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2015/108163

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY JKL (A MINOR) TO APPLY FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION OF THE DEPARTMENT OF JUSTICE

COLTON J

Introduction

[1] On 26 October 2015 the applicant, who was then a 15 year old child with Asperger's Syndrome, was arrested and interviewed by the PSNI as a suspect in an alleged cyber-crime involving the "hacking" of customer details retained by "Talk Talk". At the time of the application he had not been charged with any criminal offence and had been released on police bail.

[2] Shortly after his arrest details of the applicant's identity, including his name, age, place of residence and photograph, appeared in various media outlets including newspapers, such as the Daily Mail, Daily Telegraph and The Sun, as well as on-line media such as Twitter and Google. As a result of those publications the applicant issued civil proceedings against these media outlets. These proceedings were ongoing when the application was heard and determined by this court.

[3] The applicant's case in the civil proceedings was that the publications about which he complained constituted an abuse of private information and a breach of his Article 8 rights under the ECHR.

[4] In the application the applicant sought the following relief in his Order 53 Statement:

"(a) An Order of Mandamus requiring the Department of Justice to immediately enact legislation to provide for reporting restrictions in pre-charge situations.

(b) A declaration that the decision of the Department of Justice to implement legislation under Article 22 of the Criminal Justice (Children) (Northern Ireland) Order 1998 covering reporting restrictions post-charge and at court but not for minors who are pre-charge is contrary to common law rules of fairness.

(c) A declaration that the said failure to enact legislation in pre-charge situations is irrational and unlawful.

(d) A declaration that the Department of Justice has acted contrary to Article 8 of the European Convention on Human Rights and contrary to Section 6 of the Human Rights Act (1998) by failing to implement legislation governing reporting restrictions for minors in pre-charge situations.

(e) A declaration that the failure of the Department of Justice to enact Section 44 of the Youth Justice and Criminal Evidence Act 1999 is unlawful.

(f) An Order of Mandamus compelling the Department of Justice to immediately enact Section 44 of the Youth Justice and Criminal Evidence Act 1999 …

(h) Such further or other relief as the Honourable Court may deem appropriate.

(i) All necessary and consequential direction."

[5] As will be seen the focus of the application against the respondent is its alleged failure to protect the anonymity of minors and its failure to enact legislation to provide for reporting restrictions in relation to children who have been arrested but not charged with any criminal offence, what the applicant refers to as a "pre-charge situation". The applicant points out that this position is in contrast with the restrictions in relation to children who are actually charged with offences. Article 22 of the Criminal Justice (Children) (Northern Ireland) Order 1998 provides statutory protection of a child's identity by way of reporting restrictions in the following provisions:

"(1) Where a child is concerned in any criminal proceedings (other than proceedings to which paragraph (2) applies) the court may direct that –

(a) no report shall be published which reveals the name, address or school of the child or includes any particulars likely to lead to the identification of the child; and

(b) no picture shall be published as being or including a picture of the child,

except in so far (if at all) as may be permitted by the direction of the court.

(2) Where a child is concerned in any proceedings in a youth court or any appeal from a youth court (including proceedings by way of case stated) –

(a) no report shall be published which reveals the name, address or school of the child or includes any particulars likely to lead to the identification of the child; and

(b) no picture shall be published as being or including a picture of any child so concerned,

except where the court or the (Department of Justice), if satisfied that it is in the interests of justice to do so, makes an order dispensing with these prohibitions to such extent as may be specified in the order.

(3) If a court is satisfied that it is in the public interest to do so, it may, in relation to a child who has been found guilty of an offence, make an order dispensing with the prohibitions in paragraph (2) to such extent as may be specified in the order …"

[6] The applicant's argument is that there is a lacuna in the legislation in that it fails to provide similar protection to those who are arrested but not charged with a criminal offence compared to those who are actually charged with an offence and brought before a court. It is argued this lacuna is irrational and unlawful. Further, it is argued that the respondent has failed to comply with its positive obligations in respect of the applicant under Article 8 of the European Convention on Human Rights and therefore is in breach of section 6 of the Human Rights Act 1998.

[7] As was pointed out in the court's original judgment it is clear that this is a matter which had been considered by Parliament. Thus, section 44 of the Youth and Criminal Evidence Act 1999 contains pre-charge reporting restriction provisions prohibiting the disclosure of material which "*is likely to lead members of the public to identify*" a person under 18 who is the subject of criminal investigation. This

provision has not been commenced after being expressly debated and considered by Parliament.

[8] On 21 December 2016 the court gave judgment in relation to this matter.

[9] In its judgment the court analysed the arguments of the parties and the applicable law and held that the measures currently in place for the protection of anonymity of minors at the pre-charge stage did not breach the applicant's Article 8 rights in view of the wide margin of appreciation available to the State in adopting measures to positively enforce Article 8 rights. The court also found that the State could not be compelled to legislate by way of commencement of section 44 of the Youth Justice and Criminal Evidence Act 1999.

[10] The applicant appealed the decision to the Court of Appeal.

[11] When the matter came before the Court of Appeal a new ground of challenge emerged, namely whether the applicant had been the subject of unlawful Article 14 discrimination, within the ambit of Articles 6 and 8 of the Convention, on the ground of his "status" as a child who had been arrested but not charged with a criminal offence.

[12] The Court of Appeal granted the applicant leave to amend his Order 53 Statement to seek the following relief:

> *"(e) A declaration that Article 22 of the Criminal Justice (Children) (Northern Ireland) Order 1998 discriminated against the applicant given his pre-charge status and therefore operated incompatibly with the applicant's rights pursuant to Article 14 of the European Convention on Human Rights in conjunction with Article 6 and/or Article 8.*
>
> *(f) A declaration that the failure to provide the applicant with pre-charge anonymity created unlawful discrimination contrary to the applicant's rights under Article 14 of the European Convention on Human Rights in conjunction with Article 6 and/or Article 8.*
>
> *(g) A declaration that the failure to provide an effective means by which the applicant could protect his privacy, in pre-charge circumstances, operated contrary to the applicant's rights under Article 8 of the European Convention on Human Rights."*

[13] The original judgment dealt with the relief sought at paragraph (g). The matter was referred back to this court because the relief sought at paragraphs (e) and (f) had not been argued at first instance. Therefore the only matter to be determined by the court relates to the relief sought in paragraphs (e) and (f). The court is not to

revisit the matters encapsulated in paragraph (g) which were dealt with in the original judgment.

[14] I am obliged to counsel for the parties in this case for their helpful written and oral submissions. Mr Ronan Lavery QC and Mr Sean Mullan appeared for the applicant. Dr Tony McGleenan QC and Mr Aiden Sands appeared for the respondent. I am also grateful for the written submissions prepared by Ms Karen Quinlivan QC on behalf of "Just for Kids Law" who were permitted to intervene.

Updated Facts

[15] Since the initial judgment JKL has been convicted upon his guilty plea in February 2018. In relation to his outstanding civil claims, as he is now 18 and the criminal proceedings had concluded, an application to discharge the anonymity order and press reporting restrictions was granted by Maguire J in the civil proceedings. The applicant's name has now been published in the local press. In those circumstances it is not clear that there is any ongoing basis for an anonymity order in these proceedings. I will hear submissions on this point at the conclusion of this ruling.

[16] The respondent submits that given the change in circumstances the issues raised are now of entirely academic interest to the applicant. The court is familiar with the well-established principles set out in the case of **R(Salem) v Secretary of State for Home Department** [1999] 1 AC 450. Having regard to the principles set out therein I consider that there is a good reason in the public interest to determine the issue raised in this case. It does not involve detailed consideration of facts. The issue raised by the Court of Appeal is potentially applicable to any person under 18 arrested but not charged with a criminal offence. On balance I consider that the matter should be ruled upon by the court.

Articles 6, 8 and 14

[17] Article 6 of the ECHR provides that:

> "1. *In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.*

> 2. *Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law."*

Article 8 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."*

Article 14 provides:

> *"The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."*

[18] Turning to the facts of this case, if the applicant had appeared as a youth defendant in the Youth Court he would have been granted anonymity by way of the protection provided under Article 22 which would have been automatic. If he appeared at an adult court, for example alongside an adult co-accused, the court could also grant similar reporting restrictions to protect his identification. It is the court's experience that such restrictions are normally granted. Yet this applicant, who was not charged or brought before any court at the time of the application, did not have any such protection. It is this difference which forms the basis of the applicant's claim that there has been a breach of his rights protected by Article 6, 8 and 14 of the ECHR.

[19] Article 14 is not a freestanding Convention right. It protects certain groups from discriminatory treatment in respect of other Convention rights.

[20] The Supreme Court has recently considered Article 14 claims in the cases of **Regina (Stott) v Secretary of State for Justice** [2018] 3 WLR 1831, **Regina (DA & Ors) v Secretary of State for Work and Pensions** [2019] UKSC 21.

[21] **Stott** dealt with the issue of the early release of prisoners and whether differences between prisoners serving extended determinate sentences of

imprisonment who only became eligible for release having served two-thirds of their sentences as opposed to other prisoners who were eligible to apply after serving half of their sentences were subject to discrimination in the enjoyment of their rights to liberty, contrary to Articles 5 and 14 EHCR. **DA & Ors** concerned the alleged discriminatory effect on lone parent families with young children in respect of a welfare benefit cap.

[22] The approach to an Article 14 claim is set out in the leading judgment of Lady Black in the **Stott** case at paragraph 8 in the following way:

> "***The approach to an Article 14 claim***
>
> *[8] In order to establish that different treatment amounts to a violation of article 14, it is necessary to establish four elements. First, the circumstances must fall within the ambit of a Convention right. Secondly, the difference in treatment must have been on the ground of one of the characteristics listed in article 14 or `other status'. Thirdly, the claimant and the person who has been treated differently must be in analogous situations. Fourthly, objective justification for the different treatment will be lacking."*

[23] In determining whether or not these elements have been met the reported decisions indicate that the courts have found it difficult to deal with each of the elements on a freestanding basis and often moved seamlessly from the consideration of one element into another. There is a degree of overlap between the four elements, particularly the last three.

[24] Thus Lady Black goes on to say at paragraph 8:

> *"…It is not always easy to keep the third and the fourth elements entirely separate, and it is not uncommon to see judgments concentrate upon the question of justification, rather than upon whether the people in question are in analogous situations. Lord Nicholls of Birkenhead captured the point at para 3 of R (Carson) v Secretary of State for Work and Pensions [2005] UKHL 37; [2006] 1 AC 173. He observed that once the first two elements are satisfied:*
>
> > *`the essential question for the court is whether the alleged discrimination, that is, the difference in treatment of which complaint is made, can withstand scrutiny. Sometimes the answer to this question will be plain. There may be such an obvious, relevant difference between the claimant and those with whom he seeks to compare himself that their situations cannot be*

> *regarded as analogous. Sometimes, where the position is not so clear, a different approach is called for. Then the court's scrutiny may best be directed at considering whether the differentiation has a legitimate aim and whether the measures chosen to achieve the aim is appropriate and not disproportionate in its adverse impact'."*

[25] Returning to the four elements there is no dispute between the parties that for the purposes of the discrimination argument the applicant's situation raises an issue within the ambit of Articles 6 and 8 of the ECHR.

[26] Turning then to the second element is the differential treatment complained of by the applicant on a ground potentially prohibited by Article 14? In this case the applicant does not seek to rely on any of the characteristics set out in Article 14 but relies on "*other status*".

[27] The jurisprudence as to what are the precise boundaries of "*other status*" is not clear.

[28] The decision in **Stott** can be traced to the decisions in **R (Clift) v Secretary of State for the Home Department** [2007] 1 AC 484 and **Clift v United Kingdom** [2010] ECHR 7205/07 which wrestled with issues that arise in relation to the differences between similar types of sentences in England and Wales and their relationship to Articles 5 and 14 of the Convention. **Clift**'s case focussed on when he would become eligible for release on parole. He had been sentenced to 18 years' imprisonment and under the applicable legislation the final decision on early release in his case lay with the Secretary of State. Prisoners serving sentences of less than 15 years did not require the Secretary of State's approval before release. The Secretary of State rejected the Parole Board's recommendation that **Clift** be released. Clift sought to bring judicial review proceedings in respect of that decision. His principle ground of challenge was based on a breach of Article 5 of the ECHR taken together with Article 14.

[29] In **Clift** (which was heard with two other appeals) the House of Lords determined that although the Convention did not require Member States to establish a scheme for the early release of prisoners, any provision of domestic law for a right to seek early release fell within the ambit of the right to liberty under Article 5. The court however determined that a prisoner serving a determinate sentence of 15 years or more, in contrast to life sentence prisoners or long term prisoners, serving less than 15 years, had not been recognised by Convention jurisprudence as an "*other status*" within Article 14. As a consequence **Clift** was unsuccessful in his challenge.

[30] The matter was subsequently considered by the ECtHR.

[31] In its judgment the court reviewed its decisions in which Article 14 was considered. In its analysis it recalled that the words "*other status*" (and *a fortiori* the French "*toute autre*" situation) have generally been given a wide meaning.

[32] In its decisions the court had consistently referred to the need for a distinction based on a "*personal*" characteristic in order to engage Article 14. The review of its case law demonstrated however that the protection conferred by that Article was not limited to different treatment based on characteristics which are personal in the sense that they are innate or inherent. The court took the view that the treatment of which the applicant complained need not exist independently of the "*other status*" upon which it is based.

[33] In its judgment the court concludes:

> *"[62] The court has frequently emphasised the fundamental importance of guarantees contained in Article 5 for securing the right of individuals in a democracy to be free from arbitrary detention at the hands of the authority (see for example* ***Cakycy v Turkey*** *[1999] ECHR 23657 at 94, para [104]). Where an early release scheme applies differently to prisoners depending on the length of their sentences, there is a risk that, unless the difference in treatment is objectively justified it will run counter to the very purpose of Article 5, namely to protect the individual from arbitrary detention. Accordingly, there is a need for careful scrutiny of differences of treatment in this field.*
>
> *[63] The court accordingly concludes that, in light of all the above considerations, the applicant in the present case did enjoy `other status' for the purposes of Article 14".*

[34] **Stott** then considered the issue of "*other status*" in light of the ECtHR's decision in **Clift**.

[35] As indicated previously **Stott**'s complaint related to an alleged difference in treatment with other prisoners in that he was compelled to serve two-thirds of his sentence before he could be eligible for release on licence as opposed to one half.

[36] He sought judicial review of the early release provisions in the relevant statute on the grounds that they constituted discrimination in the enjoyment of his right to liberty contrary to Articles 5 and 14 of the ECHR.

[37] The Divisional Court of the Queen's Bench Division held that it was bound by existing House of Lords authority to reject the claim on the grounds that the claimant did not have an "*other status*" for the purpose of a discrimination claim under Article 14 but that, had it not been so constrained it would have found that other status was established, and would have gone on to find the relevant legislation incompatible with Article 14. Consequently the Divisional Court issued a certificate

pursuant to section 12 of the Administration of Justice Act 1969 permitting the claimant to apply directly to the Supreme Court for permission to appeal which was subsequently granted.

[38] On the appeal, which was heard by five justices, it was held that (Lord Carnwath dissenting) having regard to the jurisprudence of the ECtHR, the difference in the treatment of extended determinate sentence prisoners in relation to early release was a difference on the ground of *"other status"* within the scope of Article 14 of the Convention.

[39] The appeal however was dismissed (Baroness Hale and Lord Mance dissenting). The majority held that there was no breach of **Stott**'s rights because (a) he was not in an analogous position to other prisoners serving different sentences and (b) the difference in treatment was proportionate and justified anyway.

[40] The complexity of the issues is demonstrated by the fact that each member of the court gave a separate judgment. Notwithstanding the extensive consideration of what is meant by other status in both **Stott** and **DA** it is clear that the courts have struggled to spell out the precise boundaries of *"other status"* in Article 14.

[41] The authorities suggest that the court should take a *"relatively broad view"* of what constitutes *"other status"*. As Lord Hodge said at paragraph [185] of the judgment in **Stott**:

> *"185. First, the opening words of the relevant phrase, 'on any ground such as', are clearly indicative of a broad approach to status. Secondly, there is ample authority in the ECtHR, the House of Lords and the Supreme Court to support the view that the words 'any other status' should not be interpreted narrowly. Thus, in* ***R (Clift) v Secretary of State for the Home Department*** *[2007] 1 AC 484, para [48], Lord Hope of Craighead stated that 'a generous meaning' should be given to the words 'or other status' while recognising that 'the proscribed grounds are not unlimited'. Similarly, in* ***R (RJM) v Secretary of State for Work and Pensions*** *[2009] AC 311, Lord Neuberger of Abbotsbury at para [42] spoke of 'a liberal approach' to the grounds on which discrimination was prohibited. In* ***Clift v United Kingdom*** *… paragraphs [55] and [56], the ECtHR spoke of the listed examples of status as being 'illustrative and not exhaustive' and suggested that a wide meaning be given to the words 'other status'."*

[42] That a wide or broad meaning should be given to *"other status"* is further reflected in paragraph [60] of the ECtHR judgment in **Clift**:

> *"The question whether there is a difference of treatment based on a personal or identifiable characteristic in any given case is a*

> *matter to be assessed taking into consideration all of the circumstances of the case and bearing in mind that the aim of the Convention is to guarantee not rights that are theoretical or illusory but rights that are practical and effective ... It should be recalled in this regard that the general purpose of Article 14 is to ensure that where a State provides for rights falling within the ambit of the Convention which go beyond the minimum guarantees set out therein, those supplementary rights are applied fairly and consistently to all those within its jurisdiction unless a difference of treatment is objectively justified.*"

[43] In **DA** the Supreme Court again focussed on the ambit of Article 14 and the meaning of "*other status*". Did the claimants have the requisite status on the basis of being a lone parent of a child of under 2, or a child of that age? The whole Supreme Court either held (three justices), or assumed (the remaining four justices), that they did.

[44] The Government's argument that the claimant's position was too transitory to be a status was rejected on the basis that a status for the purpose of Article 14 did not need to be permanent. The court noted "*the relatively broad view of the concept of status*" taken by the majority in **Stott**.

[45] Nonetheless it is clear that the court still held reservations about finding that membership of a narrowly defined group such as lone parents with children under 2 amounted to a status.

[46] The difficulty which the court had is apparent from the comments of Lord Hodge that "*there is, as yet little clarity*" as to the boundaries of the category. He concluded his judgment by saying that "*I am content to leave the question of status to future dialogue with the ECtHR* [paragraph 131]".

[47] In similar vein Lord Carnwath in **Stott** commented that both the domestic courts and the ECtHR had for a long time been struggling to find a rational criterion for defining and limiting the scope of "*other status*" in Article 14.

[48] Another example of the consideration of the boundaries of "*other status*" is the English Court of Appeal's decision in **Simawi v Haringey LBC** [2009] EWCA Civ 1770 which concerned succession to a secure tenancy on the death of the sole tenant. The appellant claimed that he had been discriminated against on the basis that he was the child of a widowed tenant, rather than the child of a divorced tenant, and that this was contrary to Article 14 taken with Article 8. In its judgment the Court of Appeal remarked upon the "*elusive*" limits of "*other status*". There was a particular debate as to whether the status had to exist independently of the differential treatment of which the person complains. The Court of Appeal felt bound by earlier Supreme Court authority to hold that it did, but found that it was tenable to say that

being the child of a widowed parent amounted to an *"other status"*, although the appellant failed for other reasons.

[49] Whether or not the applicant enjoys *"other status"* for the purpose of Article 14 in this case is by no means straight forward. In relation to the applicant one can see that his status is not dependent on anything innate or personal to him. Of course the fact that he is a minor is innate or personal to him but his status for the purposes of this application depends on something extra, namely the fact that he has been arrested and interviewed in relation to a criminal offence.

[50] However on balance I have come to the conclusion that he does. I do so having regard to the passages which I have set out above which clearly point towards a liberal and broad interpretation of what amounts to *"other status"*. I am particularly influenced by the dicta to the effect that the general purpose of Article 14 is to ensure that rights which do fall within the ambit of the Convention are applied fairly and consistently. The decision to arrest and interview the applicant in relation to a suspected crime has legal consequences for him. This reflects the conclusion in **Bah v United Kingdom** [2012] 54 EHRR 21 where the ECtHR considered the issue of status in relation to housing provision for immigrants. At paragraph 46 the court states:

> *"46. The Court finds therefore, in line with its previous conclusions, that the fact that immigration status is a status conferred by law, rather than one which is inherent to the individual, does not preclude it from amounting to an `other status' for the purposes of Article 14. In the present case, and in many other possible factual scenarios, a wide range of legal and other effects flow from a person's immigration status."*

[51] Whilst I can see that *"a wide range of legal and other effects"* do not necessarily flow for the applicant in this scenario it is significant that he was released subject to bail conditions set by the police. Those conditions imposed restrictions upon him and any failure to comply or any breach of conditions could have resulted in his arrest. Following his initial arrest he was brought back to the police station for further interview. Again he was released on bail and remained subject to conditions. Thus his situation had been significantly affected by his arrest. In addition, it can properly be said that the status upon which he relies exists independently of his complaint, which concerns the provisions relating to the protection of his identity.

[52] Thus not without hesitation I have come to the conclusion that the applicant does enjoy *"other status"* for the purposes of Article 14. It seems to me that the hesitancy in so concluding does impact on the intensity of the court's scrutiny in relation to the third and fourth issues to be considered.

[53] I turn now to the issue as to whether or not the applicant can establish that he is in an analogous situation to children who are charged with a criminal offence and brought before a court. I also will consider whether or not if he is in an analogous

situation whether the difference identified by him is justified. It may be necessary to look at these two issues together. For example as Lady Black said in **Stott:**

> *"It is not at all easy to separate these two questions into watertight compartments."*

At paragraph [138] of her judgment she says:

> *"138. In determining whether groups are in a relevantly analogous situation for article 14, regard has to be had to the particular nature of the complaint that is being made, see for example para [66] of* ***Clift v United Kingdom****."*

[54] This resonates with the approach of Baroness Hale in the case of **AL (Serbia) v Secretary of State for the Home Department** [2008] 1 WLR 1434 where she said at paragraph [25] when she considered the Strasbourg jurisprudence on this point:

> *"[25] Nevertheless, as the very helpful analysis of the Strasbourg case law in Article 14, carried out on behalf of Mr AL shows, in only a handful of cases has the court found that the persons with whom the complainant wishes to compare himself are not in a relatively similar or analogous position (around 4.5%). This bears out the observation of Professor David Feldman in* ***Civil Liberties and Human Rights in England and Wales, 2nd Edition (2002), p144,*** *quoted by Lord Walker of Gestingthorpe in the Carson case at paragraph 65;*
>
> > *`The way the court approaches it is not to look for identity of position between different cases, but to ask whether the applicant or the people who are treated differently are in `analogous' situations. This will to some extent depend on whether there is an objective and reasonable justification for the difference in treatment, which overlaps with the questions about the acceptability of the ground and the justifiability of the difference in treatment. This is why, as Van Dijk and Van Hoof observe … "In most instances of the Strasbourg case law … the comparability test is glossed over, and the emphasis is (almost) completely on the justification test".'"*

[55] The requirement to demonstrate an "*analogous position*" does not require that the comparator groups are identical. The fact that in **Clift** the applicant's situation was not fully analogous to that of shorter term or life prisoners and that there were differences between the various groups did not preclude the application of Article 14.

[56] The applicant must demonstrate that having regard to the particular nature of his complaint he was in a relevantly similar situation to others treated differently.

[57] Returning to **Stott** at paragraph [148] Lady Black says:

> *"Recognising that there are valid arguments both ways in relation to Issue 2A,* [whether the others are in an analogous situation – my insertion] *it seems appropriate to act on the wise suggestion of Lord Nicholls of Birkenhead, in* ***R (Carson) v Secretary of State for Work and Pensions*** *[2006] 1 AC 173, that sometimes, lacking an obvious answer to the question whether the claimant is in an analogous situation, it may be best to turn to a consideration of whether the differential treatment has a legitimate aim, and whether the method chosen to achieve the aim is appropriate and not disproportionate in its adverse impact (Issue 2B) …"*

[58] Lady Hale who dissented from the conclusion of the court in **Stott** recognised that these issues, of analogous situation and objective justification, are *"often discussed together in the cases"* (para 213).

[59] Mr Lavery's written and oral submissions have not really focussed on whether the applicant is in an analogous situation to someone who appears before a court charged with a criminal offence but has rather focussed on what he says is the lack of any objective justification for their different treatment, what might be described as the pre-charge and post-charge dichotomy. He says that the difference simply cannot be justified. Referring to someone in the applicant's position he submits:

> *"Even though they are deemed less culpable in the eyes of the law since they have not been charged with any offence the applicant child who is pre-charge receives no protection under statute whereas a post-charge child receives automatic protection."*

[60] In responding, Dr McGleenan points out that there is no reasonable expectation of privacy during proceedings in open court, as courts operate openly and subject to the full scrutiny of the public. The requirements of public justice are such that it is necessary to have statutory intervention to protect the interests of minors, particularly their Article 8 interests. This is the mischief at which Article 22 is directed.

[61] By contrast there is no court involvement at the investigatory stage in a criminal process and, depending on the circumstances, a minor is likely to have a reasonable expectation of privacy at common law, which falls to be protected in the

same way as the privacy of minors is protected in every other sphere ie through the law of privacy.

[62] In looking at whether or not the difference relied upon here can withstand scrutiny the court in my view is entitled to take into account the nature of the status relied on. As pointed out earlier this is not a case involving arbitrary detention as was the case in **Stott**. The cohort to which the applicant belongs is not a "*suspect category*" to use the language of Lord Hope at paragraph [10] in **AL (Serbia) v Secretary of State for the Home Department** [2008] 1 WLR 1434, nor is there any suggestion of deliberate targeting of any protected group. In such circumstances the easier it is to regard the fact that the applicant was treated differently as falling within the discretionary area of judgement that rests with the State.

[63] In terms of justification the court has to ask the question as to whether or not any differential treatment has a legitimate aim, and is the method chosen to achieve it appropriate and not disproportionate in its adverse impact. The legitimate aim of Article 22 is clearly the protection of minors who appear before courts, who would otherwise be subject to public identification and scrutiny.

[64] On the question of adverse impact and proportionality I am influenced by a number of matters. In this context I refer to paragraphs [49] and [50] of the original judgment as follows:

> *"[49] In terms of the situation in this jurisdiction the respondent avers that in the six years since the devolution of policing and justice the issue of enacting legislation to restrict reporting on minors at the pre-charge stage has never been raised with the DOJ by any NGOs, children's charities, politicians or individuals. The applicant's case is the first occasion that the matter has been brought to the department's attention. Mr Sands refers me to the very detailed report from the Children's Law Centre and Save the Children in June 2015. Whilst raising many issues concerning the protection of children from negative media representation the report does not expressly raise the issue of pre-charge publicity. It does however ask that NIA and Executive should "ensure that all relevant international standards are integrated into youth justice legislation, policy and practice, implementing commitments made under the Hillsborough Agreement".*
>
> *[50] It is submitted on behalf of the respondent that the absence of any such representations indicates that there is no great public concern about this matter. Nonetheless, it is indicated on behalf of the respondent that:*
>
> > *`Since devolution, it has been the policy of the DOJ not to simply mirror the legislative*

approach taken in England and Wales but instead to ensure that legislation in this jurisdiction is subject to full public consultation and debate in the Assembly. If it was considered that there was a need to legislate in order to restrict reporting on minors at the pre-charge stage, then the preferred approach of DOJ would be to consult with key stakeholders and the Justice Committee, before considering whether to commence Section 44 of the 1999 Act, particularly as it is cognisant of the concerns previously expressed about the potential unintended effects of the 1999 Act, to ensure that the provisions were fit for purpose and are subject to Assembly scrutiny.'"

[65] This consideration is reinforced by the second affidavit of Declan McKeown, who is the Chief Executive of Youth Justice Agency working in the DOJ, sworn on 18 April 2019.

[66] He avers as follows:

"7. In my first affidavit which was sworn more than 3 years ago, I had said that since the devolution of policing and justice in 2010, this issue had never been brought to the attention of the Department by any individual, politician, charity or non-governmental organisation. That remains the case. The Youth Justice Agency continues to meet on a regular and ongoing basis with bodies such as the Children's Law Centre and the Children's Commissioner about Youth Justice matters. The Children's Commissioner has a statutory responsibility to safeguard and promote the rights of children in Northern Ireland and to advise the Government on policies and legislation relating to children and young people and reported on the findings of the UN Committee on the Rights of the Child following the inspection of the UK by the Committee in 2016. The Commissioner produced a document entitled `12 Priorities for Action for Children in Northern Ireland' for the attention of the Committee. I refer to a copy of same … . The only Youth Criminal Justice issue raised by the Commissioner was that of the minimum age of criminal responsibility.

8. Youth justice issues of all kinds are raised and discussed by the Children's Law Centre and the Children's Commissioner during our regular and ongoing contact, but the question of anonymity for minors at the pre-charge stage has never been highlighted as an issue with the Department."

[67] In paragraphs 9, 10 and 11 he sets out figures in relation to the number of young people who have come before the courts in the last 5 years, totalling in the region of 2,000. Some of these include children who are dealt with by way of diversionary disposal which meant that they did not appear before a court.

[68] At paragraph 13 he avers:

> *"13. The Department is not aware of any instances of a breach of anonymity by the media in the thousands of cases above at the pre-charge stage, other than the case of the applicant. It would seem, therefore, the means by which the privacy rights of young persons who have been arrested is not a matter that has given rise to any significant concern."* (There appears to have been an omission after the words "*have been arrested"*)

[69] In short there is no evidential basis to demonstrate that the scheme operates in a discriminatory manner. This of course is not necessarily a complete answer to the applicant's case but bears on the issue of adverse impact and proportionality.

[70] Having considered these matters I have come to the conclusion that the applicant is not in a relevantly analogous situation to children who actually appear before a court because of the differences to which I have referred. The two comparators under scrutiny occupy positions in situations which are manifestly different in the context of protection of their privacy and rights to a fair trial. Given the presumption of public justice the statutory intervention under Article 22 is necessary to protect the Article 6 and Article 8 rights of children who are brought before the courts. Otherwise their identity will become public. That is not the case with children who are in the *"pre-charge"* situation described by Mr Lavery.

[71] Having reached the conclusion that the applicant is not in an analogous situation to those children who are charged and appear before a court for the purposes of Article 14 it is not strictly necessary to consider the issue of justification. However given the way I have analysed the issues I consider that I should deal with the issue of justification. I consider that any differential treatment does have a legitimate aim and that the method chosen to achieve it is appropriate and not disproportionate in its adverse impact. The consideration of this issue can be resolved by reference to the matters I have identified in the discussion above. The legitimate aim at the heart of Article 22 is to protect children in a situation where there will be a presumption that they will be identified. Their vulnerability to breaches of their Article 6 and Article 8 rights is manifestly greater to those in a pre-charge situation who enjoy common law protection.

[72] There is nothing unfair or irrational in the State's approach. There is a clear policy rationale behind the introduction of Article 22 and the failure to commence Section 44. Any difference in treatment or outcome comes within the State's margin

of appreciation. The State's reasons could not be said to be "*manifestly without reasonable foundation*", the test applied by the Supreme Court in **DA & Ors** in the context of economic or social policy.

[73] I therefore refuse the relief sought in the amended grounds ((e) and (f)).

[74] On the assumption that the applicant is legally aided I make the usual order in relation to costs. The respondent is to be awarded costs against the applicant not to be enforced without the leave of this court or the Court of Appeal. The applicant's costs are to be taxed in accordance with the Legal Aid Order.