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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

Gallagher's (Lorraine) Application (Judicial Review) [2016] NICA 42

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

AND

IN THE MATTER OF THE DECISIONS OF THE DEPARTMENT OF JUSTICE MADE IN APRIL 2014 AND 24 JULY 2014

Before: Gillen LJ, Weatherup LJ and Weir LJ

GILLEN LJ (giving the judgment of the court)

Introduction

[1] This is an appeal by the Department of Justice ("DoJ") against the judgments of Treacy J of 19 July 2015 and 11 May 2016. Treacy J determined that the statutory arrangements providing for the disclosure in an Enhanced Disclosure Certificate ("EDC") of Conviction Information (and the parallel requirement for self-disclosure to an employer) where there is more than one conviction, irrespective of their age or subject matter, are unlawful as offending against Article 8 of the European Convention on Human Rights and Fundamental Freedoms ("Article 8 of the Convention").

[2] Mr Coll QC appeared on behalf of the appellant with Mr Sands. Mr Wolfe QC appeared on behalf of the respondent with Mr Coyle. We pay tribute to the care and thoroughness with which the respective arguments, both written and oral, were presented to this court.

Background

[3] The respondent in this case has a criminal record comprising of convictions on six counts which arose from two incidents. In the first incident, in 1996, she was stopped by police whilst driving without a seat belt with her three children in the car. She was convicted on one count of driving without a seat belt and three counts of carrying a child under 14 years of age in the back of a car without a seat belt and fined a total of £85.

[4] In the second incident, in 1998, she was convicted on two further offences of carrying children under 14 without a seat belt and was fined £80.

[5] In 2012 and 2013, the respondent was awarded an Access Diploma in combined studies with commendation, a Level 3 QCF Certificate in Working in Community Mental Health Care and Level 2 Diploma in Health and Social Care (Adults) for Wales and Northern Ireland. She completed training courses in mental health and was admitted to the Northern Ireland Social Care Council's Register of Social Care Workers. She worked as an agency worker at a number of Trust health care facilities for adults with learning disabilities.

[6] On 11 February 2014 she applied to the Western Health and Social Care Trust ("the Trust") for a post at the Oak Tree Centre. On the application form she disclosed she had been convicted of an offence of carrying a child without a seat belt on 4 May 1996 and was fined £25. The application form stated that all convictions must be declared including motoring offences and that, within Health Social Services, criminal convictions are never regarded as spent and, therefore, applicants have to include all convictions even if they occurred sometime before.

[7] On 1 April 2008, a statutory scheme for disclosure of criminal record information had entered into force in Northern Ireland. In April 2014, shortly after the respondent applied to the Trust, this statutory scheme was amended in light of changes to the same scheme in England and Wales. Under the scheme, Access NI, a branch within the appellant Department, is responsible for carrying out checks on criminal records and police information on individuals who wish to work in certain types of jobs to enable employers to make safer recruitment decisions. The checks are carried out under Part V of the Police Act 1997 and Access NI will then produce a Disclosure Certificate. There are three levels of check: basic, standard and enhanced. Enhanced checks, required for those working closely with unsupervised children and vulnerable adults, make disclosure of the full criminal history including spent and unspent convictions (subject to the "filtering scheme" created by the 2014 statutory reform).

[8] On 17 June 2014 the Trust offered the respondent the role of Temporary Part-Time Care Assistant at a centre in Limavady providing for adults with learning disabilities. The offer was subject to her completing and returning a personal declaration form and an Access NI Disclosure Application Form to enable an Access

NI check to be carried out in order to obtain an EDC. Under the Rehabilitation of Offenders (Exceptions) Order (NI) 1979 ("the 1979 Order") an employer is entitled to seek information from an applicant in respect of the applicant's criminal record for convictions that otherwise would be regarded as spent under the Rehabilitation of Offenders Order (NI) 1978. On the personal declaration she disclosed a conviction describing it as "carrying child without seatbelt 1996" and also (in relation to the same conviction) as "4 May 1996 carrying child without seat belt fined £25". This form had included the statement that "it is important that you list ALL charges, prosecutions, convictions, cautions, binding-over orders even if they happened a long time ago …"

[9] On 24 July 2014 the Access NI check yielded an EDC disclosing all of the respondent's convictions. Following interviews with the Trust, the respondent received a letter of 29 September 2014 from the Trust indicating that the offer of appointment had been withdrawn and her name had been removed from the waiting list. On 23 October 2014 the Trust give a full explanation of its reasoning which concluded with the following statement:

> "The fact remains that on two separate occasions you were asked if you have any convictions/cautions and you did not fully disclose your convictions at either opportunity. The Western Trust considers failure by an applicant to declare complete and accurate information about convictions to be a serious breach of trust and this is why the posts were withdrawn."

The key issue

[10] It is common case that the key issue in this appeal is the lawfulness of the statutory requirement that in the context of an EDC and a parallel requirement for self-disclosure, the existence of more than one conviction will mean that in every such case all convictions, no matter their age or subject matter, will be disclosable.

[11] Two statutory schemes are relevant to this case. First, the provisions of Part V of the Police Act 1997 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. Secondly, the self-disclosure arrangements under the 1979 Order which enables an employer to seek information from an applicant in respect of the applicant's criminal record for convictions that otherwise would be regarded as spent under the Rehabilitation of Offenders Order (NI) 1978. Certain convictions which are deemed "protected" do not have to be disclosed in the course of an application for certain excepted classes of employment.

[12] Amendments to these schemes were brought about by the Police Act 1997 (Criminal Record Certificates: Relevant Matters) (Amendment) Order (NI) 2014 and the Rehabilitation of Offenders (Exceptions) (Amendment) Order (NI) 2014.

[13] We pause to observe that at this time similar legislation operated in England and Wales with the Police Act 1997 as amended by the Police Act (Criminal Record Certificates: Relevant Matters) (Amendment) (England and Wales) Order 2013 (SI 2013/1200) and the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 (SI 1975/1023) as amended by the Rehabilitation of Offenders Act (Exceptions) Order 1975 (Amendment) (England and Wales) Order 2013 (SI 2013/1198).

[14] We have appended to this judgment the relevant contents of both the relevant statutory provisions that operated in Northern Ireland at the time of the respondent's employment application.

The essential aspects of the revised statutory scheme

[15] It is common case that the aim of the legislation is to facilitate employment of former offenders, while affording protection to the vulnerable and children together with a recognition of the special requirements of certain sensitive professions, employments and activities.

[16] The Rehabilitation of Offenders (Exceptions) (Amendment) Order (NI) 2014 changed its predecessor-- the 1979 Order-- in that it re-instated protection in the case of what it named as "protected caution" and "protected conviction". A caution is protected if it was given otherwise than for any of fourteen listed categories of offence and if at least six years have passed since the date of the caution (or two years if the person was then a minor): Article 4. A conviction is protected if it was imposed otherwise than for any of the listed categories; if it did not result in a custodial sentence; if the person has not been convicted of any other offence; and if at least 11 years have passed since the date of the conviction (or 5½ years if he was then a minor).

[17] The Police Act 1997 (Criminal Records Certificates: Relevant Matters) (Amendment) Order (Northern Ireland) 2014 amended its predecessor narrowing the content of the Criminal Record Certificate and the Enhanced Criminal Record Certificate analogously. The obligation is to include in the certificate details of every "relevant matter". Whereas the definition of relevant matter originally included all convictions including all spent convictions, the new Order amends the definition so as to render the obligation to make disclosure of spent convictions and of cautions under the 1997 Act broadly co-extensive with the new narrower obligation of the person to make disclosure under the amended 1979 Order.

[18] These recent amended Orders therefore represent a departure from the former regime under which disclosure of all spent and unspent convictions and all cautions was required of the question that was put or the application for a certificate made, in the specified circumstances. Even in those circumstances certain spent convictions and cautions, identified by their subject matter and in the case of a

conviction also by the sentence, and also by the number and age of them, are no longer required to be disclosed. (See Re T per Lord Wilson at paragraph 13-15).

[19] Of relevance to this case is the fact that the parallel requirements of the amended Orders dictate that a person such as the respondent, having more than one conviction, must disclose all her convictions to the employer (in this case the relevant Trust). All her convictions will be set out in the Enhanced Criminal Record Certificate by Access NI notwithstanding that none of her offences individually is a specified offence, did not result in custodial sentences and was more than 11 years old.

Article 8 of the Convention

[20] The Article provides:

> "(1) Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

[21] It is helpful to consider the affidavit dated 19 March 2015 filed by Tom Clarke, general manager of Access NI the criminal history disclosure service for Northern Ireland, setting out the rationale behind these statutory schemes. In essence he made the following points:

- Prior to the implementation of the scheme in 2014, the appellant gave careful consideration to the compatibility of the new scheme with Article 8 of the Convention in order to ensure there would be sufficient safeguards to protect the rights of the individual.

- An extensive consultation process was undertaken involving a review of Access NI's procedures by Sunita Mason. She was an independent advisor for Criminality Information in England and Wales who had produced a report in March 2010 for the Home Office in England and Wales following the deliberations of the Independent Advisory Panel for the Disclosure of Criminal Records.

- In line with the recommendations she made in England and Wales, Ms Mason similarly recommended that the appellant should bring forward proposals to filter out convictions that were old and minor as well as information such as cautions.

- A multi-disciplinary panel was set up in England and Wales to agree principles on which old and minor convictions should be filtered out.

- A new filtering scheme was introduced in England and Wales in 2013 following the decision of the United Kingdom Supreme Court in R (On the Application of T) v Chief Constable of Greater Manchester Police; R (On the Application of B) v Secretary of State for the Home Department [2015] AC 49 (hereinafter called "T") in which the court held that a blanket disclosure of all spent convictions and cautions was incompatible with Article 8 of the Convention.

- The decision taken in Northern Ireland in 2014 was to mirror the new scheme introduced in England and Wales which had been operational for a year and appeared to be running smoothly.

- The scheme had to be sufficiently certain to make it workable and predictable, allowing for automatic issue of certificates.

- Lines had to be drawn as to when cautions or convictions could be filtered out.

- It was no longer the case that all convictions and cautions would be automatically disclosed.

Authorities

[22] We are grateful to counsel for the array of authorities that they have put before us in this matter. We have found the following of particular assistance.

[23] R (T) v Chief Constable of Greater Manchester Police and Others [2014] UKSC 35 is of course the leading authority emanating from the Supreme Court. In short, this judgment determined that the unamended provisions were incompatible with Article 8 of the Convention.

[24] T's case arose when he disputed whether his two warnings for stealing bikes (having been acquired at the mere age of 11) should be disclosed in the EDC (termed an ECRC in England and Wales) when participating in a sports study degree course which required working alongside children. In short there were no safeguards regarding the keeping of the records, no review, no rational risk assessment and no attempt to relate the warnings for theft to the proposed social work with children.

[25] The Supreme Court in T dealt with the two aspects of Article 8.2 of the Convention which must be addressed by this court. First, whether the legislation's requirements for disclosure constitute an interference "in accordance with the law". Secondly, whether the statutory provisions can be regarded as "necessary in a democratic society".

[26] Lord Reed, giving the majority decision, observed that the requirement that the phrase "in accordance with the law" implied that "the law must … give the individual adequate protection against arbitrary interference (see paragraph [68]).

[27] At paragraph [113] et seq Lord Reed said:

> "… Put shortly, legislation which requires the indiscriminate disclosure by the state of personal data which it has collected and stored does not contain adequate safeguards against arbitrary interferences with Article 8 rights.
>
> 114. This issue may appear to overlap with the question whether the interference is 'necessary in a democratic society': a question which requires an assessment of the proportionality of the interference. These two issues are indeed inter-linked … but their focus is different. Determination of whether the collection and use by the state of personal data was necessary in a particular case involves an assessment of the relevancy and sufficiency of the reasons given by the national authorities. In making that assessment, in a context where the aim pursued is likely to be the protection of national security or public safety, or the prevention of disorder or crime, the court allows a margin of appreciation to the national authorities, recognising that they are often in the best position to determine the necessity for the interference. As I have explained, the court's focus tends to be upon whether there were adequate safeguards against abuse, since the existence of such safeguards should ensure that the national authorities have addressed the issue of the necessity for the interference in a manner which is capable of satisfying the requirements of the Convention. In other words, in order for the interference to be 'in accordance with the law', there must be safeguards which have the effect of enabling the proportionality of the interference to be adequately examined.

> Whether the interference in a given case was in fact proportionate is a separate question.
>
> 115. … Whether a system provides adequate safeguards against arbitrary treatment, and is therefore 'in accordance with the law' within the meaning of the Convention, is not a question of proportionality, and is therefore not a matter in relation to which the court allows national authorities a margin of appreciation."

[28] Addressing the 1997 legislation, Lord Reed referred to the judgment of the European Court of Human Rights ("ECtHR") in MM v United Kingdom [2013] App. No. 24029/07. At paragraph [119] Lord Reed said:

> "That judgment 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."

[29] We note that Lord Wilson, in a minority judgment, adopted a different stance on the principle of legality. At paragraph [38] he said:

> "… I take the view in respectful disagreement with the other members of this court that the 1997 Act does not fall foul of the principle of legality. The Court of Appeal was in my view right to decline to conclude, even in the light of the MM case, that either the 1997 Act or the 1975 Order did so; …. Lord Reed JSC suggests in para 114 that the question of whether there are safeguards which enable the proportionality of the interference adequately to be examined affects the legality, whereas the question of whether the interference was proportionate affects necessity. But in my view the ECtHR's third point logically falls within the latter; and I depreciate its seepage into the former."

[30] Turning to the second aspect of Article 8.2 of the Convention, the Supreme Court was unanimous in concluding that the old statutory provisions under the 1997 Act could not be regarded as "necessary in a democratic society". Lord Wilson summarised the criteria for the test of necessity at paragraph [39] in the following terms:

> "In this respect one asks first whether the objective behind the interference was sufficiently important to justify limiting the rights of T and B under Article 8; second whether the measures were rationally connected to the objectives; third whether they went no further than was necessary to accomplish it; and fourth, standing back, whether they struck a fair balance between the rights of T and B and the interests of the community."

[31] In a passage much cited in this case Lord Wilson said at paragraph [41]:

> "Nevertheless the nature of T's and JB's attack on the regime is obvious. It is that it operated indiscriminately. The exception (so the argument goes) from the eradication for practical purposes of certain entries from a person's record in accordance with the 1974 Act should be bounded by two sets of rules: rules which specify the type of request which should justify some disclosure and rules which identify the entries which should then be disclosed. The regime certainly contained rules of the former character. But there were none of the latter character. If the type of request was as specified, there had to be disclosure of everything in the kitchen sink. There was no attempt to separate the spent convictions and the cautions which should, and should not, then be disclosed by reference to any or all of the following: (a) the species of the offence; (b) the circumstances in which the person committed it; (c) his age when he committed it; (d) in the case of a conviction, the sentence imposed upon him; (e) his perpetration or otherwise of further offences; (f) the time that elapsed since he committed the offence; and (g) its relevance to the judgement to be made by the person making the request. The case of *T* is held up as an egregious example of the flaws in the regime. His theft of two bicycles before he even became a teenager was disclosed in connection with his proposed

> participation in sporting activities with children, to which (it is said) it had no conceivable relevance."

[32] In brief, therefore, the Supreme Court majority decision was that the disclosure provisions of the 1997 Act were incompatible with Article 8 of the Convention in that they failed to meet the requirement of Article 8.2 that the interference with Convention rights must be "in accordance with the law". It unanimously held that the provisions of the Act were not "necessary in a democratic society".

[33] A somewhat different approach was adopted by the court when dealing with the 1975 Order (comparable to the 1979 Order in this jurisdiction). Of this Order Lord Reed said at [140]:

> "[140] The question then arises whether the interference with the right to respect for private life resulting from the 1975 Order is justifiable under article 8(2). … 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 conclusion reached in relation to the 1997 Act cannot automatically 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."

[34] However Lord Reed went on to conclude at paragraphs [142]-[143] that there was no rational connection between the interference with Article 8 resulting from the requirement that a person disclosed 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 that children, let alone his suitability, for the remainder of his life, for the entire range of activities covered by the 1975 Order. Consequently the court concluded that the interference in issue in the case of T was not necessary in a democratic society to attain the aim of protecting the safety of children.

[35] T's case was of course determined in the context of the English legislation prior to the amendments adumbrated in this judgment. These amendments were made to the legislation in light of the judgment in Re T. The instant case is a

challenge to those amendments in so far as they mandate full disclosure indefinitely in the event of more than one conviction.

[36] Two cases in England have addressed the new statutory regime. First, R (P and A) v Secretary of State for Justice [2016] EWHC 89 (Admin). In this case the Divisional Court was asked to consider the compatibility with Article 8 of the Convention of the revised ECRC regime under the 2013 Order. In particular, the challenge concerned the amended provision in Section 113A(6) of the Police Act 1997. The effect of the provision is that where there are two or more convictions they are always disclosable on a CRC or an ECRC. Further, where the conviction is of a specified kind or resulted in a custodial sentence or is "current" (i.e. for an adult within the last 11 years and for a minor within the last 5 years and 6 months), then it would always be disclosable.

[37] P had, whilst an adult, a period of severe and undiagnosed mental illness during which she had committed two offences of theft by shoplifting very inexpensive items, being cautioned for one and convicted for the other. She was then also convicted for failing to surrender to bail and attend court. Her health having considerably improved, she sought to return to her teaching profession as a teaching assistant. Such work required an ECRC.

[38] A had also acquired two convictions for theft at the ages of 17 and 18. He was now 51 years of age and wished to work in the finance industry in a role which might require Financial Services Authority approval, again under which his past convictions required to be disclosed.

[39] The argument for the claimants was that to set the bar at one single conviction was arbitrary and not either "in accordance with the law" or necessary to proportionate within the second limb of the test set out in Article 8(2).

[40] The judgment of McCombe LJ agreed with the claimants' propositions. He held that the Supreme Court's approach in T had moved the law on a considerable distance concerning whether a decision is in accordance with the law. The court determined that the effect of T was to require the provision to set out adequate safeguards which would have the effect of enabling the proportionality of the interference to be adequately examined, as well as protection against arbitrariness. At paragraph [86], citing from the judgment of Treacy J in the instant case, he said:

> "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'."

[41] At paragraph [88] McCombe LJ went on to say:

> "If, as I now think, the present scheme, as represented by the 1997 Act at least, is not in accordance with the law, within the meaning of Article 8.2, then (as Lord Reed explained) the State's 'margin of appreciation' falls away. The deference that a judge would always feel towards a scheme expressly sanctioned by Parliament cannot be engaged in this case. Equally, therefore, it seems to me, that questions of administrative convenience which trouble the Defendants so much can have no operative place in assessing the lawfulness of the interference with Convention rights. For my part, in any event, I am far from convinced that a review scheme would be unworkable, in some cases ad hoc related to a specific application for a certificate or more generally after the lapse of suitable time, with a time bar to a further application for review after an unsuccessful attempt."

[42] McCombe LJ went on to hold at paragraph [89], that there was no reason why a second conviction should require, for an entire lifetime, disclosure of those convictions. There was no "rational relationship", with the purpose of the legislation (i.e. rehabilitation). Carr J added briefly a judgment to the effect that the court could not accept that this was a situation which warranted a bright line approach. If a measure was not necessary, it was irrelevant how administratively convenient it may be.

[43] In R (On the Applications of G) v Chief Constable of Surrey Police and Others [2016] EWHC 295 (Admin), the claimant had applied for judicial review of the disclosure scheme for convictions and cautions. The claimant had been issued with two reprimands for offences of sexual activity with a child when he was 13 years old. The court held again in this instance that the statutory regime that required disclosure of historic reprimands to potential employers seeking enhanced disclosure was, in the absence of procedural safeguards to assess relevance and proportionality, incompatible with ECHR Article 8.

[44] At paragraph [43] of the judgment, Blake J said:

> "If there are insufficient safeguards to ensure that the data retained is relevant to and necessary for the purpose for which it is disclosed to the third party, then, despite the existence of the filtering process under the more recent national measures that have the status of law domestically, the overall regime for

> disclosure cannot be said to have the characteristics that the ECHR requires in order for the interference with private life caused by the transmission to be in accordance with the law."

[45] Whilst these three cases cited above provide the foundation of the principles which have guided us in this case a number of other authorities cited by counsel have served to further inform our thinking. They can be mentioned in brief.

S v United Kingdom, Marper v United Kingdom [2009] 48 EHRR 50

[46] This case revolved around the indefinite detention of fingerprints and DNA samples of suspects who were later not convicted of a criminal offence. At paragraph [95] the court said:

> "… 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 the scope of discretion conferred on the competent authorities and the manner of its exercise …"

[47] At paragraph [124] et seq the court said:

> "… The Court is struck by the blanket and indiscriminate nature of the power of retention in England and Wales. The material may be retained irrespective of the nature or gravity of the offence with which the individual was originally suspected or of the age of the suspected offender; fingerprints and samples may be taken – and retained – from a person of any age, arrested in connection with a recordable offence, which includes minor or non-imprisonable offences. The retention is not time-limited; the material is retained indefinitely whatever the nature or seriousness of the offence of which the person was suspected. …. In particular, there is no provision for independent review of the justification for the retention according to defined criteria, including such factors as the seriousness of the offence, previous arrests, the strength of the suspicion against the person and any other special circumstances.

> [125] In conclusion, the court finds that the blanket and indiscriminate nature of the powers of retention of the fingerprints, cellular samples and DNA profiles of persons suspected but not convicted of offences … fails to strike a fair balance between the competing public and private interests and that the respondent State has overstepped any acceptable margin of appreciation in this regard."

MM v United Kingdom (Applications No 24029/07) 13 November 2012

[48] In this case the fourth section of the ECtHR determined a violation of Article 8 of the Convention where the applicant had been required to disclose information about a caution for a child abduction offence in an enhanced disclosure request. The court of its own motion concluded that if a disclosure regime did not provide for sufficient safeguards to protect private life, it would not be in accordance with the law, within the meaning of the case law in Strasbourg. The court of its own motion determined that if a disclosure regime did not provide for sufficient safeguards to protect private life, it would not be in accordance with the law. The court held that the retention and disclosure of the applicant's caution data could not be regarded as "being in accordance with the law".

R (On the Application of W) v Secretary of State for Justice [2015] EWHC (Admin) 1952 (8 July 2015)

[49] Mr Coll placed a measure of reliance on this case. The issue to be determined arose out of the proposed disclosure of a conviction for assault occasioning actual bodily harm ("AOABH") when the claimant was 16, for which the claimant received a conditional discharge. A conviction for mere assault would not have required disclosure. At the outset it must be observed that the applicant in W conceded at the outset that the disclosure regime was in accordance with the law. Accordingly, the "in accordance with the law" concept was never argued before the court. The court determined that Parliament was entitled to decide which offences fell on which side of the disclosure line in circumstances where the AOABH charge was sufficient to attract the dangerousness provisions of the criminal law. The availability of alternatives did not call into question the lawfulness of the statutory scheme unless it was clear, taking account of the margin of appreciation, that the legislature had failed to accord sufficient importance to the individual's Article 8 rights. In terms Parliament had made a bright line rule that the courts should respect as to the category of offence where retention of data and provision under the duty of enhanced disclosure would be indefinite.

R (F (A Child)) v Secretary of State for the Home Department [2010] UKSC 17

[50] This was a decision of the Supreme Court which made a declaration in relation to the Sexual Offences Act 2003 requiring sexual offenders to notify the

police of certain information indefinitely. The declaration was made that indefinite application of the notification requirements, without an opportunity being afforded to the offender to demonstrate that he presented no measurable risk of re-offending, was incompatible with Article 8.

Beghal v Director of Public Prosecutions [2015] UKSC 49

[51] This case involved a claimant stopped and questioned by police officers under the Terrorism Act 2000 which allowed nominated officers, without the need for reasonable suspicion, to stop, to question and if necessary to detain a person for up to nine hours when passing through ports or borders in order to see whether they appeared to be someone who had been concerned in the commission, preparation or instigation of acts of terrorism.

[52] Citing S and Marper, Lord Hughes JSC at paragraph [31] said:

> "Legality in this latter sense may be failed, for example, where there is an over-rigid regime which does not contain the flexibility which is needed to avoid an unjustified interference with a fundamental right."

[53] After invoking MM and T, Lord Hughes continued at paragraph [31]:

> "In those cases the statutory rules under which recordable convictions and cautions were automatically retained and compulsorily disclosed on applications for particular forms of employment were held to fail the tests of legality. This was in large part because they were without any flexibility or discretion to allow for the case where the recorded matter was irrelevant to the proposed employment and thus disclosure would constitute an unjustified (disproportionate) interference with Article 8 rights. The safeguards … were required in order to guard against automatic operation of the rule resulting in disproportionate interference with Article 8 rights."

[54] In Beghal's case, the court considered that a fair balance had been struck between the rights of the individual and the interests of the community at large and hence the need for proportionality had been satisfied.

R (Tigere) v Secretary of State for Business, Innovation and Skills [2015] UKSC 57

[55] In this case the concept of the bright-line rule was discussed at paragraph [37] by Baroness Hale in the following terms:

> "Hitherto the evidence and discussion in this case has tended to focus on whether there should be a bright-line rule or a wholly individualised system. There are obvious intermediate options, such as a more properly tailored bright line rule, with or without the possibility of making exceptions for particularly strong cases which fall outside it."

Gaughran v Chief Constable of the Police Service for Northern Ireland [2015] UKSC 29

[56] This was a case concerning the retention of biometric information relating to convicted persons. The court concluded that the choice to retain the data of those convicted of recordable offences represented the exercise of a balanced and rational judgement by the state. It set out in slightly different terms the four basic tenets of proportionality later recorded by Lord Wilson in paragraph [39] of T and set out in paragraph [30] of this judgment.

The judgments of Treacy J

[57] The initial judgment of Treacy J was delivered on 10 July 2015. It dealt largely with the proportionality argument. On this occasion the court found, *inter alia*, as follows:

- The retention, storage and disclosure of criminal information engaged the respondent's rights under Article 8(1) of the Convention.

- The lack of consideration of relevance rendered the scheme indiscriminate and thus unlawful.

- The measures went further than necessary to achieve the legitimate objective of protecting vulnerable persons and failed to strike a fair balance between the rights of the individual and the interests of the community.

- Bright lines must be drawn as close to the point at which criminal record information ceases to be relevant as is possible.

- The scheme was basically unlawful because in the case of any person with more than one minor conviction it mandated all minor convictions be available for disclosure forever.

[58] The appellant appealed that decision and the matter came before the Northern Ireland Court of Appeal ("NICA") on 6 March 2016. At that hearing NICA directed that two further matters be remitted to the High Court namely:

- That the High Court make specific findings in relation to the lawfulness of the self-declaration part of the scheme under the Rehabilitation of Offenders (Exceptions) (NI) Order 1979 and the Rehabilitation of Offenders (Exceptions) (Amendment) Order (NI) 2014.

- Secondly, the NICA granted the respondent leave to amend the Order 53 statement so that the High Court could consider and determine a new ground of challenge to the requirement for self-declaration and criminal record disclosure where the respondent has more than one criminal conviction.

[59] On 11 May 2016, Treacy J gave a further judgment which, *inter alia*, determined the following issues:

- The appellant had adopted a blanket approach in its self-declaration provision towards people with more than one conviction.

- This approach did not permit consideration of the relevance of the information to be disclosed or the proportionality of the disclosure.

- There was no rational connection between the interference with the respondent's Article 8 rights and the objective of safeguarding vulnerable people.

- The court's original findings in respect of the scheme for the disclosure of criminal convictions on an EDC were equally applicable to the requirement to self-declare minor offences: the requirement went further than necessary to achieve the objective of safeguarding vulnerable people and failed to strike a balance between the respondent's rights and the interests of the community.

- Accordingly, the requirement to self-declare failed the test of "necessity".

[60] On this occasion the learned trial judge also considered the test for legality under both legislative provisions. He concluded that the fundamental flaws in the old scheme identified by the Supreme Court in T remained, that a process for independent review was not in place at the time of the impugned decisions and the approach of the scheme was so rigid and mechanistic that it produced the kinds of arbitrary results which the learned judge identified at paragraph [40] of his earlier judgment. The learned trial judge concluded that the arrangements of the 1979 Order as amended were 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. Accordingly, the self-declaration aspect of the regime also failed the test of legality and suffered from the same condition of arbitrariness which beset the 1997 Act.

The appellant's submissions

[61] Mr Coll, in the course of a well-structured skeleton argument and carefully prepared oral submissions advanced the following arguments.

In accordance with the law

- There are sufficient safeguards to enable the proportionality of the interference with Article 8 rights to be examined and therefore satisfies the test of interference being "in accordance with the law".

- A review mechanism is not an absolute requirement.

- This is not a case where the law is vague or flawed with a broad discretion as to the management/use of criminal record information.

- The presence of the reference in Lord Wilson's judgment at paragraph [41] of T (see paragraph 31 of this judgment) to "the perpetration or otherwise of other offences "is sufficient to make these provisions in accordance with the law and be viewed as proportional.

Proportionality

- The changes in the 2014 regime saw the introduction of a strong degree of filtering of old and minor offences providing bright lines which excluded certain convictions/cautions from self-disclosure.

- The insistence on disclosure of multi-convictions does not alter the overall status of the scheme

- The new system has been created as a result of extensive expert consideration on consultation, oversight by the Justice Committee, agreement of the Northern Ireland Executive and legislative taken steps by the Northern Ireland Assembly.

- More than one conviction is a matter of significance as it may point towards a propensity/recklessness for criminal law which is appropriate for assessment.

- The parameters of the balancing exercise struck is a matter within the margin of appreciation.

- That the scheme may result in harshness in certain cases at the margins does not render the scheme disproportionate or irrational.

The respondent's submissions

[62] Mr Woolfe, in equally clear and concise arguments, advanced the following points.

In accordance with the law

- There is an absence of adequate legal protection against arbitrariness. This is another over rigid scheme which does not contain the flexibility needed to avoid an unjustified interference with a fundamental right.

- The scheme discloses data to third parties without regard to the nature of the offence, the disposal of the case, the time which has elapsed since the offence took place or the relevance of the data to the employment sought.

- The scheme does not bring sufficient safeguards against abuse so as to enable the proportionality of the interference with Article 8 rights to be examined.

- The scheme seeks to make a virtue of the bright line rule ignoring the inflexibility of those rules and the absence of discretion. The recent invocation of a review mechanism has come too late to assist the appellant in this case.

- Both sides of the scheme, including the self-declaration requirement, have the same characteristics in terms of practical consequences. The degree of intrusiveness is effectively the same as under the Police Act and therefore the self-declaration also is not in accordance with the law.

Proportionality

- The measures are not rationally connected to the objective.

- These measures go further than is necessary to achieve the legitimate aim.

- The current scheme does not permit the consideration of the relevance of the information to be disclosed or proportionality of that disclosure.

Further scheme changes

[63] The Justice Act (Northern Ireland) 2015 Part V at Schedule 4, amending the Police Act 1997, came into effect in April 2016. Without rehearsing the full contents of that Act which makes changes to the Access NI disclosure scheme, the changes can be summarised as follows:

- There is now a filtering review mechanism operational in Northern Ireland. The Act makes provision for a Standard or Enhanced criminal Record Certificate to be referred to an independent reviewer.

- The requirement to furnish a copy of the Criminal Record Certificate to anyone other than the applicant, except in defined circumstances, will be removed. Thus an applicant can decide to share the certificate with her prospective employer or challenge any information contained therein before doing so.

- There will be extended to Northern Ireland the independent appeals process currently in place in England and Wales in relation to police information permitting the Independent Monitor to consider an application from a person who believes that information provided on an Enhanced Certificate is not relevant and ought not to be included.

- There is an amendment allowing for a higher relevancy test so that a chief police officer will now only include information on a certificate which he reasonably believes to be relevant and which ought to be included. The previous test had required the disclosure of information that might be relevant and which ought to be included. The legislation also makes provision for a statutory Code of Practice to which chief officers must have regard in discharging their functions.

[64] A memorandum from the office of the Justice Minister prior to the introduction of this latest change, which was before the court, recorded as follows:

> "Review mechanisms
>
> 18. On the basis of legal advice it is clear 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 whole as disproportionate. The Minister agrees that there should be a review process and officials are currently working on developing this."

[65] Mr Coll informed us that this independent review mechanism is still under consideration in relation to the self-disclosure obligations. Needless to say these further changes were not in operation at any time relevant to these appeals and we make no observations as to their adequacy.

Conclusion

[66] It is common case in this matter that the respondent's Article 8 rights under the Convention are engaged by these schemes. Lord Hope in R (On the Application of L) FC (Appellant) v Commissioner of Police of the Metropolis (Respondent) [2009] UKSC 3 said at paragraph [27] of that judgment:

> [27] This line of authority from Strasbourg shows that information about an applicant's convictions which is collected and stored in central records can fall within the scope of private life within the meaning of Article 8(1), with the result that it will interfere with the applicant's private life when it is released. It is, in one sense, public information because the convictions took place in public. But the systematic storing of this information in central records means that it is available for disclosure under Part V of the 1997."

[67] Is the 1997 legislation as amended by Police Act 1997 (Criminal Record Certificates: Relevant Matters) (Amendment) Order (Northern Ireland) 2014, insofar as it mandates disclosure by the State of more than one conviction indefinitely in the circumstances posited, in accordance with the law?

[68] We have come to the conclusion that such a provision is not in accordance with the law for the following reasons. First, it is important to appreciate that "in accordance with the law "does not merely refer back to domestic law but also relates to the quality of law, requiring it to be compatible with the rule of law. Hence there must be a measure of legal protection against arbitrary interference with Article 8 rights. We do not consider that there are any or adequate safeguards with this provision which would have the effect of enabling the proportionality of the interference to be adequately examined.

[69] In particular there is no system:

- to review the keeping of the records of the convictions indefinitely and for their disclosure,
- to carry out a rational risk assessment of the need for disclosure,
- to relate the relevance of the convictions to any proposed job.

[70] In short, this legislation failed to draw any distinction on the basis of the nature of the offences, the terms of the disposal of the cases, the time that had elapsed since the offences had taken place or, importantly, their relevance to the employment sought. The cumulative effect of these omissions together with the

absence of any mechanism for independent review effectively excluded such safeguards.

[71] We do not go as far to say that the provision now made for independent review under the provisions of the Justice Act (Northern Ireland) 2015 Part V and Schedule 4 necessarily betrays a sense of ebbing confidence on the part of the Minister of Justice in the lawfulness of the existing legislation. However it does reveal how easily at least one important safeguard could have been introduced into the 2014 amendment. Failure should inevitably sharpen the eye and Re T criticisms of the old system had been the engine behind the 2014 legislation. A modest degree of wider re-thinking should have indicated that the absence of safeguards in situations where more than one conviction has occurred required to be addressed. Sadly, it appears that until the 2015 legislation, the need for such safeguards in relation to the circumstances surrounding more than one conviction seem to have been shrouded in disregard.

[72] In this context, the concept of "in accordance with the law" within the meaning of Article 8.2 removes the State's "margin of appreciation". We respectfully endorse the view of McCombe LJ in P and A at paragraph [88]:

> "The deference that a judge would always feel towards a scheme expressly sanctioned by Parliament cannot be engaged in this case. Equally, therefore, it seems to me, that questions of administrative convenience which trouble the defendants so much can have no operative place in assessing the lawfulness of the interference with Convention rights."

[73] Doubtless, legislators often are in the best position to determine the necessity for interference with individual rights in the interests of society at large. However courts must still pose the question as to whether or not there are adequate safeguards against abuse. We are satisfied that in the instant case no such safeguards exist where more than one conviction is automatically to be disclosed.

[74] Are the provisions in the 1979 legislation as amended by the Rehabilitation of Offenders (Exceptions) (Amendment) Order (Northern Ireland) 2014, mandating a self-disclosure of more than one conviction to an employer in the circumstances posited, in accordance with the law?

[75] In the case of this legislation, we have decided to echo the caution of the Supreme Court in T as found at paragraph [140] of Lord Reed's judgment. We respectfully agree that the conclusion reached in relation to the 1997 Act as amended cannot automatically be extended to the 1979 Order as amended. Strict standards clearly do apply in relation to the collection, storage and use *by the State* of personal data. It is arguable that the requirements of self-disclosure in the context of the 1979

Order as amended are somewhat less stringent than the particularly sensitive element of the use and disclosure by the *State* of personal data. Our caution is echoed by McCombe LJ in P and A, at paragraph [90]. We have concluded that it is not necessary to make a determination on this aspect of the matter given our conclusions on proportionality as set out below.

[76] Do the provisions of the 1997 legislation as amended and the 1979 Order as amended meet the requirement of "necessity" set out in Article 8.2 of the Convention?

[77] We have concluded that neither of these provisions meets such a test for the following reasons. We recognise that the margin of appreciation concept does apply in this instance. We accept that consideration has been given to this matter by the Justice Committee, the Northern Ireland Executive and the Northern Ireland Assembly. The objective sought to be achieved is very important. Nonetheless the test of necessity under the terms of the Convention does invite an assessment of relevancy and sufficiency of the reasons given for the mandatory provision of disclosure of criminal records where there has been more than one conviction.

[78] We consider that these provisions operate indiscriminately. To adopt the phrase of Lord Wilson in T, "everything in the kitchen sink" (albeit to a somewhat more restricted degree than in T) has to be provided where there is more than one conviction. No attempt is made to separate spent convictions from other convictions. No attempt has been made to:

- consider the species of the individual offences,
- consider the circumstances in which the offences were committed,
- ascertain the age of the perpetrator at the time of each of the offences,
- assess the nature of the sentence imposed,
- consider the lapse of time since the last conviction,
- consider the lapse of time since all of the offending occurred,
- apply some judgement to the relevance of the offences to the application for disclosure and the employment which is sought.

[79] In short, this is yet another instance of a blanket, automatic, inflexible approach to disclosure where there has been more than one offence. It is the use of indiscriminate power to ensure disclosure. We consider the State has overstepped any acceptable margin of appreciation.

[80] Mr Coll's contention that more than one conviction can betray a propensity or recklessness towards the criminal law does not persuade us. That may be the case but the absence of any mechanism to assess this in the individual case illustrates that the blanket nature of the provision goes much further than is necessary to protect the aim of the legislation. There is no attempt to carry out a balancing exercise between the interests of the person concerned and the community at large.

[81] It cannot be appropriate that two minor offences, as opposed to only one minor conviction, from many years before, which the individual may well have put behind him/her in all other respects of their lives, should suddenly appear on a criminal record relating to work with vulnerable adults or children without any assessment whatsoever. It is the lack of consideration that makes this scheme indiscriminate and therefore disproportionate.

[82] The invocation of the bright line concept does not protect the appellant in this case. Where the bright line filters certain specific violent offences from less violent offences as in W, the concept works well. In this instance, however, the bright line approach does no more than produce a blanket and indiscriminate approach to mandatory disclosure in circumstances which may have absolutely no relevance to the employment sought. The well-chosen instances adumbrated by Treacy J in paragraph [40] of his first judgment illustrate well the irrationality and startling consequences of such a blanket approach.

[81] Accordingly, because the 1997 Act as amended is not in accordance with the law and fails the necessity test and because the 1979 Order as amended fails the necessity test, we affirm the decision of Treacy J.

APPENDIX

Section 113A of the Police Act 1997

"113A Criminal record certificates

(1) The [Department of Justice in Northern Ireland] must issue a criminal record certificate to any individual who-

(a) makes an application, and
(b) pays in the prescribed manner any prescribed fee.

(2) The application must-

(a) be countersigned by a registered person, and
(b) be accompanied by a statement by the registered person that the certificate is required for the purposes of an exempted question.

(3) A criminal record certificate is a certificate which-

(a) gives the prescribed details of every relevant matter relating to the applicant which is recorded in central records, or
(b) states that there is no such matter.

(4) The [Department of Justice in Northern Ireland] must send a copy of a criminal record certificate to the registered person who countersigned the application.

(5) The [Department of Justice in Northern Ireland] may treat an application under this section as an application under section 113B if-

(a) in his opinion the certificate is required for a purpose prescribed under subsection (2) of that section,
(b) the registered person provides him with the statement required by that subsection, and
(c) the applicant consents and pays to the [Department of Justice in Northern Ireland] the amount (if any) by which the fee payable in relation to an application under that section

exceeds the fee paid in relation to the application under this section.

(6) In this section-

"central records" means such records of convictions and cautions held for the use of police forces generally as may be prescribed;
"exempted question" means a question in relation to which section 4(2)(a) or (b) of the Rehabilitation of Offenders Act 1974 (effect of rehabilitation) has been excluded by an order of the [Department of Justice in Northern Ireland] under section 4(4) of that Act;

"relevant matter" means –

(a) a conviction within the meaning of the Rehabilitation of Offenders Act 1974, including a spent conviction, and
(b) a caution.

….

(7) The [Department of Justice in Northern Ireland] may by order amend the definitions of "central records" and "relevant matter" in subsection (6)."

Section 3 of the Police Act 1997 (Criminal Record Certificates: Relevant Matters) (Amendment) Order (Northern Ireland) 2014

"In section 113A(6), for the definition of "relevant matter" substitute:

""relevant matter", in this section as it has effect in Northern Ireland, means-

(a) in relation to a person who has one conviction only –

(i) a conviction of an offence within subsection (6D);
(ii) a conviction in respect of which a sentence of imprisonment, a sentence of service detention or custodial order was imposed; or
(iii) a current conviction;

(b) In relation to any other person, any conviction;
….."

Section 4 of the Police Act 1997 (Criminal Record Certificates: Relevant Matters) (Amendment) Order (Northern Ireland) 2014

"…

(6E) for the purposes of the definition of "relevant matter" as it has effect in Northern Ireland –

(a) "conviction" has the same meaning as in the Rehabilitation of Offenders (Northern Ireland) Order 1978 and includes a spent conviction within the meaning of that order;
(b) a person's conviction is a current conviction if –

(i) the person was aged 18 or over on the date of the conviction and that date fell within the 11 year period ending with the day on which the certificate is issued, or
(ii) the person was aged 18 or under on the date of conviction and that date fell within the period of 5 years and 6 months ending with the day on which the certificate is issued;

…"

Section 9 of the Police Act 1997 (Criminal Records) (Disclosure) Regulations (Northern Ireland) 2008

"**Enhanced criminal record certificates: prescribed purposes**

9(1) The purposes for which an enhanced criminal record certificate may be required in accordance with a statement made by a registered person under section 11B (2)(b) of the Act, are prescribed as follows; namely for the purposes of –
…

(e) considering the applicant's suitability for a position which involves regularly caring for, training, supervising or being in the sole charge of a person aged 18 or over who is a vulnerable adult within the meaning given by paragraph (2) below;"

Section 113B of the Police Act 1997

"(1) The [Department of Justice in Northern Ireland (Access NI)] must issue an enhanced criminal record certificate to any individual who –

(a) makes an application, and
(b) pays in the prescribed manner any prescribed fee.

(2) The application must –

(a) be countersigned by a registered person, and
(b) be accompanied by a statement by the registered person that the certificate is required for the purposes of an exempted question asked for a prescribed purpose.

(3) An enhanced criminal record certificate is a certificate which –

(a) gives the prescribed details of every relevant matter relating to the applicant which is recorded in central records and any information provided in accordance with subsection (4), or
(b) states that there is no such information.

(4) Before issuing an enhanced criminal record certificate the [Department of Justice in Northern Ireland] must request the chief officer of every relevant police force to provide any information which, in the chief officer's opinion –

(a) might be relevant for the purpose described in the statement under subsection (2), and
(b) ought to be included in the certificate.

(5) The [Department of Justice in Northern Ireland] must also request the chief officer of every relevant police force to provide any information which, in the chief officer's opinion-

(a) might be relevant for the purpose described in the statement under subsection (2),

(b) ought not to be included in the certificate, in the interests of the prevention or detection of crime, and
(c) can, without harming those interests, be disclosed to the registered person.

(6) The [Department of Justice in Northern Ireland] must send to the registered person who countersigned the application –

(a) a copy of the enhanced criminal record certificate, and
(b) any information provided in accordance with subsection (5).

(7) The [Department of Justice in Northern Ireland] may treat an application under this section as an application under section 113A if in his opinion the certificate is not required for a purpose prescribed under subsection (2).
…"

Article 5(2) of the Rehabilitation of Offenders (Northern Ireland) Order 1978

"*Effect of rehabilitation*

5(1) Subject to Articles 8 and 9, a person who has become a rehabilitated person for the purposes of this Order in respect of a conviction shall be treated for all purposes in law as a person who has not committed or been charged with or prosecuted for or convicted or sentenced for the offence or offences which were the subject of that conviction; and, notwithstanding the provisions of any other statutory provisions or rule of law to the contrary…

(2) Subject to the provisions of any order made under paragraph (4), where a question seeking information with respect to a person's previous convictions, offences, conduct or circumstances is put to him or to any person otherwise than in proceedings before a judicial authority –

(a) the question shall be treated as not relating to spent convictions or to any circumstances ancillary to spent convictions, and the answer thereto may be framed accordingly…"

Rehabilitation of Offenders (Exceptions) Order (Northern Ireland) 1979

"**Exclusion of article 5(2) of the Order in relation to certain questions**

2(1) …. none of the provisions of article 5(2) of the Order shall apply in relation to –

(a) any question asked by or on behalf of any person, in the course of the duties of his office or employment, in order to assess the suitability –

…

(ii) of the person to whom the question relates for any office or employment specified in Part II of Schedule 1 or for any work specified in paragraph … 12 …"

"**Part II of Schedule 1**

…

(12) Any employment or other kind of work which is concerned with the provision of [health care] and which is of such a kind as to enable the holder to have access to persons in receipt of such services in the course of normal duties."

The Rehabilitation of Offenders (Exceptions) (Amendment) Order (Northern Ireland) 2014

4 Insertion of new Article 1A

1A – (1) For the purposes of this Order, a person's conviction is a protected conviction if the conditions at paragraph (2) are satisfied and

(a) Where the person was under 18 years at the time of the conviction, five years and six months or more have passed since the date of the conviction; or

(b) Where the person was 18 years or over at the time of the conviction, 11 years or more have passed since the date of the conviction

(2) The conditions referred to in paragraph (1) are that –

a. The offence of which the person was convicted was not a listed offence;

b. No sentence mentioned in paragraph (3) was imposed in respect of the conviction; and

c. The person has not been convicted of any other offence at any time.