SUBJECT	CASE NAME AND REFERENCE
(A) GENERIC SENTENCING PRINCIPLES	
Sentence length ▪ Dangerousness	**R v Lang and others** [2005] EWCA Crim 2864 **R v S and others** [2005] EWCA Crim 3616 **The CPS v South East Surrey Youth Court and G** [2005] EWHC 2929
Sentences/ Ancillary Orders ▪ Anti-Social Behaviour Orders (ASBOs) ▪ Drug Treatment and Testing Orders (DTTO)	**R v Wadmore, Foreman** [2006] EWCA Crim 686 **R v Woods and Collins** [2005] EWCA Crim 2065
(G) PUBLIC ORDER OFFENCES	
Firearms Offences ▪ Exceptional Circumstances	**R v Rehman and Wood** [2005] EWCA Crim 2056
(I) OFFENCES AGAINST PUBLIC JUSTICE	
Breach of Licence Breach of a Non-Molestation Order	**R v Pick and Dillon** [2005] EWCA Crim 1853 **Head v Orrow** [2004] EWCA Civ 1691
(K) MISCELLANEOUS OFFENCES	
Immigration Offences ▪ Failing to produce an immigration document in force	**R v Ai** [2005] EWCA Crim 936

(A) GENERIC SENTENCING PRINCIPLES

Dangerousness

Legislation: *s.224-229, Criminal Justice Act 2003*

R v Lang and others [2005] EWCA Crim 2864

R v S and others [2005] EWCA Crim 3616

The CPS v South East Surrey Youth Court and G [2005] EWHC 2929

The judgments in these cases gave guidance on a number of different aspects of the provisions relating to the sentencing of dangerous offenders – sections 224-229 of the Criminal Justice Act 2003. This guidance is summarised below.

Criteria

The criteria for the use of the sentences for dangerous offenders is that the offender has committed a specified offence and that the court is satisfied that there is a significant risk of serious harm to members of the public occasioned by the commission of further specified offences by the offender. Once the criteria are met, the court is required to impose one of the sentences provided for public protection.

A specified offence is one listed in Schedule 15 to the Act. Where a specified offence is punishable in the case of an adult with at least 10 years imprisonment, it is a "serious offence".

Different options and requirements exist depending on whether or not a specified offence is a serious offence.

- Where an offender is convicted of a specified offence and the court has made a finding of significant risk it must impose an extended sentence (s.227 in relation to offenders aged 18 or over on conviction and s.228 in relation to offenders under 18).

- Where an offender aged 18 years or over is convicted of a serious offence and the court has made a finding of significant risk either a life sentence or indeterminate imprisonment for public protection must be imposed (s.225(2)) and (3)).

- Where an offender aged under 18 years is convicted of a serious offence and the court has made a finding of significant risk either

an extended sentence, a life sentence or a sentence of detention for public protection must be imposed (s.226).

- The sentence must be a life sentence if the offence is one for which the maximum penalty is life imprisonment (or detention for life) and the seriousness of the offence is such as to justify imprisonment (or detention) for life (s.225 (3)).

Fixing the minimum term within an indeterminate sentence.

This should be approached in the same way as for discretionary and automatic life sentences before the Criminal Justice Act 2003. In most cases, this requires the court:

- to assess the notional determinate sentence that would have been imposed if the indeterminate sentence had not been imposed taking care:
  - i) to ensure that the appropriate reduction for a guilty plea is allowed,
  - ii) that this sentence is based on the seriousness of the offence and does not incorporate the element of risk which is already covered by the indeterminate sentence

- to identify half that term (which would have been the term actually spent in custody before release on licence)

- to deduct from that term any time spent in custody on remand (subject to the usual discretion to direct that time should not count)

There will be exceptional cases where more than half the term may be appropriate: see R. v. Szczerba [2002] Cr.App. R.(S.) 387. (Compendium page 5)

Assessing "significant risk"

The requirement that a risk be "significant" is a higher threshold than mere possibility of occurrence. It must be "noteworthy, of considerable amount or importance".

A wide variety of information will need to be considered much of which will most readily be made available in a pre-sentence report. The guidance in the Guide for Sentences of Public Protection (issued in June 2005 by the National Probation Service) is valuable and that which relates to the assessment of dangerousness (paragraph 5) is compatible with Court of Appeal guidance.

A sentencer is not bound by the assessment in the report but, where a sentencer is contemplating differing from such an assessment, both counsel should be given the opportunity to address the point.

Assessing "serious harm"

The Act defines serious harm as "death or serious personal injury, whether physical or psychological". This has been a concept familiar since the Criminal Justice Act 1991 and there are existing authorities that assist in determining whether harm is "serious", for example R v Bowler 15 Cr.App.R (S) 78.

The fact that the further offence foreseen is a "serious offence" for the purposes of this part of the Act does not automatically indicate that commission of such an offence would result in "serious harm".

If the specified offence foreseen is not a "serious offence", it is likely to be rare that there will be a "significant risk of serious harm".

The rebuttable assumption

Where an offender has previously been convicted of a "relevant offence" (that is, a specified offence or its equivalent committed anywhere in the United Kingdom), there is a rebuttable assumption that the "significant risk" threshold has been passed.

Courts are expected to reach a reasonable conclusion in the light of information before them. The statute includes no reference to standard or burden of proof. Unless the information about offences, pattern of behaviour and the offender shows a significant risk of serious harm from further offences, it will usually be unreasonable to conclude that the assumption applies.

Parliament's repeatedly expressed intention is to protect the public from serious harm. It cannot, therefore, have been the intention to require the imposition of indeterminate sentences for relatively minor offences.

Young Offenders

When sentencing young offenders, it is important to bear in mind that they may change and develop within a shorter time than an adult. This, together with the level of maturity of the youth, may be highly relevant when assessing both the future conduct and whether that may give rise to significant risk of serious harm.

The court has more discretion than with an adult over the choice of sentence once the criteria have been satisfied. In particular, the court may impose an extended sentence even where the qualifying offence is a serious offence whereas, in the case of an adult offender, the court may only impose a life sentence or imprisonment for public protection.

Where the offender is particularly young, an indeterminate sentence may be inappropriate even where a serious offence has been committed and there is a significant risk of serious harm from further offences. For example, an indeterminate term was unsuitable for a 14 year old girl with little previous criminal record and with *serious* criminality limited to the one offence of robbery before the court: R v D [2005] EWCA Crim 2292.

Youth Court – approach when dealing with potentially "dangerous offender"

Wherever possible, those under 18 should be tried in a youth court.

It is important to be particularly rigorous before concluding that the risk criterion is likely to be met and this will almost always require a pre-sentence report. In the case of a specified offence that is not a serious offence, such an assessment is unlikely to be appropriate until after conviction.

Giving reasons

Reasons should usually be given for all conclusions, particularly for the finding as to whether or not there is a significant risk. This should include a brief indication of the information taken into account.

Meaning of "members of the public"

The serious harm has to be to "members of the public". This is an all-embracing term and does not exclude certain categories of people.

How to sentence for multiple offences where only some are specified offences and the risk criterion is met

Generally, those offences that are not specified offences should receive shorter concurrent sentences.

Where a specified offence is being sentenced alongside a serious offence, an extended sentence must be imposed for the specified offence.

Consecutive extended sentences will not usually be appropriate.

Determining when the licence period starts within an extended sentence

Where an extended sentence is imposed, the offender will be released only after completion of one half of the term imposed by the court **and** authorisation of release by the Parole Board. Within this sentence, the phrase "appropriate custodial term" describes the sentence imposed by the court (other than the extension period) part or all of which may be served in custody and no more than half of which will be served on licence in the community.

The extension period commences on completion of the whole of the custodial term imposed by the court. By way of example, if the court imposes a 6 year sentence with an extension period of 3 years, the offender may be released at any time after completing 3 years in custody. However, the extension period will not commence until the 6 years have been completed giving a total sentence covering 9 years.

Sentences / Ancillary orders

Anti-Social Behaviour Orders (ASBOs)

R v Wadmore, Foreman [2006] EWCA Crim 686

The Court considered a range of decisions including that of the House of Lords in *McCann* [2003] 1 AC 787, and of the Court of Appeal in *Boness, Bebbington* [2005] EWCA Crim 2395. It identified ten principles (statutory references are to the Crime and Disorder Act 1998 as amended):

(1) Proceedings under s. 1C are civil in nature, so that hearsay evidence is admissible, but a court must be satisfied to a criminal standard that the defendant has acted in the anti-social manner alleged.

(2) The test of "*necessity*" set out in s. 1C(2)(b) requires the exercise of judgment or evaluation; it does not require proof beyond reasonable doubt that the order is "necessary".

(3) It was particularly important that the findings of fact giving rise to the making of the order are recorded by the Court.

(4) The terms of the order made must be precise and capable of being understood by the offender.

(5) The conditions in the order must be enforceable in the sense that the conditions should allow a breach to be readily identified and capable of being proved. Therefore the conditions should not impose generic prohibitions, but should identify and prohibit the particular type of anti-social behaviour that gives rise to the necessity of an ASBO.

(6) There is power under s. 1C(5) to suspend the starting point of an ASBO until an offender has been released from a custodial sentence. However, where a custodial sentence in excess of a few months is passed and the offender is liable to be released on licence and is thus subject to recall, the circumstances will be limited in which there would be a demonstrable necessity to make a suspended ASBO, to take effect on release. There might be cases where geographical restraints could supplement licence conditions.

(7) Because the test for making an ASBO and prohibiting an offender from doing something is one of necessity, each separate order prohibiting a person from doing a specified thing must be necessary to protect persons from anti-social behaviour by the offender. Therefore, each order must be specifically fashioned to deal with the offender concerned. The court has to ask: "is this order necessary to protect persons in any place in England and Wales from further anti-social acts by him".

(8) Not all conditions set out in an ASBO have to run for the full term of the ASBO itself. The test must always be is what is necessary to deal with the particular anti-social behaviour of the offender and what is proportionate in the circumstances.

(9) The order is there to protect others from anti-social behaviour by the offender. Therefore the court should not impose an order which prohibits an offender from committing specified criminal offences if the sentence which could be passed following conviction for the offence should be a sufficient deterrent.

(10) It is unlawful to make an ASBO as if it were a further sentence or punishment. An ASBO must therefore not be used merely to increase the sentence of imprisonment that the offender is to receive.

Drug Treatment and Testing Orders (DTTOs)

R v Woods and Collins [2005] EWCA Crim 2065

Having considered the review of existing authorities in R v Belli [2004] 1 Cr App R (S) 82, the Court identified the following factors as relevant to the decision to impose a DTTO. It would appear that these are equally relevant to the imposition of a drug rehabilitation requirement within a community order or a suspended sentence order.

1. A DTTO is designed for, amongst others, repeat offenders whose offending is driven by drug dependence. Such offenders will often be those who would otherwise be sent to prison and not necessarily for a short period.

2. A DTTO is not a soft option; it imposes significant obligations on the offender, the court retains quite intensive supervision of progress and there is the power to substitute imprisonment on failure to comply.

3. Where the offender is a prolific offender, it does not necessarily mean that a DTTO will not be the right order though there will be circumstances where the nature of the offence or the scale of offending means that only a custodial sentence is appropriate.

4. A DTTO is an expensive order. It is in the interests neither of the public nor the offender for such an order to be made where there are no reasonable prospects of it succeeding. Conversely, no-one should expect 100% success rate and some lapse is often a feature of an order which turns out to be substantially successful.

5. There are difficult balancing decisions to be made at two stages:

   (a) Does the case justify adjournment for a report on the possible availability of such an order?

   (b) If there is such a report and it is favourable, is a DTTO the right disposal?

6. A sentencer is not under an obligation to adjourn for a report in every case in which it is suggested that the cause of offending is drug dependence and that the offender would welcome a DTTO. To adjourn for a report if there is no prospect of such an order being made would be wasteful and raise false expectations in the offender.

7. When considering whether or not to seek a report, the court will look for indications that the offender is likely to engage with the order, and that there is a sufficient stable home life to give a reasonable prospect of success.

8. It will also consider the nature of the offending. The gravity of the offences or the personal characteristics of the offender, such as repeated breaches of community orders, might demonstrate that a DTTO will plainly be inappropriate. Sentencers should not, however, reject the possibility of a DTTO simply on the grounds that the offender is a repeat thief or burglar for whom otherwise a custodial sentence would be inevitable.

9. If a report is obtained, it is the responsibility of the court to weigh in the balance the public interest as well as the interest of the offender, and to assess the criminality of the offender as well as the desirability and prospects of rehabilitation.

(G) PUBLIC ORDER OFFENCES

Firearms Offences

Exceptional Circumstances

Legislation: *s.51A Firearms Act 1968*

R v Rehman and Wood [2005] EWCA Crim 2056

The court considered those factors which would amount to exceptional circumstances sufficient to justify not imposing the five year minimum sentence provided by this provision.

- The circumstances are exceptional for the purpose of this provision if it would mean that the imposition of five year's imprisonment would result in an arbitrary and disproportionate sentence.

- The fact that an offender is unfit to serve a five year sentence may be relevant as is the fact that he or she is of very advanced years.

- It is necessary to look at all the circumstances involved and take a holistic approach, rather than dividing the circumstances into those that are capable of being exceptional and those that are not.

(I) OFFENCES AGAINST PUBLIC JUSTICE

Breach of Licence

Legislation: *s.116 Powers of Criminal Courts (Sentencing) Act 2000* (**Note:** This provision is repealed by schedule 37, Part 7 to the Criminal Justice Act 2003 when in force)

R v Pick and Dillon [2005] EWCA Crim 1853

- Parliament intended that an offender should remain liable to be returned to prison for all or any part of the sentence still unserved at the time of the commission of a further offence.

- The fact that a court has already imposed a return to prison upon conviction of a further offence will not prevent another court exercising the same power in respect of any later offending taking place before the defendant has served in full the original sentence, in respect of which he is on licence.

Breach of a Non-Molestation Order

Legislation: *s.42 of the Family Law Act 1996.*

Courts will need to have regard to the relevant provisions of the Domestic Violence, Crime and Victims Act 2004 when it comes into force and to the guideline Breach of Protective Orders issued by the Sentencing Guidelines Council (consultation guideline issued 11th April 2006).

Head v Orrow [2004] EWCA Civ 1691

- The level of sentencing which preceded the Protection from Harassment Act 1997 does not fully reflect contemporary opinion. Parliament and society, and the Court of Appeal, generally now regard domestic and other violence associated with harassment and molestation as demanding more condign punishment than formerly. Sentences in committal proceedings for breaches of injunctions under s.42 of the 1996 Act should reflect this range of opinion.

- There must be proportionate regard to the statutory maximum sentence in s.14 of the Contempt of Court Act 1981.

- If there are concurrent criminal or civil proceedings great care must be taken to ensure that sentences in two or more courts do not punish twice for the same thing.

- So far as possible sentences passed under s.42 should not be manifestly discrepant with sentences for harassment charged under the 1997 Act.

- In cases of actual or threatened violence, so far as is consistent with avoiding duplicated punishment, sentences for contempt of orders under s.42 should not be manifestly discrepant with sentences passed in the Crown Court for comparable offences, for instance under the Offences Against the Person Act 1861.

(K) MISCELLANEOUS OFFENCES

Immigration Offences

Failing to produce an immigration document in force

Legislation: s.2 (1), Asylum and Immigration (Treatment of Claimants) Act 2004

Maximum Penalty: 2 years' imprisonment

R v Ai [2005] EWCA Crim 936

- The purpose of the legislation is to prevent and discourage false claims as to nationality and identity, prevent those whose claims are unsuccessful being able to thwart removal because of difficulties in establishing their identity or nationality and preventing agents and traffickers maintaining control over those whom they traffic.

- A strong deterrent element is needed in sentencing, to send a clear message to agents or people traffickers that the requirements which they are said to impose on their clients will not avail them and that their clients face a real risk of a custodial sentence.

- The legislation specifically precludes reliance upon the instructions of an agent as a reasonable excuse for not presenting documents. Whilst the instructions of an agent may in certain circumstances be a mitigating component, it cannot be so strong a component that it undermines the purpose of the legislation.

- It is undesirable for sentencers to reach a view about the soundness, or otherwise of the underlying asylum or immigration claim.