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(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

N J's Application [2011] NIQB 122

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW BY N J

AND IN THE MATTER OF A DECISION OF THE SECRETARY OF STATE FOR NORTHERN IRELAND

AND IN THE MATTER OF A DECISION OF A LOCAL PUBLIC PROTECTION PANEL

Before Morgan LCJ, Treacy J and Sir John Sheil

MORGAN LCJ

[1] In this application for judicial review the applicant challenges:

(i) the lawfulness of the Secretary of State's decision to issue the Public Protection Arrangements Northern Ireland (PPANI) *Guidance to Agencies* on the basis that the Guidance breaches Article 8 of the ECHR; and

(ii) the lawfulness of the decision of the Local Area Public Protection Panel (LAPPP) to categorise the applicant as a potentially dangerous person (PDP) presenting a Category 2 risk of serious harm as defined within the PPANI *Guidance to Agencies* without appropriate regard to the requirements of procedural fairness and / or article 6 of the ECHR; and

(iii) the lawfulness of the said decision of the LAPP on the basis that it took into account an irrelevant consideration.

The Guidance to Agencies

[2] The Bichard Enquiry Report was published in June 2004 and looked at the public protection arrangements for children and vulnerable adults in the wake of the murders by Ian Huntley of Jessica Chapman and Holly Wells. The Police Information Technology Organisation submitted a memorandum to that enquiry describing the establishment of a national Violent Sex Offenders Register (VISOR) to provide police and probation services with a register of violent and/or registered sex offenders. VISOR was established on a national basis in 2004. The register contains information on the subject's offending history, personal details including photographs and appearance, education, employment and financial information and offender management plans. Thereafter access was provided to prisons in England and Wales, police, prisons and criminal justice social workers in Scotland and the Police Service of Northern Ireland.

[3] Article 50 of the Criminal Justice (Northern Ireland) Order 2008 gave the Secretary of State power to issue guidance on co-operation and the sharing of information between agencies, identified in Article 49 of the said Order, for the purpose of contributing to the effective assessment and management of certain persons. On devolution this power passed to the Department of Justice.

> "49.—(1) In this Part—
> "agencies" means—
> (a) the Police Service of Northern Ireland;
> (b) the Probation Board for Northern Ireland;
> (c) the Department of Education;
> (d) the Department for Employment and Learning;
> (e) the Department of Health, Social Services and Public Safety;
> (f) the Department for Social Development;
> (g) HSC Boards and HSC trusts;
> (h) Education and Library Boards;
> (i) the Northern Ireland Housing Executive;
> (j) the National Society for the Prevention of Cruelty to Children;
> "serious harm" means death or serious personal injury, whether physical or psychological;
> "specified" means specified in guidance under Article 50.
> (2) The Department of Justice may by order amend the definition of "agencies" in paragraph (1).
>
> *Guidance to agencies on assessing and managing certain risks to the public*
> 50.—(1) The Department of Justice may issue guidance to agencies on the discharge of any of their functions which contribute to the more

effective assessment and management of the risks posed by persons of a specified description

(2) Guidance under this Article may contain provisions for the purpose of facilitating co-operation between agencies, including—

(a) provisions requiring agencies to maintain arrangements for that purpose and to draw up a memorandum of co-operation; and

(b) provisions regarding the exchange of information among them.

(3) Paragraph (2) does not affect the generality of paragraph (1).

(4) Agencies shall give effect to guidance under this Article.

(5) The Department of Justice shall consult the agencies before issuing guidance under this Article.

(6) The Department of Justice shall not specify a description of persons in guidance under this Article unless, whether by reason of offences committed by them (in Northern Ireland or elsewhere) or otherwise, the Department of Justice has reason to believe that persons of that description may cause serious harm to the public."

Article 51 makes provision for the appointment of 2 lay advisers to monitor in consultation with the agencies the arrangements set up under Article 50(2)(a).

[4] Statutory Guidance was issued by the Secretary of State in 2008. The core functions of the arrangements are set out in paragraph 2.2 of the Guidance and are identified as:

i. the identification of relevant offenders/potentially dangerous persons;
ii. the sharing of relevant information among agencies;
iii. the assessment of risk; and
iv. the management of risk.

[5] Paragraph 2.6 deals with the identification of relevant offenders and potentially dangerous persons.

> **"Identification of relevant offenders/potentially dangerous persons with PPANI**
>
> Effective multi agency public protection starts with an assessment of existing information and an accurate categorisation of relevant offenders/pdps. Prompt and accurate categorisation will allow agencies to gather and share relevant information and enable them to choose the appropriate risk management strategies. In the absence of this initial accuracy there are real dangers that important information will not be gathered and shared or that information will be shared inappropriately, and the energy of agencies

will be diverted from those offenders/pdps posing the highest risk of serious harm. The criteria for entry to PPANI assessment are as follows:

(a) Relevant Sexual Offender

A person is a relevant sex offender if he/she:
• is subject to the notification requirements of Part 2 of the Sexual Offences Act 2003.
• has been convicted of a sexual offence or sexually motivated offence, is not subject to the notification requirements of Part 2 of the Sexual Offences Act 2003, but about whom an agency has current significant concerns.

(b) Relevant Violent Offender

A person is a relevant violent offender if he/she:
• has from 6th October 2008 been convicted of a violent offence (including homicide) against a child or vulnerable adult; or who has a previous conviction for a violent offence against a child or vulnerable adult and about whom an agency has current significant concerns.
• has from 1st April 2010 been convicted of a violent offence (including homicide) in domestic or family circumstances; or who has a previous conviction for a violent offence in domestic or family circumstances and about whom an agency has current significant concerns.
• has from 1st April 2011 been convicted of a violent offence (including homicide) where the offence has been motivated by hate.

(c) Relevant other potentially dangerous person

A person is a relevant other potentially dangerous person if he/she:
• is subject to a Risk of Sexual Harm Order (RSHO).
• has been interviewed by police for an alleged or suspected sexual offence against a child or a serious sexual assault on an adult and is in the process of being reported with a view to prosecution.
• from 6th October 2008 has been interviewed by police for an alleged or suspected violent offence (including homicide) against a child or vulnerable

adult and is in the process of being reported with a view to prosecution.
• from 1st April 2010 has been interviewed by police for an alleged or suspected violent offence (including homicide) in domestic or family circumstances and is in the process of being reported with a view to prosecution.
• from 1st April 2011 has been interviewed by police for an alleged or suspected violent offence (including homicide) where the offence has been motivated by hate and is in the process of being reported with a view to prosecution."

The guidance issued in England and Wales under equivalent legislation is confined to relevant offenders and the inclusion of potentially dangerous persons constitutes, therefore, a significant distinction.

[6] Paragraph 2.10 deals with the categories of risk into which an individual who falls within the definition in paragraph 2.6 must be placed.

"**Category 1 risk of serious harm**

"Someone whose previous offending (or current alleged offending in the case of potentially dangerous persons), current behaviour and current circumstances present little evidence that they will cause serious harm through carrying out a contact sexual or violent offence." The risks presented by offenders/pdps assessed as Category 1 risk of serious harm will not be subject to PPANI multi agency risk management.

Category 2 risk of serious harm

"Someone whose previous offending (or current alleged offending in the case of potentially dangerous persons), current behaviour and current circumstances present clear and identifiable evidence that they could cause serious harm through carrying out a contact sexual or violent offence." Offenders/pdps assessed as Category 2 risk of serious harm will be subject to an agreed PPANI multi agency risk management plan, which will be delivered by agencies at local practitioners' level. Such cases will require the involvement of multi agency co-operation, collaboration and support,

> within the bounds of each agency's statutory duty, to manage the risk.
>
> **Category 3 risk of serious of harm**
>
> Someone whose previous offending (or current alleged offending in the case of potentially dangerous persons), current behaviour and current circumstances present compelling evidence that they are highly likely to cause serious harm through carrying out a contact sexual or violent offence." Persons assessed as presenting this level of risk of serious harm (the critical few) will require a risk management plan involving a wide range of interagency support and high levels of resourcing."

[7] Paragraph 2.9 identifies those cases which will be entered onto the VISOR database, the agencies to whom access will be given and the period of time for which the record will be kept.

> "ViSOR is a database designed to hold details of all relevant offenders/pdps whose risks are being managed through a multi agency risk management plan. All cases within ViSOR are known as "nominals". It is the responsibility of the PSNI to ensure that ViSOR contains all relevant information relating to relevant offenders/pdps and is maintained in accordance with ViSOR National Standards. It is currently available to the police service and, will eventually be made available to probation and the prison service. All nominals will remain in ViSOR until the person's 100th birthday. At this point the case will be reviewed with the expectation that the nominal record will be removed."

It is one of the complaints in this case that there is no process for review of the VISOR entry and its removal in any circumstances. The affidavit of Superintendent Wallace indicated that once a nominal no longer met the criteria for risk management within PPANI a closing Risk Management Plan would be created and approved by the supervisor. It should then be archived by the relevant designated person. Once archived, the information can only be accessed if authorised by a supervisory officer. There is, however, no direct challenge in these proceedings to the maintenance and operation of VISOR which is controlled by the police on a national basis in accordance with guidelines promulgated by the Association of Chief Police Officers. The Police Service of Northern Ireland is not, therefore, a party to this application.

[8] The exchange of information between the agencies is considered in Chapter 3. The Guidance notes that information sharing protocols are already in place. There are five information sharing principles set out:

> "Information sharing must:
>
> • Have lawful authority:
> • Be necessary;
> • Be proportionate; and done in ways which,
> • Ensure the safety and security of the information shared and;
> • Be accountable."

[9] The Guidance considers disclosure to third parties in Chapter 4. It advises that the principles underpinning disclosure to third parties are the same as for information sharing, but inevitably involve greater sensitivities given that disclosure may be to individual members of the public as opposed to central or local government or law enforcement agencies. Because of this, great caution should be exercised before making any such disclosure. The Guidance indicates that the lawful authority and necessity requirements will be met where making the disclosure is for the purpose of managing the risk of offenders/PDPs and that the critical factor in determining if disclosure is lawful is likely to be the proportionality requirement. It then sets out the following criteria which should be met before disclosing information about an offender to a third party.

> "(i) The offender presents a risk of serious harm to the person, or to those for whom the recipient of the information has responsibility (for example, children).
> (ii) There is no other practicable, less intrusive means of protecting the individual(s), and failure to disclose would put them in danger. Also, only that information which is necessary to prevent the harm may be disclosed, which will rarely be all the information available.
> (iii) The risk to the offender should be considered although it should not outweigh the potential risk to others were disclosure not to be made. (This may need reconsideration in light of the comments of Lord Hope at paragraphs 44 and 45 in R (L) v Comr of Police of the Metropolis) The offender retains his rights (most importantly his Article 2 right to life) and consideration must be given to whether those rights are endangered as a consequence of the disclosure. It is partly in respect of such consideration that

> widespread disclosure of the identity and whereabouts of an offender is rarely advisable.
> (iv) The disclosure is to the right person and that they understand the confidential and sensitive nature of the information they have received. The right person will be the person who needs to know in order to avoid or prevent the risks.
> (v) The involvement of the offender (where risk factors allow) both in the decision regarding the need to disclose and in the actual disclosure itself. In some cases, the ideal situation is for the offender to give their consent and to undertake the disclosure themselves. This could be either in the presence of their DRM or for the content of the disclosure to be confirmed/verified by the DRM subsequently.
> (vi) Preparation and discussion with those third parties receiving the information. This includes: checking what they already know; that they understand the confidential and sensitive nature of the information they have received; that they know how to make use of the information, and what to do in the event of anything occurring which they need to report, and that they know whom to contact."

[10] Chapter 4 provides that LAPP minutes should be provided in redacted form to the offender/PDP and the minutes provided should include the name and personal details of the person, the reason the case was referred for consideration, the assessed category of risk of serious harm and index offence and the risk management plan. Chapter 7 advises that in planning risk management consideration can be given to involving the offender. Paragraph 2.5 recognises that it is good practice for offenders/PDPs to know that the assessed risks are being managed through PPANI and indicates that they should always be allowed the opportunity to present written information to the LAPP meeting through their Designated Risk Manager. In certain circumstances their participation in the LAPP meeting may be beneficial.

The Facts

[11] On Sunday 26.04.09 police attended a call to a house in Belfast in relation to a 13 year old female child being in the house with a 19 year old male. On arrival police spoke to Mr. A (co-accused) who was totally naked. They enquired if the IP was in the house. Mr. A denied she was in the house. Police then requested entry to search for the child and Mr. A admitted that she was upstairs. Police found the IP in an upstairs bedroom naked from the waist down and curled up on the bed. She was dishevelled and unresponsive with her eyes rolling in her head. She was helped to the bathroom where she

vomited several times. Vomit had also been observed in the bedroom. She was crying hysterically and informed police she was sore "down below." She then said to police "Don't let them rape me again, don't let them see me." She also said "They gave me a tablet." Police spoke to Mr. A, who made a number of significant statements and admitted that he had sexual intercourse with IP during a threesome with another male. He refused to name the other male and was subsequently arrested for the rape of the IP and UCK of another.

[12] The IP was not fit for interview due to her intoxicated state, but when spoken to later she alleged that she had been raped by a second male, NJ, on a sofa in the living room at the same house. NJ attended Grosvenor Road PSNI station on 26.04.09 and admitted being involved in a threesome incident in the bedroom at the house previously referred to. He was arrested on suspicion of the rape of the IP. During interview NJ stated he had consensual sexual intercourse with the IP in the living room of the house. He stated that the IP had initiated the vaginal intercourse and that she was consenting and fully participating. He stated that the IP told him she was 17 years old earlier in the evening. In relation to the threesome with Mr. A, he stated that he and the IP had gone upstairs and that everyone participated willingly. He stated that the sexual acts had all been initiated by the IP. He stated that he received oral sex from her, while she was vaginally penetrated by Mr. A. He then stated that he digitally penetrated her before having vaginal sex and the IP was performing oral sex on Mr. A.

[13] The applicant was born on 29 June 1989. On 26 April 2009 he was charged with rape. He agreed that sexual intercourse had taken place but maintained that he reasonably believed that the injured party was over 16 years old and that she had consented to the intercourse. He was admitted to bail. At a LAPP meeting on 1 July 2009 it was determined that he met the criteria for entry to PPANI assessment as a potentially dangerous person who had been interviewed by police for an alleged or suspected sexual offence against a child and is in the process of being reported with a view to prosecution. He was not invited to attend or make representations to that meeting. Thereafter he was interviewed by the police officer who was appointed his Designated Risk Manager. That information was taken into account by the LAPP at its next meeting where the applicant was assessed as a category 2 risk. It followed that he was put on VISOR. Subsequent to the hearing of this application he was unanimously acquitted by a jury on counts of rape and unlawful carnal knowledge.

The arguments of the parties

[14] The applicant submitted that the papers disclosed a mistaken belief within the LAPPP that the applicant may have been part of a family whose surname was spelt in a different way and who had come to the attention of

social services for suspected voyeurism. There was affidavit evidence dealing with this which made it clear that although this issue had been raised as a matter requiring investigation at the LAPP meeting on 1 July 2009 it had not been taken into account in the final decision making process. In those circumstances there is no need to consider this argument further.

[15] The applicant questioned the procedural fairness of the decision making process noting that the documentary record of each LAPPP meeting included a section headed 'Offender participation at the LAPPP meeting.' The applicant is currently not, of course, an offender but it was observed that the entry under this heading relating to the meeting on 1 July 2009, at which the applicant was assessed as a PDP, states: "N/A – not category 3". It is submitted that this constitutes a misdirection. The applicant also says that the LAPPP proceeded without countenancing the possibility that the allegations were not true.

[16] It is argued that the completion of the assessment of risk and the consequent inclusion of a person on ViSOR until age 100 before an individual is afforded an opportunity to answer the allegations made against him constitutes a breach of his Article 6 rights. In summary, the applicant says that the LAPPP's decisions, particularly in respect of the critical question of categorisation, were reached in a procedurally unfair manner, in breach of the legitimate expectation as to procedure engendered by the *Guidance to Agencies* and in breach of the right to a fair hearing in the determination of the applicant's civil rights pursuant to Article 6 ECHR. The position is compounded by the absence of an appeal on the merits to a court with full jurisdiction.

[17] He submits that the safeguards surrounding the information retained about him are of limited consequence. Public information can fall within the scope of private life where it is systematically collected and stored in files held by the authorities. Private life is a broad term not susceptible to exhaustive definition and the protection of personal data is of fundamental importance to a person's enjoyment of his or her right to respect for private and family life, as guaranteed by Article 8 of the Convention (see Marper v UK (2008) 48 EHRR 1169). The absence of a right to a review of the entry onto VISOR and the classification which led to that entry constituted a disproportionate interference with the applicant's Article 8 rights.

[18] The respondents, in response to the Article 8 challenge, question whether Article 8 has been engaged and note that the applicant makes no specific complaint in any of his evidence to the court as to how potential inclusion on the ViSOR database involves a serious level of intrusion into his sphere of personal autonomy. The respondents also draws attention to the fact that the court has evidence as to the confidential and secure nature of the ViSOR database, noting that there has been no public dissemination of the

applicant's status as a ViSOR nominal and no demonstrable impact upon his employment or other aspects of his private life.

[19] As regards the question of any breach of Article 8, they submit that the Secretary of State's decision to issue the *Guidance to Agencies* and the related relationship with referrals to the ViSOR database is an action taken in furtherance of a legitimate aim and one recognised as a positive obligation by the Strasbourg Court in Stubbings (1996) 23 EHRR 213. They note the court's observation in Huang [2007] UKHL 11 of 'the need to balance the interests of society with those of individuals and groups. This is indeed an aspect which should never be overlooked or discounted.' The proportionality of the guidance must be examined principally in relation to its overall effect (see Re Kevin Gallagher [2003] NIQB 26).

[20] As regards procedural fairness the respondents submit that the application of the entry criteria for PPANI assessment requires nothing more than an audit of empirical facts and not a consideration of representations by a potential subject or their legal representative. Specifically, in determining whether a subject should be brought within the PPANI assessment process the LAPPP will consider (i) whether he has been interviewed by police for an alleged offence against a child and (ii) whether he is in the process of being reported with a view to prosecution. The applicant met both conditions.

[21] The respondents submit that Article 6 is not engaged in this case. The designation reached by the LAPP involves no determination of a criminal charge nor does it determine any civil right.

Discussion

Procedural fairness

[22] The general principles of procedural fairness were reviewed by Lord Mustill in R v Secretary of State for the Home Department ex p Doody [1994] 1 AC 531 at 560. Although the requirements of procedural fairness are now more demanding that reflects Lord Mustill's comment that the standards of fairness are not immutable and may change with the passage of time. What fairness requires depends on the context of the decision.

[23] The context of this decision is the identification within the Guidance of those who are identified as potentially dangerous persons. The qualifying conditions are in this case that the person has been interviewed for an alleged sexual offence against a child and that the matter is in the process of being reported with a view to prosecution. The latter condition in the context of the Guidance covers the period of the pursuit of the prosecution until determination of the report.

[24] The Guidance does not invite the LAPP to make any judgment on the validity or otherwise of the allegations or the criminal liability of the person concerned in determining whether the public protection arrangements apply. It is correct that paragraph 2.5 of the Guidance refers to the participation of the offender/PDP at LAPP meetings but it is noteworthy that this is facilitated by the Designated Risk Manager (DRM). The initial review, which in this case took place on 1 July 2009, was for the purpose of determining whether the applicant fell within the arrangements. The appointment of a DRM under the Guidance is a consequence of the decision to include the applicant in the arrangements. The role of the DRM once appointed is to ensure the participation of the offender in the management of risk. It is not envisaged that the offender/PDP will generally participate in the decision to apply the arrangements.

[25] The conditions for entry into the arrangements are consistent with such a scheme. In this case the applicant takes no issue with the fact that the conditions for entry to PPANI in his case were satisfied. The conditions as set out at paragraph 5 above do not suggest that there is a role for consultation on whether the person falls within the arrangements. In our view the context makes clear that the participation of the person affected occurs at the risk management stage.

[26] At the first LAPP meeting the assessment of risk in respect of the applicant was categorised as 'P' or pending on the basis that the LAPP needed further information on the applicant's circumstances. The entry referred to at paragraph 15 above appears to indicate that the applicant was considered not to be category 3. The DRM then interviewed the applicant about his circumstances and reported to the next LAPP meeting on 24 September 2009. The assessment of the applicant as category 2 at that meeting reflected the degree of risk arising from the evidential material then available. The task of the LAPP was not to determine whether the applicant was criminally liable. That was for the criminal court.

[27] We consider that the requirements of procedural fairness in the context of these arrangements did not impose an obligation to hear from the applicant before determining that he fell within the arrangements. Indeed there was no argument at the hearing that he did not fall within the arrangements. We consider that he did have an opportunity to put forward any representations he wished on how the risk should be managed to his DRM shortly after the arrangements applied to him and subsequently through his solicitor. He had been interviewed about the allegations and was well placed to deal with the issues. We do not consider that there was any breach of procedural fairness.

Article 6

[28] The four core functions of the arrangements are set out in paragraph 2.2 of the Guidance and are the identification of relevant offenders/PDPs, the sharing of relevant information among agencies, the assessment of risk and the management of risk. It is not the function of the arrangements to determine the criminal responsibility of the persons subject to the arrangements. Decisions as to who is subject to the arrangements and the categorisation of those people do not involve the determination of a criminal charge. There may be a degree of supervision for the purpose of prevention of crime but that does not engage the criminal limb of Article 6 (see Guzzardi v Italy (1980) 3 EHRR 333.

[29] The civil limb of Article 6 applies only where there is a determination of a civil right or obligation and in particular does not apply to interim decisions (see Lamprecht v Austria No 71888/01). It follows, therefore, that the civil limb does not apply to determinations made relating to the investigation of an offence (see Fayed v UK 18 EHRR 393). The decision must be decisive for some right of the applicant. Any decision made by a LAPP to identify a person as a PDP within the arrangements and to categorise that person is a preventative and protective decision which is not decisive for any such right.

[30] We accept that the Guidance recognises that there may be circumstances in which some material held as a result of these arrangements may be made available to employers and others as set out in paragraph 4.4 of the Guidance although we have been informed that a standard Access NI check would not involve access to VISOR. We consider, however, that the determination of categorisation does not determine any right in relation to employment as was the case in R (Wright and others) v Secretary of State for Health and another [2009] UKHL 3. In that case once placed on the list the person was considered unsuitable to work with vulnerable adults. The listing was decisive. In this case the listing has no direct effect. Any effect is dependent upon disclosure which is subject to the constraints set out at paragraph 9 above and has not been the subject to specific challenge in these proceedings.

[31] Article 6 does not, therefore, apply to such a decision either in its civil or criminal limbs.

Article 8

[32] We have set out in paragraph 2 above the nature of the personal information retained on VISOR. It is common case that the purpose of the arrangements is to ensure that this information is available for sharing in accordance with the principles set out in paragraph 3 of the Guidance. Some

assistance as to whether the storing and sharing of such information engages the protections of Article 8 can be gained from the decision of the Supreme Court in R (L) v Commissioner of Police of the Metropolis [2009] UKSC 3. That was a case in which there was a challenge to the disclosure of information contained in a social services report that the claimant had little control of her 13 year old son and had not co-operated with social services when he was placed on the child protection register. The disclosure arose in the context of the claimant's employment as an assistant in the playground and canteen of a school. It was further disclosed that the son had subsequently been convicted of robbery and sentenced to detention in a young offender institution.

[33] The leading judgment was given by Lord Hope who gathered the principles in the following paragraphs.

> "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 Act long after the event when everyone other than the person concerned is likely to have forgotten about it. As it recedes into the past, it becomes a part of the person's private life which must be respected. Moreover, much of the other information that may find its way into an ECRC relates to things that happen behind closed doors. A caution takes place in private, and the police gather and record information from a variety of sources which would not otherwise be made public. It may include allegations of criminal behaviour for which there was insufficient evidence to prosecute, as in R v Local Authority and Police Authority in the Midlands, Ex p LM [2000] 1 FLR 612 where the allegations of child sexual abuse were unsubstantiated. It may even disclose something that could not be described as criminal behaviour at all. The information that was disclosed on the appellant's ECRC was of that kind.
> 28 The ECRC disclosed that the appellant's son X was put on the child protection register and that he was removed from it after he had been found guilty of

> robbery and received a custodial sentence. His conviction could be seen as public information because his trial was held in public. But the fact that the appellant was the mother of the person who had been convicted and sentenced to detention was private information. So too was information about the proceedings in which it was alleged that she failed to exercise the required degree of care and supervision of her son and that she had refused to co-operate with the social services. They were recorded in the minutes of the child protection conference on 29 January 2002. But the conference did not take place in public, nor were the minutes open to public scrutiny. These were aspects of her private life which had to be respected when the decision was taken as to whether or not details which had been stored in the police files should be released"

[34] In this case it may be said that all of the information about the encounter with the 13 year old girl was the subject of a public trial after which the applicant was acquitted. There is no doubt, however, that the information is subject to systematic storing once it is entered onto VISOR and its retention is effectively permanent. The storage and distribution of such information was also identified by Lord Neuberger as potentially engaging Article 8.

> "71 I consider that article 8 will, at least frequently, be engaged by an adverse ECRC, because it will involve the release of information about the applicant, which is stored on public records. Even where the information released in the ECRC is already in the public domain (as will be the case with almost all convictions), it seems to me that re-publication of the information can often engage article 8 : see, in the domestic context, R v Chief Constable of the North Wales Police, Ex p AB [1999] QB 396 , 416 and 429 (per Buxton J in the Divisional Court and Lord Woolf MR in the Court of Appeal, respectively), and, in Strasbourg, Segerstedt-Wiberg v Sweden (2006) 44 EHRR 14 , para 72 and Cemalettin Canli v Turkey (Application No 22427/04) given 18 November 2008 , para 33. Where the information, or a substantial part of the information, released in the ECRC is not in the public domain, as will very often be the position in relation to information falling within section 115(6)(a)(ii) (7) , the case for article 8 engagement, as I see it, is self-evidently even stronger: see Leander v

Sweden (1987) 9 EHRR 433 , para 48 and Rotaru v Romania (2000) 8 BHRC 449 , para 43. "

[35] We have no doubt that there may be many cases where the sharing of the information retained on VISOR will engage Article 8. All of the judges in this jurisdiction are acutely aware of the significant number of domestic violence allegations which do not lead to a public trial but often form the basis of material taken into consideration in determining risks in connection with the grant of bail. On the materials available in this case we do not consider that some of the matters accumulated in respect of the applicant other than the publicly available information about his acquittal have reached the level of seriousness identified by Lord Bingham in R (Gillan) v Commissioner of the Metropolis [2006] UKHL 12 but we accept that over time the disclosure of the circumstances of that acquittal may have receded in memory to the point where its disclosure could engage Article 8.

[36] We also accept that the engagement of Article 8 in relation to the retention and sharing of the type of information contained within VISOR in respect of this applicant is supported by the decision of the ECHR in S and Marper v UK (2008) 48 EHRR 50. The Court approved its earlier approach in relation to photographs and fingerprints and applied this to DNA samples and profiles. It placed considerable emphasis on the feature that the material was to be retained permanently for criminal law purposes but recognised in paragraph 86 that the type of information retained and shared may be relevant to justification.

[37] We conclude, therefore, that the retention and sharing of information through VISOR in respect of PDPs will often and perhaps usually engage Article 8. The question then arises as to whether the retention of that information and any subsequent sharing of it is justified. That requires consideration of whether the retention and sharing is in accordance with law, is for a legitimate purpose and is proportionate.

[38] It is accepted that the retention of the information is for a legitimate purpose. It is necessary, however, to recognise that information on VISOR is held not just for the purpose of the protection of rights and freedoms of others including children and the management of any risk of harm from PDPs but also to assist in the detection, investigation and prosecution of offenders. VISOR is controlled by the police and is a national database subject to operational controls promulgated by ACPO. There is no complaint within this judicial review directed to the management of VISOR by the Police Service of Northern Ireland. These proceedings have not been served on the police and no attempt has been made to join police as a party to this application.

[39] It was also accepted by the applicant that the arrangements were in accordance with law. The relevant law was the 2008 Order and the Guidance

published on foot of the power in Article 50 of that Order. No issue was taken about the quality of the law.

[40] The fundamental argument pursued by the applicant was that the indefinite retention of private information for the purpose of accessing and sharing it without any review of the necessity for continued retention cannot be justified. In support of that submission the applicant relied on R (F) and Thompson v SSHD [2010] UKSC 17 which was a case concerned with the absence of a review of the notification requirements under section 82 of the Sexual Offences Act 2003. In that case Lord Phillips suggested that the issue of proportionality required the consideration of three questions.

> "(i) What is the extent of the interference with article 8 rights?
> (ii) How valuable are the notification requirements in achieving the legitimate aims? and
> (iii) To what extent would that value be eroded if the notification requirements were made subject to review?"

[41] The respondents drew attention to the fact that the arrangements do not impose the type of intrusive reporting of movements and living arrangements which were of concern to the courts in that case. The material retained in this case did not have the level of intimate personal detail of the DNA samples in Marper. The information was only stored after consideration of whether a particular level of risk was achieved in respect of a particular type of offending and was not therefore arbitrary.

[42] The principles of information sharing were set out and developed in the Guidance. These principles covered not only sharing among agencies, but also third parties. No criticism was made of the content of the principles. Where it was proposed to share information with third parties the Guidance created a presumption that the person affected should be informed so that he could make any representation.

[43] The respondents relied on the evidence that once the level of risk fell so that the criteria for risk management were not met within PPANI the information was archived and access was through a supervising officer. It was accepted, however, that there was no evidence of the criteria for disclosure of archived information or indication of the function and role of the supervising officer. There was no system of independent monitoring of these arrangements although some monitoring functions were carried out by the Strategic Management Board and the Lay Observers.

[44] We are left, however, with no evidence to indicate to us how valuable the retention and sharing of the information on VISOR in respect of PDPs is.

We know that those assessed as category 1 risks are not included in VISOR. We know that some or perhaps many PDPs who are initially included in VISOR may no longer meet the criteria for risk management within PPANI but the information relating to them remains on VISOR. This database is not the only source of information held by the police but we do not know how these various sources interact.

[45] In light of the information available to us we are not in a position to determine the answers to the second and third questions set out by Lord Phillips in paragraph 40 above. There are also significant gaps in the information about the manner in which the material is managed within VISOR. We conclude, therefore, that the respondents have not provided a justification in these proceedings for the permanent inclusion of PDPs assessed as category 2 or 3 risks on VISOR.

[46] As we have pointed out VISOR is controlled by police. Any issue about its compliance with Article 8 would require a direct challenge to the retention of information on the database and its management and the involvement of the police as a party to the hearing. Neither occurred in this case. In those circumstances we invite submissions from the parties on the remedy, if any, that is now appropriate.