was operated flexibly, and a written flexibility would provide the necessary assurance: [23].
5. 46. Silber J said that he would apply the test in Refugee Legal Centre in R (on the application of Medical Justice) v Secretary of State for the Home Department [2010] EWHC 1925 (Admin), [33]. He declared unlawful a Home Office policy allowing the removal of certain categories of persons from the United Kingdom without providing the standard 72 hours' notice. The challenge by the claimant NGO was to the policy itself, and not by particular claimants to the effect of the policy in their specific cases.
6. 47. In the Medical Justice case, however, Silber J also invoked what for present purposes can be described as a wider test of unacceptable risk. He said that the unacceptable minimum risk of unfairness referred to in Refugee Legal Centre did not mean that a policy would only be unlawful if it would necessarily give rise to interference with the right of access to justice, or that it would be impossible to operate such a policy without causing such interference. The “proven risk of injustice” had to depend on the consequences: [34]. Silber J then stated that Refugee Legal Centre showed that the policy could be declared unlawful if there is an “unacceptable risk” or “a serious possibility” that the right of access to justice of those subject to it would be or was curtailed: [36]. Silber J invoked in support the lower test of likelihood in Fernandez v Government of Singapore [1971] 1 WLR 987, a case involving a statutory test in extradition – if the policy or guidance envisaged or recommended conduct which would be in breach of the right of those subject to it to enjoy access to justice or if there was a “reasonable chance”, “substantial grounds for thinking” or “serious possibility” that the policy, if executed in accordance with its terms, would give rise to such breaches: [39]. He went on to hold that the policy was unlawful because there was a very high risk if not an inevitability that the long standing constitutional right of proper access to legal advice and to the courts would be infringed :[172].
7. 48. On appeal to the Court of Appeal one of the grounds of appeal advanced by the Secretary of State was that Silber J should have applied the test as stated by Sedley LJ in Refugee Legal Centre, [7], and not any wider test. Sullivan LJ (with whom Lord Neuberger and Maurice Kay LJ agreed) held that despite Silber J referring to a wider test, he had in fact applied the Refugee Legal Centre test, given what he had said at paragraphs [33] and [172] of his judgment (“very high risk if not inevitability”): see [2011] EWCA Civ 1710, [25]-[27]. Effectively Sullivan LJ did not support to the wider test which Silber J advanced in the course of his judgment in the Medical Justice case.
8. 49. The wider test was used in R (on the application of Suppiah) v Secretary of State for the Home Department [2011] EWHC 2 (Admin). That was a decision relating to the detention of failed asylum seekers and their children pending their removal. Wyn Williams J held that while the Secretary of State's policy relating to detaining families with children, properly interpreted, was lawful, the UK Border Agency had not applied it lawfully and the families’ rights under Articles 5 and 8 of the European Convention on Human Rights 1950 had been breached by their unlawful detention. As regards the lawfulness of the policy, the judge held that the claimants could not establish that the policy could not work lawfully in practice. Nor could they establish that there was such a risk of unlawful decision-making when the policy was applied. In the course of his judgment, Wyn Williams J cited Refugee Legal Centre and Medical Justice for the proposition that a policy which was in principle capable of being implemented lawfully, but which nonetheless gave rise to an unacceptable risk of unlawful decision-making, was itself an unlawful policy: [137]. However, Wyn Williams J did not have the benefit of the Court of Appeal judgment in Medical Justice, which came eleven months after he handed down his judgment.
9. 50. MK v Secretary of State for the Home Department [2012] EWHC 1896 (Admin) involved a challenge to the Home Secretary's blanket instruction to case workers which in broad terms meant that where failed asylum seekers renewed their asylum claims there would be a delay in their obtaining welfare support under section 4 of the Immigration and Asylum Act 1999. Foskett J held that the policy was unlawful because it “does involve a significant risk that the Article 3 rights of a significant number of applicants for section 4 support will be breached…[G]iven the test that a case like Munjaz requires to be applied, it seems to me clear that the instruction has to be characterised as unlawful”. As well as Munjaz, Foskett J invoked Wyn Williams J’s decision in Suppiah in the course of his reasoning, and referred to the latter’s reliance on Refugee Legal Centre and Medical Justice, without taking in the Court of Appeal’s decision in the latter: [154]-[156].
10. 51. My conclusion is that what I have termed the wider test - a policy giving rise to an unacceptable risk of unlawful decision-making - should be avoided. It did not have the support of the Court of Appeal in Medical Justice. Wyn Williams J’s decision in Suppiah was overtaken by the Court of Appeal decision in that case. Foskett J’s decision in MK is firmly based on Munjaz. What the authorities demand is that the policy must lead to unlawful action, or that there be a very high risk or an inevitability of that occurring (Gillick; the Court of Appeal in Medical Justice). To put it another way there must be a proven risk of unlawfulness, going beyond the aberrant and inhering in the system itself (Refugee Law Centre). In Article 3 cases there need only be a significant risk of unlawfulness flowing from the policy (Munjaz). The lower threshold where a policy raises Article 3 issues is justified because of the unqualified nature of the right that article confers.
11. 52. In my view these high thresholds are justified, first, for evidential reasons. Policies can have disparate impacts in practice and the overall impact will be difficult to gauge. These evidential difficulties may be more acute where challenges are brought to policies by NGOs and particular claimants are not involved. It is likely that Sedley LJ had evidential problems in mind when he referred in Refugee Law Centre to a proven risk of unfairness, which went beyond the aberrant but was inherent in the system. A risk inherent in the system will be more obvious than an unacceptable risk, or even a serious possibility, of unlawfulness. Secondly, there are institutional and constitutional limits to what the courts should determine. The executive is in daily touch with areas of administration; the courts will not have the same expertise to calculate how policies play out in practice and what their overall likely impact is. But the courts should adopt a high threshold for a more fundamental reason. Policy making and implementation is an imperfect business. Sometimes there will be a strong imperative to adopt a particular approach. Governments will not consciously adopt a policy they know leads to unlawfulness. For a court to strike down a policy because the risk of unlawfulness is “unacceptable” risks, in my view, going over the line. Especially with social and economic policies it has long being recognized that government is entitled to a wide margin of appreciation. The high thresholds I have identified in the case law recognise this.

Article 8 procedural requirements

1. 53. The concept of private life in Article 8 of the Convention has been given a broad interpretation to cover the physical and psychological integrity of a person and to protect the right to personal development and to establish and develop relationships with others: Pretty v United Kingdom(2002) 35 EHRR 1, [61]; R(Wood) v Commissioner of Police of the Metropolis [2009] EWCA Civ 414; [2010] 1 WLR123, [21]-[22], per Laws LJ. There is clear authority that Article 8 may be engaged in relation to the licence conditions of those serving the non-custodial part of a sentence of imprisonment: for example, R(Craven) v Secretary of State for the Home Department [2001] EWHC 850 (Admin) (licence condition imposing exclusion zone from where the offender’s family lived):[27]; R(Corbett) v Secretary of State for Justice [2009] EWHC 2671(Admin); [2010] HRLR 3 (licence condition requiring offender to participate in polygraph sessions with a view to monitoring his compliance with other licence conditions and improving the way in which he was managed during his release: [30]). In the analogous situation of R (BB) v Special Immigration Appeals Commission [2012] EWCA Civ 1499; [2013] 1 WLR 1568, the Secretary of State for the Home Department accepted that Article 8 rights were engaged by bail conditions imposing a curfew of 18 hours on a person whom she intended to remove from the United Kingdom.
2. 54. Consistent with general principle, however, in any particular case it is necessary to examine whether Article 8 rights are engaged in respect of the particular licence conditions under challenge. R(MA) v National Probation Service [2011] EWHC 1332 (Admin) involved a challenge to licence conditions imposed on an offender released at the halfway point of a 9 year sentence for two offences of rape, one offence of kidnapping and one offence of false imprisonment of his wife. The offender had not shown any remorse for what he had done, denied guilt, and refused to undertake any rehabilitative courses. The licence conditions prevented him from contacting his wife or members of her family and required him to stay away from Leeds and Bradford where they lived, to notify his supervising officer of any developing personal relationships with women and to live at a particular hostel with a 10 hour night curfew and to report every two hours during the day. He alleged that the reporting and curfew conditions infringed his right to liberty under Article 5 and his right to respect for private life under Article 8. Much of his case was that the conditions of the licence prevented him from working in the family business: [8], [23]. Keith J held that the effect of the conditions did not prevent him from working in the family business, but at most inconvenienced his participation in its affairs. Thus the level of interference had not attained the minimum level of severity as to have consequences of such gravity to engage the operation of Article 8: [28].
3. 55. In R (on the application of Gunn) v Secretary of State for Justice [2009] EWHC 1812 (Admin) stringent additional licence conditions were imposed on an offender following his release from prison. The Multi-Agency Public Protection Arrangements panel (MAPPA) had had regard to his criminal history and police reports detailing his involvement in organised crime. It assessed him as posing a real risk of harm to members of the public such that it was appropriate for him to be categorised at level 3 within the MAPPA guidance. The Secretary of State agreed with that assessment. Blake J held the assessment of risk was not for the court to make, but it was very much for the MAPPA panel: [29]. The interference with the offender’s rights under article 8 was in accordance with law within the meaning of article 8(2) and for a legitimate purpose. The conditions did not prevent him from having contact with his family.
4. 56. Although there is no mention of them in Article 8, the European Court of Human Rights has held that there are procedural rights implicit in its provisions. A leading decision is Turek v Slovakia (2007) 44 EHRR 43*,* where the Court said:

“The Court reiterates that, whilst Article 8 of the Convention contains no explicit procedural requirements, the decision-making process involved in measures of interference must be fair and such as to ensure due respect of the interests safeguarded by Article 8 (see Buckley v United Kingdom, no. 20348/92 §76, ECH 1996-IV).

In particular, the Court will examine whether the procedural protection enjoyed by the applicant at the domestic level in respect of his right to respect for his private life under Article 8 of the Convention was practical and effective (see, among many other authorities, Papamichalopoulos and Others v Greece …) and consequently compatible with that Article.”

1. 57. That case wasconcerned with the applicant’s unsuccessful attempts to challenge the authorities’ decision to register him as an “agent” of the former State security service. The consequence of his registration was that he was disqualified from holding certain posts in public administration. The court held that the registration process interfered with his right to respect for private life under Article 8. Under the domestic law he was required to establish that his registration was contrary to the rules. However, the rules governing registration were secret. In those circumstances, that requirement placed an unrealistic burden on the applicant. It did not respect the principle of equality and was excessive. “The applicant’s proceedings therefore cannot be considered as offering him effective protection of his right to respect for private life”: [113].
2. 58. What the Strasbourg court requires is that the decision-making process involved in measures of interference, when considered as a whole, must be fair and such as to afford due respect to the interests safeguarded by Article 8. Regard is to be had to the particular circumstances of the case, notably the serious nature of the decisions taken: R and H v United Kingdom (2012) 54 EHRR 2, [75] (involvement of biological parents in adoption). In particular circumstances it may be essential that the parties can access information relied on by the authorities to be able to put forward in a fair or adequate manner those matters militating in their favour: Dolhamre v Sweden [2010] 2 FLR 912, [116] (children taken into care after accusations of abuse, later withdrawn).
3. 59. These Strasbourg principles of effective participation in the decision-making process to protect Article 8 rights have been applied by the domestic courts: see H and L v A City Council [2011] EWCA Civ 403, [51]; Turner v East Midlands Trains Ltd [2012] EWCA Civ 1470; [2013] ICR 525, [42]-[45].
4. 60. What is required by way of procedure in any particular case turns on the extent of interference with those rights and the nature of the interests at stake: R (BB) v Special Immigration Appeals Commission [2012] EWCA Civ 1499; [2013] 1 WLR 1568, [52], per Lord Dyson MR. That is the same approach as the common law; the standards of fairness are not immutable. In a well-known passage in Doody v Secretary of State for the Home Department [1994] 1 AC 531, 560D-G, Lord Mustill made that point, identifying as factors the statutory background and the context of the decision. Fairness, he said, very often required that a person adversely affected by a decision have an opportunity to make representations on his own behalf “either before the decision is taken with a view to producing a favourable result, or after it is taken, with a view to procuring its modification, or both”. Lord Mustill added that since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests, fairness very often required that a person be informed of the gist of the case to be answered.
5. 61. R v Secretary of State for the Home Department, ex p Hickey (No 2) [1995] 1 WLR 734 involved circumstance where the Court of Appeal held that the Home Secretary should disclose information, and allow representations, before the decision was taken whether to refer the safety of a conviction to the Court of Appeal, Criminal Division. Simon Brown LJ referred to how, especially in a high-profile case which was likely to have attracted wide publicity, it was difficult to suppose the Home Secretary could remain as open-minded as if no clear decision had been taken, strive as he might to avoid becoming defensive and entrenched in his view: 744D-E.
6. 62. Bank Mellat v HM Treasury[2013] UKSC 39; [2013] 3 W.L.R. 179 was another case where the court required the party to have the opportunity to make representations before the decision was made. There the Treasury made an Order in Council containing a direction prohibiting transactions and business relationships with the bank in order to prevent facilitation of the production of nuclear weapons in Iran. In giving the majority judgment of the Supreme Court on this point, Lord Sumption said that prior consultation was demanded because the Order had the serious, possibly irreversible effect of depriving the bank of its English business; there were no practical difficulties in the way of an effective consultation exercise; and the direction was not based on general policy considerations, but on specific factual allegations of a kind plainly capable of being refuted, being for the most part within the special knowledge of the bank: [32], [37]. Lord Sumption accepted that prior consultation was not a requirement in every case: [36].

Procedural rights with license conditions

1. 63. The claimant’s central complaint is that under Article 8 of the Convention he should have been afforded an opportunity to have his views taken into account at the material stage of the decision-making process, namely the MAPPA meetings at which the additional licence conditions came to be selected. In particular fairness demanded that he should have been able to advance his objections about the impact that the proposed licence conditions would have upon him. This should have been a properly informed opportunity, such that he would have been in a position to make meaningful representations about the impact of the conditions on his mental health and his ability to access effective treatment for his severe post traumatic stress disorder. The failure to obtain and take into account his representations at the MAPPA stage means that the process did not ensure due respect for his interests safeguarded under Article 8. Thus the MAPPA panel was not in a position to make a properly informed assessment of the necessity and proportionality of the proposed conditions. The shift in Dr Shapero’s assessment of the impact of the electronic tagging condition before and after having discussed it with the claimant demonstrates the impact that taking account of the claimant’s representations could have had. The fact that licence conditions are subject to continuing review once the offender is in the community is no substitute for an opportunity being afforded to make meaningful representations before release. The purpose of subsequent reviews is to assess the continued appropriateness of the licence conditions in light of the offender’s conduct after release, not to revisit the original conditions.
2. 64. As a matter of principle it seems to me that the procedural rights contained in Article 8 can be engaged in fixing an offender’s licence conditions. What is required is an assessment of their nature and practical effect in each case. The requisite procedural rights are the very basic the law requires so that the offender is able to make meaningful representations. As Ms Kaufmann QC for the claimant conceded there is no need for the claimant’s presence or for oral representations, and there is no requirement for licence conditions to be fixed by an independent body such as the Parole Board. As well, in accordance with principle, the offender’s procedural rights must give way in certain circumstances such as urgency. Moreover, the impact which representations can be expected to have will be limited in an area such as this where the assessment of risks is, as Blake J said in Gunn, quintessentially one of judgment. Where offenders are considered to pose a significant risk of serious harm to the public, those convicted of terrorist offences being a paradigm case, the restrictions liable to be imposed on them on licence will likely be very severe indeed, including most if not all the available additional conditions, and applied very strictly.
3. 65. At one point the Secretary of State submitted that since early release subject to licence conditions is a significant advance in an offender’s private life, Article 8 may not be engaged in particular cases. Certainly in some cases – R (MA) [2011] EWHC 1332 (Admin) is an example – Article 8 will not be engaged. However, that cannot detract from the finding of the other authorities mentioned earlier in this judgment that Article 8 is engaged with the fixing of licence conditions. The Secretary of State also seemed to suggest that the logic of the claimant’s position was that he should be challenging all conditions, not just the three conditions set out in his statement of claim. Thus the curfew conditions were especially onerous and should also have been challenged, if there was to be an Article 8 attack. In my view with standard conditions the assessment of necessity and proportionality has been struck by Parliament for all relevant offenders. By contrast additional conditions require an individualised exercise of judgment, where issues of procedural fairness arise. Then it was said that the MAPPA panel is not the decision maker, to which Article 8 procedural requirements apply. Rather, the offender manager makes recommendations to the Secretary of State’s representative, the prison governor, who actually decides on the conditions. That in my view overlooks the reality of the system, that recommendations originate from MAPPA meetings, with the offender manager as a participant, the offender manager then making recommendations to the prison governor, who is unlikely to go behind the assessment of the MAPPA panel.
4. 66. So Article 8 conferred on this claimant the basic procedural right to make meaningful representations about the additional conditions in his licence. It seems to me that in the circumstances of this case the procedural requirements were satisfactorily met. Here the claimant’s concerns were on the table at the MAPPA meetings. The offender manager, with overall responsibility for overseeing the claimant’s sentence, attended these meetings and fed in the claimant’s perspective. The claimant’s self harming and his threats of suicide were well known during his time in prison and a feature of discussions at the MAPPA meetings. It was also known that the self harming was superficial and that it and the suicide threats could be used if the offender did not get his own way.
5. 67. The MAPPA panel knew well in advance of the claimant’s release of his desire to be treated by Dr Korzinski at the Foundation and the implications for that of his living in London. The Foundation had no accommodation and there was considerable delay in its replies to questions raised by the authorities. (This is no criticism of Dr Kolinsky; no doubt as a charity the Foundation is hard pressed.) Dr Shapero, who attended three panel meetings, had made clear to the MAPPA meeting a month before the claimant’s release that the claimant would be unhappy with the electronic tag. At the latest the claimant himself knew of the electronic tag a week before his release (on the Secretary of State’s case, almost three weeks before his release). Admittedly Sally Middleton’s letter was written a day before his release, and therefore after the prison governor had approved the additional conditions. She said that the electronic tag would affect the claimant’s mental health, albeit quoting Dr Korzinski’s more general point that the electronic tag would interfere with the therapeutic process.
6. 68. It is not in the least surprising that in the preparation for his release, whatever objections the claimant raised relevant to the additional conditions they would be substantially discounted. The reality was that this claimant had committed terrorist offences. He refused to engage in rehabilitative work in prison. Nor would he accept responsibility for his offending. His OASys assessments, which had been given to him, were that he posed a high risk of harm in the community. Obviously he would be subject to the most stringent additional conditions in his licence. With this as background, and the security problems in the hostel where he would live, the electronic tag was in my view an obviously proportionate response.
7. 69. The imposition of conditions was not set in stone. The MAPPA process was a continuing process, beginning well before his release and involving some sixteen meetings over a twenty-one month period. After her letter of 23 June, Sally Middleton pursued his case tenaciously, making a considerable number of representations about the licence conditions. And the licence conditions were varied over time. Thus the offender’s reporting and curfew requirements were relaxed. Eventually, in February 2012, the electronic tag itself was removed. By 29 October 2012 the licence conditions were varied so that the claimant could visit Dr Kolinsky in London. When finally it was agreed that the claimant could move to London he decided he would prefer to remain in the West Midlands, where the Probation Trust assisted him to find a council flat. The reality in this claimant’s case is that his Article 8 procedural rights were satisfied.

Policy

1. 70. Ms Kaufmann QC opened her oral argument with a challenge to the policy. In her submission it was unlawful, since it created an unacceptable risk of breach of Article 8 of the European Convention on Human Rights (“ECHR” or “the Convention”). In her submission she could succeed in showing that the policy was unlawful, even if on the facts of this claimant’s case she lost. The facts gave the claimant the standing to bring the case, but engagement with the policy demanded examination of cases across the spectrum.
2. 71. While the Article 8 aspect of the case was obvious from the grounds and skeleton argument the challenge to the policy was not. Combing the bundles produced occasional references to the issue. Mr Strachan QC for the Secretary of State and Mr Rumney for the Probation Trust said that they were caught unawares. Nevertheless, I allowed Ms Kaufmann QC to develop her submissions. The hearing had to be adjourned for a week, which gave the defendants’ counsel the opportunity to work up their arguments. In the event they focused on the Article 8 issue although Mr Strachan QC relied on R (Munjaz) v Mersey Care NHS Trust [2005] UKHL 58; [2006] 2 A.C. 148 as regard the threshold for a finding of unlawfulness as regards the policy and his submission that the claimant could not succeed in this regard.
3. 72. Ms Kaufmann QC submitted that the policy regarding licence conditions would not result in a fair procedure in Article 8 cases in that it did not spell out the duty to allow representations. For the purpose of assessing whether there was a risk that the policy would result in illegality, in her submission it was necessary to hypothesise the full spectrum of cases that were liable to arise. She did not see it as her task to suggest how the policy might be reworded to be lawful. However, she submitted that the current policy failed to avert an unacceptable risk of breach of the procedural guarantees under Article 8. There were bound to be cases, such as the claimant’s, in which the additional licence conditions constituted a serious interference with the offender’s Article 8 rights. Article 8’s procedural guarantees would be thwarted because the policy did not ensure adequate disclosure, within a sufficient period of time, for the offender to make meaningful representations to the MAPPA panel. On the contrary, the policy contemplated that the first communication to the offender of his licence conditions should arise once the decision has been taken, and then for the purpose of explaining the predetermined conditions.
4. 73. As I read the policy it is premised on the offender manager being the conduit for the offender’s concerns to MAPPA meetings. The discussions in MAPPA begin, under the policy, at least six months prior to release with offenders like the claimant. Section 4.8 of the MAPPA 2009 Guidance provided expressly for an offender to present information to MAPPA meetings through their offender manager and that it was good practice that offenders knew of MAPPA and were engaged with the process. Paragraph 12.16 of the current MAPPA guidance is along the same lines. As well the current “offender manager model” requires the active collaboration of offenders in planning for their sentence. There is no policy of refusing to disclose MAPPA minutes; under chapter 13 of the current MAPPA Guidance an offender can request disclosure. An offender is aware of the key factors bearing on risk since he is aware of his offending, of his engagement with rehabilitative programmes in prison and of his OASys assessments. Many offenders will retain contact with the solicitors who represented them in the criminal proceedings. As in the claimant’s case, they will be able to make relevant representations. Paragraph 2.40 of PI 07/2011 made clear that before release the offender was to have the additional conditions explained. In my view all of this is miles away from the high threshold explained earlier in the judgment which would render the policy on additional licence conditions unlawful because of the risk of breach of Article 8 procedural rights.

Conclusion

1. 74. My conclusion is that this claim fails.