**Neutral Citation: [2016] NIQB 43**

*Ref:* **TRE9951**

*Judgment: approved by the Court for handing down*
*(subject to editorial corrections)**

*Delivered:* **11/05/2016**

**2015 No.005901**

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND**

_____

**QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)**

_____

**Gallagher's (Lorraine) Application (Judicial Review) [2016] NIQB 43**

**IN THE MATTER OF AN APPLICATION BY LORRAINE GALLAGHER FOR JUDICIAL REVIEW**

**AND IN THE MATTER OF DECISIONS OF THE DEPARTMENT OF JUSTICE MADE IN APRIL 2014 & ON 24TH JULY 2014**

_____

**TREACY J**

**Background**

[1] In its first judgement [2015] NIQB 63 this Court concluded that the automatic disclosure of the Applicant's convictions violates article 8 of the European Convention on Human Rights, and that this finding constitutes just satisfaction. Martin Wolfe QC appeared with Christopher Coyle for the applicant and Peter Coll QC appeared with Aidan Sands for the respondent. I am grateful to all counsel for their very helpful submissions and the welcome economy with which the case was presented.

[2] The Respondent's appeal against this decision came on for hearing before the Court of Appeal on the 8 March 2016. The case was remitted for this Court to hear further argument and decide two particular matters which are expressed thus in the applicant's written submissions:

(a) First, whereas both parties are agreed that the issue concerning the requirement for the Applicant to self-declare her criminal convictions was argued before this Court at the initial hearing (see for example at paragraph 20 of the Applicant's original skeleton argument at tab 15), the Court of Appeal took the view that the findings contained in the judgment of this

Court focused solely on the lawfulness of the criminal record disclosure aspect of the regime (under Part V of the Police Act 1997). Accordingly, the Court of Appeal has asked this Court to make a finding in relation to the lawfulness of the self-declaration part of the scheme (under the Rehabilitation of Offenders (Exceptions) (NI) Order 1979).

(b) Secondly, the Court of Appeal granted the Applicant leave to amend the Order 53 Statement so that this Court might consider and determine the following new ground of challenge to the requirement for self-declaration and criminal record disclosure because the Applicant has more than one criminal conviction:-

Amended O. 53 Statement - Ground 3(a)(x)

These infringements of the Applicant's rights under Article 8(1) cannot be regarded as being in accordance with the law under Article 8(2) and therefore represent a violation of her rights under Article 8 of the Convention.

[3] The Court of Appeal will reconvene to consider the Respondent's appeal upon the determination of the issues set out above.

**The Obligation to Self-Declare Criminal Convictions**

[4] In its judgment this Court recorded in the paragraphs set out below that the Applicant was concerned not only about the automatic disclosure of her criminal record on a disclosure certificate because she had more than a single conviction, but also her complaint that she was required to self-declare her criminal convictions:

> "[3] Under the applicable statutory framework for certain exempted areas of employment an applicant's conviction(s) can be disclosed to potential employers on a criminal record disclosure certificate without any real consideration of the relevance of this criminal record information and whether the convictions in question are 'spent'.
>
> [4] If an applicant for such a certificate has more than 1 conviction they will all be disclosed automatically, irrespective of whether they are considered 'spent' and irrespective of their relevance to the employment sought.
>
> [5] Furthermore, irrespective of whether a criminal record disclosure is sought, if an applicant has more than 1 conviction she must disclose all of her convictions by way of a personal declaration to a potential employer for certain exempted areas of employment irrespective of

> whether they are now 'spent', the nature of the convictions, and other pertinent factors." (applicant's emphasis)

[5] The judgment referred to the self-declaration as part of the chronology:

> "20th June 2014 - Personal Declaration and Access NI consent signed and returned to WHSCT by the Applicant. The Personal Declaration disclosed only one of the convictions.".

[6] As Mr Wolfe QC reminded the court the Applicant was in fact obliged to make two declarations in respect of her criminal convictions during the job application process with the WHSCT. The first was made when applying for employment on the 11 February 2014 when she stated "carrying child without seat belt in 1996." The second declaration was made on the 20 June 2014 after she received a conditional offer of employment when she informed the employer that she had been convicted of carrying a child without seat belt on the 4 May 1996, for which she was fined £25.00.

[7] In fact the Applicant had been convicted of four seat belt related offences arising out of an incident which took place on the 4 May 1996, and she had been convicted of a further two seat belt related offences arising out of an incident which occurred on the 17 June 1998.

[8] The parties are agreed that it was clear to the Court that the statutory framework had "twin pillars":
(i) the provisions of Part V of the Police Act 1997 (as amended) which provided for the disclosure on a criminal record certificate of any conviction where the person concerned had more than one criminal conviction of any kind (see paragraph 48 of the original judgment);
(ii) the self-disclosure arrangements - The Rehabilitation of Offenders (Exceptions) (Amendment) Order (NI) 2014 inserted a new Article 1A into the Rehabilitation of Offenders (Exceptions) Order (NI) 1979 with the effect that certain convictions were deemed to be "protected" - that is, those convictions which were protected would not have to be disclosed in the course of an application for certain excepted classes of employment.

[9] As with the criminal record disclosure arrangements contained within the terms of the amended Police Act 1997, the corresponding regime introduced by the amendments made to the Rehabilitation of Offenders (Exceptions) Order 1979 operate so as to catch persons, such as the Applicant, who have been convicted of more than one offence. Her convictions are not regarded as "protected" and she is required to disclose them in the self-declaration form when applying for employment as a social care worker.

[10] It is common case that under the new Article 1A of the 1979 Order the requirement to self-declare convictions applies irrespective of,
(i) the nature of the offences,
(ii) their relevance to the job applied for,
(iii) the sentence imposed,
(iv) the passage of time since the last conviction,
(v) age at the time of conviction, or
(vi) whether the convictions would have otherwise become 'spent' under the Rehabilitation of Offenders framework.
(vii) additionally, there is no mechanism and there remains no mechanism by which an effected person can seek an independent review of the requirement to make a self-declaration.

[11] In this context the Applicant maintains the same contentions which she advanced in relation to the disclosure arrangements under Part V of the Police Act 1997, and which were accepted by the Court. Mr Wolfe submits that the only difference between the two pillars is that on the one side the State stores and discloses the criminal record information upon receipt of an application or request to do so, whereas on the other side it is the job seeking Applicant who is compelled by the statutory regime to make the disclosure if she wishes to be considered for the job.

[12] The applicant contends that Article 8 is engaged whether the disclosure of conviction material is made by the State, or whether it is released by the job applicant as a condition precedent to engaging in a recruitment process or for receiving an offer of employment. It is argued the nature of the disclosure required is essentially the same.

[13] In R(T) -v- Chief Constable of Greater Manchester Police [2015] AC 49, the Supreme Court considered whether the blanket requirement for self-declaration under the pre-amendment GB legislation (ie. the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975) engaged Article 8. Lord Reed stated:

> "[138] It seems to me to be reasonably clear that laws requiring a person to disclose his previous convictions or cautions to a potential employer constitute an interference with the right to respect for private life, protected by Article 8. Whereas the European Court laid particular emphasis, when considering Part V of the 1997 [Police] Act in MM -v- United Kingdom, on the interference constituted by the state's disclosure of personal data which it had collected and stored, that issue does not arise directly in relation to the disclosure by a person of information retained in his own memory. On the other hand, the same issue arises out of the private aspect of a person's personal history, especially as

> it fades into the past and becomes forgotten by the world at large…"

[14] He also addressed the contention that the law does not actually compel a self-declaration as the person concerned could elect not to pursue particular kinds of employment. As counsel pointed out it is readily apparent that Lord Reed was not impressed with this argument:

> "[139] The fact that the relevant laws do not, strictly speaking, require an ex-offender to disclose his criminal record, since he can avoid doing so by refraining from applying for jobs in the relevant sectors or by abandoning such an application when the inevitable question is asked, is no answer to these points."

[15] The UKSC held that the self-declaration regime under consideration in that case was not necessary in a democratic society. Lord Reed said:

> "[142] I cannot however see any rational connection between minor dishonesty as a child and the question whether, as an adult, the person might pose a threat to the safety of children with whom he came into contact. There is therefore no rational connection between the interference with article 8 rights which results from the requirement that a person disclose warnings received for minor dishonesty as a child, and the aim of ensuring the suitability of such a person, as an adult, for positions involving contact with children, let alone his suitability, for the remainder of his life, for the entire range of activities covered by the 1975 Order.
>
> [143] It can only be concluded that the interference in issue in this case was not necessary in a democratic society to attain the aim of protecting the safety of children."

[16] Counsel also referred me to the judgement of Lord Wilson who agreed that the 1975 Order failed the requirement of necessity. He found that given the age and/or triviality of the offences which the Supreme Court was considering, the requirement to self-declare under the 1975 Order "went further than was necessary to accomplish the statutory objective and failed to strike a fair balance between [the rights of the applicants] and the interests of the community" [see para 40].

[17] The Respondent unsuccessfully argued before this Court that the regime under consideration in the instant case is Convention compliant because it implements a new filtering mechanism which was not part of the arrangements

considered by the Supreme Court in R(T). The Respondent maintains this approach contending that whereas the old system took a blanket approach the new system is more calibrated and discriminate and would therefore meet the test set out in R(T).

[18] I accept the applicant's argument that this approach overlooks the reality that a blanket disclosure approach is applied to those who acquire two convictions. As Mr Wolfe put it in his excellent written submissions "the Respondent has taken one blanket scheme, tweaked it, and replaced it with another". As the applicant correctly submitted it is simply not necessary to operate a system which requires her to disclose her historic convictions for minor offences, and for Access NI to reveal them on an EDC for ever more.

[19] The Court has already rejected the Respondent's submission and agreed with the applicant's analysis as regards the criminal record disclosure framework enshrined within (the new) Part V of the Police Act 1997 :

> "[38] I cannot agree with the Respondent's reasoning. While the issues identified in T have been partially resolved by the introduction of some filtering for age of conviction, for an individual like the instant Applicant, it is correct that the current scheme does not permit consideration of the relevance of the information to be disclosed or proportionality of that disclosure. It is this complete lack of consideration that makes the scheme indiscriminate and thus unlawful. The measure goes further than necessary to achieve the legitimate end - the objective of protecting vulnerable persons can be achieved with a less invasive regime. The measures fail to strike a fair balance between the rights of the individual and the interests of the community."

[20] I agree with counsel that this reasoning is equally applicable to the self-declaration regime. The Applicant is required under the 1979 Order to disclose all of her minor convictions, and she will continue to be required to make these disclosures for so long as she wishes to engage in employment in the social care profession. The self-declaration arrangements are capable of producing precisely the same "irrational situations" or arbitrariness as the court identified at paragraph 40 of its judgment in respect of enhanced disclosure certificates.

[21] The court was informed that when the judgment was handed down both parties together interpreted the decision as also applying to the amended 1979 Order. I am reminded that at the invitation of the court the parties took steps to formulate a number of declarations to reflect the conclusions reached, although the parties were ultimately informed that the court took the view that further declaratory relief was unnecessary. In respect of the issue of self-declaration the

parties had agreed that the following declarations appeared to reflect the view of the court:

> "[2] That the requirement upon the Applicant to disclose all of her convictions, and her 'spent' convictions in particular, in applying for certain exempted areas of employment, on the basis that she has more than one conviction goes further than is necessary to achieve the legitimate aim of protecting vulnerable people as is, thereby, in breach of her rights under Article 8 of the European Convention on Human Rights and section 6(1) of the Human Rights Act 1998;
>
> [4] That the Rehabilitation of Offenders (Exceptions) (Northern Ireland) Order 1979 cannot be read or given effect in a way which is compatible with rights under Article 8 of the European Convention on Human Rights dated 1950 as it requires a person who has more than one minor conviction to disclosure (sic) all of their convictions in applying for certain exempted areas of employment."

[22] Applying the second question of the four stage approach to 'necessity' referred to in Bank Mellett, the applicant submitted that the imposition by the impugned scheme of a requirement to self-declare minor seat belt offences cannot be rationally connected to the objective of the arrangements. In support of this proposition counsel referred to R (P and A) -v- Secretary of State for Justice and others [2016] EWHC 89 (Admin), where the court dealt with the same scheme of criminal record disclosure and self-declaration which is under scrutiny in the instant case. The court (McCombe LJ and Mrs Justice Carr) stated:

> "[89] Having reached the conclusion that the Act in its present form fails to meet the ECHR requirements 'as to the quality of the law' a decision on whether the interference with Article 8 is "necessary" does not strictly arise. However, I can see no reason for thinking that the convictions in issue in the present cases before us bear, for the Claimants' entire lifetimes a rational relationship with the objects sought to be achieved by the disclosure provisions of the [1997] Act, simply because in the case of each Claimant there is more than one conviction … the reasoning that appealed to Lord Reed on this point in the un-amended scheme seems just as applicable here."

[23] The court then considered the application of R(T) to the requirement to self-declare criminal convictions under the 1975 Order and concluded that this scheme failed to meet the requirement of "necessity".

[24] In light of the foregoing I accept the following contentions advanced by Mr Wolfe:
(i) the requirement imposed by the 1979 Order interferes with the Applicant's Article 8 rights;
(ii) there is no rational connection between the interference (caused by the requirement to self-declare minor offences committed nearly 20 years ago), and the objective of safeguarding vulnerable people;
(iii) the court's original findings in respect of the scheme for the disclosure of criminal convictions on an EDC are equally applicable to the requirement to self-declare minor offences: the requirement goes further than is necessary to achieve the objective of safeguarding vulnerable people, and it fails to strike a balance between the Applicant's rights and interests of the community; and
(iv)) accordingly, the requirement to self-declare also violates Article 8 of the Convention since the interference with the Applicant's rights fails the test of 'necessity.'

**"In Accordance with the Law"**

[25] When this application was originally considered by the court was not invited to consider whether either pillar of the criminal convictions disclosure framework also failed to satisfy the first limb of Article 8(2), namely, whether the interference with the Applicant's Article 8 rights was in "accordance with the law." The court of Appeal granted leave to amend the Order 53 Statement to allow that issue to be considered.

[26] The applicant submits that both parts of the scheme under consideration in this case fail to satisfy the requirement of legality because of the arbitrariness of the scheme and the absence of any mechanism to challenge the arbitrary outcome.

[27] In support of this contention I was referred to MM -v- United Kingdom [2012] ECHR wherein the ECtHR reviewed the "in accordance with the law" limb of Article 8(2):

> "193. The requirement that any interference must be 'in accordance with the law' under Article 8 §2 means that the impugned measure must have some basis in domestic law and be compatible with the rule of law, which is expressly mentioned in the preamble to the Convention and inherent in the object and purpose of Article 8. The law must thus be adequately accessible and foreseeable, that is, formulated with sufficient precision to enable the individual – if need be with appropriate advice – to regulate his conduct. For domestic law to meet these requirements, it must afford adequate legal protection against arbitrariness and accordingly indicate with

> sufficient clarity and scope of discretion conferred on the competent authorities and the manner of its exercise .."

[28] The ECtHR concluded that the absence of adequate legal protection against arbitrariness was a sound basis for finding that the provisions in question did not comply with the requirement that they be in accordance with the law.

[29] In R(T), after considering MM, Lord Reed noted that the legislation governing the disclosure of the data in the version with which those appeals was concerned, was indistinguishable from the version of Part V of the 1997 Act which the ECtHR was concerned with in MM. Lord Reed stated:

> "[119] [MM] establishes, in my opinion persuasively, that the legislation fails to meet the requirements for disclosure to constitute an interference 'in accordance with the law'. That is so, as the court explained in MM, because of the cumulative effect of the failure to draw any distinction on the basis of the nature of the offence, the disposal in the case, the time which has elapsed since the offence took place or the relevance of the data to the employment sought, and the absence of any mechanism for independent review of a decision to disclose data under section 113A."

[30] I agree with the applicant that the decision of the majority in R(T) is authority for the proposition that where the State manages and stores criminal record data, it risks arbitrariness and it is likely to fail to meet Convention requirements as to the quality of the law, if it discloses that data to third parties without regard to the nature of the offence, the disposal in the case, the time which has elapsed since the offence took place or the relevance of the data to the employment sought, and if it fails to institute any mechanism for independent review.

[31] The Courts Attention was also drawn to the decision of the Supreme Court in R (F) (A child) -v- Secretary of State for the Home Department [2011] AC 331, which considered the absence of review arrangements in the context of the reporting restrictions placed on those convicted of sexual offences.

[32] I agree with the applicant that the fundamental flaws in the old scheme identified by the Supreme Court in R(T) remain; that a process for independent review was not in place at the time of the impugned decisions; and further that the approach of the scheme is so rigid and mechanistic that it produces the kinds of arbitrary results which were identified at paragraph 40 of my earlier judgment.

[33] Mr Wolfe referred to the phrase *"irrational situations"* (at paragraph [40]) that was used to describe the outcomes produced by Part V of the Police Act 1997. He submitted correctly that the word "arbitrary" is an appropriate synonym in this

context because it was the arbitrariness of the results produced by the mandatory requirement for disclosure of more than one minor conviction, without the opportunity for review or challenge, which the Court appeared to have in mind when the scheme was found to have violated the rights of the Applicant.

[34] Counsel pointed out that it was this same quality of arbitrariness which the Court in R (P and A) found present in the operation of the same scheme in England and Wales, and which caused it to condemn the criminal records disclosure aspect (as opposed to the self-declaration aspect) as not being in accordance with the law (paragraph 88). In that case (at paragraph 86) the court said:

> "[86] We can see, first from the present cases before us, secondly from the facts of the Gallagher case and, thirdly, from the further examples given by Treacy J at [40] in that case, that the present rules can give rise to some very startling consequences. Such results are, in my judgment, properly to be described as "arbitrary."

[35] Mr Wolfe relied on the following passage in that case where the Court went on to decry the absence of any mechanism by which such arbitrary results might be checked:

> "[87] …when the rules are capable of producing such questionable results, on their margins, there ought (as it seems to me) to be some machinery for testing the proportionality of the interference if the scheme is to be "in accordance with the law" under the wider understanding of that concept that emerges from the T case, following MM."

[36] R(G) [2016] EWHC 295 (Admin) concerned the requirement by the Claimant to disclose two cautions for offences of sexual activity with a child, at a time when the Claimant was also a child during the period when the incidents occurred. The court treated the self-declaration aspect and the criminal record disclosure aspect as having the same practical effect. The court found that since the Claimant had no means of seeking to persuade a public authority that disclosure of the cautions under both aspects of the scheme was not relevant or necessary, the interference with his Article 8 rights was not in accordance with the law (at paragraphs 48-50). The court held that a review mechanism was both needed and practicable.

[37] Counsel observed that Mr Clarke on behalf of the Respondent explained in his affidavit that in Northern Ireland there was a proposal to introduce a review framework, by which a person such as the Respondent (with more than one conviction) could ask for the disclosure to be reviewed. That mechanism was included within Schedule 4 of the Justice Act (NI) 2015, amending the Police Act 1997, and went live earlier this year. Mr Wolfe said that no explanation has been

given for the failure to have this mechanism in place when the limited filtering mechanism came into operation in April 2014.

[38] Thus as he submitted the safeguard offered by a review mechanism prospectively came too late to assist this Applicant in this case. The review mechanism is focused on the contents of criminal record and enhanced criminal record certificates and provides for the possibility of removing spent convictions from these certificates if the independent reviewer is satisfied that removal will not undermine safeguarding or protection considerations. However as counsel pointed out the mechanism does nothing to address the interference with Article 8 inherent in the self-declaration arrangements under the Rehabilitation of Offenders legislation.

[39] There is real force in the contention that the belated introduction of the review mechanism to enable a challenge to be brought to the content of the certificates points up the unlawfulness of the arrangements which were put in place at the time when the Applicant was compelled to enter the impugned scheme in 2014.

[41] The Respondent was plainly aware of the importance of a review mechanism when it introduced the changes in this area in April 2014. As counsel pointed out the Respondent has indicated that as far back as 2013 it was in receipt of legal advice to the effect that "*there needs to be some provision for a person to ask for discretion to be exercised in their particular case and that the absence of a review mechanism might render a scheme as a wholly disproportionate*". That view was repeated in the Minister's Memorandum to the Executive in November 2013.

[42] The Applicant submits that applying the approach taken by the courts in in MM -v- UK, R (T), R (P and A) and R (G), this court should conclude that Part V of the Police Act 1997 is incompatible with Article 8 of the ECHR because, by failing to afford to the Applicant any means to review or challenge the disclosure of her criminal convictions on an EDC before they were disclosed, it has failed the test of being in accordance with the law.

[43] The Applicant recognises that in R(T), the Supreme Court declined to answer the question whether the self-disclosure aspect of the pre-amended scheme (under the Rehabilitation of Offenders provisions) failed the "in accordance with the law" test:

> "[140] The question whether the interference is "in accordance with the law" appears to me to be less straightforward, and it is unnecessary to answer it. The conclusions reached in relation to the 1997 Act cannot be extended to the 1975 Order, since the question whether the domestic law affords adequate safeguards against abuse must be judged by reference to the degree of

> intrusiveness of the interference being considered. As I have explained, particularly strict standards apply in relation to the collection, storage and use by the state of personal data, as under Part V of the 1997 act. It may be arguable that the requirements in the context of the 1975 Order are somewhat less stringent, as the particularly sensitive element of the use by the state of personal data is absent."

[44] Likewise the court in R (P and A), declined to engage with the question of whether the self-declaration provisions within the new form of the Rehabilitation of Offenders Order framework failed the legality test. It was satisfied that it was unnecessary to go further having decided that the scheme in this respect failed the 'necessity' limb of Article 8(2).

[45] Notwithstanding the above Mr Wolfe submitted that this court should not decline to answer the question whether the self-declaration provisions of the 1979 Order are in accordance with the law. The Supreme Court suggested that the requirement for self-declaration in the context of the Rehabilitation of Offenders framework could arguably be regarded as "somewhat less stringent." While the applicant accepted that a particular sensitivity surrounds the State's use of the citizen's personal data, and that this requires strict control, she submitted that the two sides of the scheme have the characteristics of "identical twins" in terms of their practical effects.

[46] As counsel forcibly observed by declaring that the Applicant's criminal convictions are not "protected" because she has more than a single conviction, she is placed in the invidious position of either making the declaration and providing the criminal record information (thereby causing an interference with her Article 8 rights), or (as the Supreme Court recognised) of protecting her right to privacy with the consequence that she would in all likelihood have to walk away from the job application process.

[47] This state of affairs would continue indefinitely because the arrangements are not time limited: there is no cut off period for those with more than a single conviction. In light of the foregoing I accept counsel submission that the arrangement under the 1979 Order is no less stringent and no less harmful for the fact that it is the citizen who is required to make the disclosure and not the State. It is the same private/personal data which is at stake. I agree that this aspect of the framework under the 1979 Order suffers from the same condition of "arbitrariness" which befalls Part V of the 1997 Act.

[48] Accordingly I hold as follows:

(a) the Rehabilitation of Offenders (Exceptions) Order (NI) 1979 violates Article 8 of the Convention since the interference with the Applicant's rights fails the test of 'necessity' under the second limb of Article 8(2) ECHR; and

(b) the 1979 Order and Part V of the Police Act 1997 each fail the requirement as to the quality of the law under the first limb of Article 8(2) ECHR, and for this reason also, the Applicant's rights under Article 8 ECHR have been violated.