Neutral Citation Number: [2017] EWCA Civ 321

Appeal Nos: C1/2014/4359, C1/2015/2862,
C1/2016/1149, C1/2016/1379

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 03/05/2017

Before :

THE PRESIDENT OF THE QUEEN'S BENCH DIVISION
(SIR BRIAN LEVESON)
LORD JUSTICE BEATSON
LADY JUSTICE THIRLWALL

Between :

THE QUEEN on the application of P	**Claimant**
- and -	
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	
THE SECRETARY OF STATE FOR JUSTICE	**Respondents**
THE QUEEN on the application of G	**Claimant**
- and -	
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	
THE SECRETARY OF STATE FOR JUSTICE	
THE CHIEF CONSTABLE OF SURREY POLICE	**Respondents**
THE QUEEN on the application of W	**Claimant**
-and-	
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	
THE SECRETARY OF STATE FOR JUSTICE	**Respondents**
MAGDALENA KROL	**Claimant**
-and-	
COMMISSIONER OF POLICE OF THE METROPOLIS	**Respondent**
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Intervener**

- -
- -

James Eadie QC, Kate Gallafent QC and **Naina Patel**
(instructed by Government Legal Department, London)
for the Secretary of State for the Home Department and Secretary of State for Justice
Hugh Southey QC and **Nick Armstrong** (instructed by Liberty) for P
Tim Owen QC and **Quincy Whitaker** (instructed by Hodge, Jones & Allen, London) for G
Alex Offer (instructed by Minton Morrill, Leeds) for W
Anne Studd QC and **Robert Talalay** (instructed by Weightmans, London)
for the Chief Constable of Surrey Police
Al Mustakim (instructed by Capital Solicitors, London) for Magdalena Krol
Alison Hewitt (instructed by Directorate of Legal Services, New Scotland Yard)
for the Commissioner of Police for the Metropolis

Hearing dates : 21-23 February 2017
- -

Approved Judgment

Sir Brian Leveson P:

1. The issue in these linked appeals concerns the interface of two important principles of social policy. The first focuses on the rehabilitation of offenders, and is aimed at allowing those who have come into conflict with the criminal law to be able, in appropriate circumstances, to put their pasts behind them and conduct their lives without further reference to what they did years, and in some cases very many years, previously. Thus, certain convictions can be 'spent' after the lapse of a specified period of time and, thereafter, for most purposes, do not need to be disclosed. The second is the requirement that the public be kept safe from those who, by reason of their past behaviour (extending beyond convictions), might remain a risk. To achieve this second aim, for potential employees seeking certain types of employment (particularly involving contact with children or other vulnerable people but extending to other sensitive areas), employers are required to obtain a certificate which identifies prior convictions, cautions and reprimands, including those that are spent, and may go further, providing other details which the police consider impacts on risk.

2. The effect of the disclosure of details of prior misconduct (whether or not it has led to a conviction for a criminal offence) undeniably affects the employability of those in respect of whom material has been disclosed. As a result, not only have there been challenges to the statutory scheme in relation to disclosure of convictions, but in addition, challenges have been made to the disclosure (and the retention) in individual cases by the police of cautions, reprimands and other material.

3. While consideration was being given by the executive to the reach of the original disclosure scheme (in particular, as a consequence of the reports of Mrs Sunita Mason, the government's Independent Advisor for Criminality Information Management, which date from 2010 and 2011), it was challenged as incompatible with Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR"). In circumstances discussed in detail below, in *R (T) v Chief Constable of Greater Manchester Police and others* [2013] EWCA Civ 25; [2013] 1 WLR 2515 ("*T v CCGMP*"), the Court of Appeal agreed with the challenge and made a declaration of incompatibility under s. 4 of the Human Rights Act 1998. Thereafter, as a result of the review which had taken place, and after an appeal was mounted to the Supreme Court so that it could be argued that the original scheme did, in fact, comply with UK obligations under Article 8, the scheme was revised. That appeal failed: see [2014] UKSC 35; [2015] AC 49. Although the revised scheme was before the Supreme Court, no opinion was expressed upon it. These cases now challenge that revised scheme.

4. The legislation which deals with disclosure is contained within the Police Act 1997 ("the 1997 Act") the Rehabilitation of Offenders Act 1974 as amended by the Criminal Justice and Immigration Act 2008 ("the 1974 Act as amended"). Following the decision, the revised scheme for the disclosure of criminal records was brought into effect by secondary legislation passed by affirmative resolution of both Houses. It is set out in the Police Act 1997 (Criminal Records Certificates: Relevant Matters) (Amendment) (England and Wales) Order 2013 (SI 2013/1200) ("the 1997 Act Amendment Order"); and the Rehabilitation of Offenders Act (Exceptions) Order 1975 (Amendment) (England and Wales) Order 2013 (SI 2013/1198) ("the 1975 Order Amendment Order 2013").

Overview

5. The 1974 Act, as amended, introduced a scheme whereby convictions and cautions (including reprimands and warnings) for criminal offences do not have to be disclosed in answer to questions insofar as such convictions and cautions are 'spent'. That is to say, depending on the age of the offender at the time of conviction and the type of sentence imposed (initially being a custodial sentence of 30 months or less, but now, by reference to s. 139(2) of Legal Aid, Sentencing and Punishment of Offenders Act 2012, a custodial sentence of four years or less), a specified period of time has elapsed. In those circumstances, a person with a spent conviction is exempted from liability for failing to disclose such matters in circumstances when he would otherwise have been obliged to do so. Cautions (including reprimands and warnings) are spent as soon as they are administered: see para. 1 of Schedule 2 of the 1974 Act as amended.

6. The protection provided by the 1974 Act, as amended, is subject to the 1975 Order (made pursuant to s. 4(4) of the 1974 Act) which removes the protection from non-disclosure in specified circumstances. In particular, by article 3 of the Order, this protection is removed in relation to questions asked in order to assess suitability for employment in the various positions listed in Schedule 1 and, by article 4, in relation to applications for jobs, among others, working with children and vulnerable adults.

7. Sitting alongside the 1974 Act, Part V of the 1997 Act created a scheme for disclosure of criminal records held by the police, whereby the police are required to provide information for the assessment of the suitability of a person for employment, or engagement in particular types of positions of trust, sensitivity, or those which involve contact with children. Thus, quite apart from the obligation on the person affected to disclose spent convictions when applying for certain positions, there is another mechanism whereby this information will be disclosed.

8. Thus, under the 1997 Act, the Disclosure and Barring Service ("DBS", formerly the Criminal Records Bureau) is required to issue a criminal record certificate ("CRC"), or an enhanced criminal record certificate ("ECRC"), to any person who applies for such a certificate on an application countersigned by a registered person. Broadly, registered persons are those entered on a register maintained by the Secretary of State containing the names of those who demonstrate a potential requirement of a need to ask exempted questions. An exempted question is relevant to suitability for engagement in specified sensitive activities, and largely tracks the 1975 Order, it being defined (by s. 113A(6) of the 1997 Act) as:

> " … a question which … so far as it relates to convictions, is a question to which section 4(2)(a) or (b) of the [1974 Act] (effect of rehabilitation) been excluded by an order of the Secretary of State under section 4(4) of that Act …"

9. An ECRC must include information which the relevant police force reasonably believes to be relevant to the enquiry made and ought to be included ('soft intelligence'); this is in addition to matters formally included in police records. Like a CRC, the DBS must supply an ECRC on an application that is countersigned by a registered person, stating that the certificate is required for the purposes of an exempted question, asked for a prescribed purpose. This is prescribed under

Regulation 5A of the Police Act 1997 (Criminal Records) Regulations 2002 (SI 2002/233), setting out a list that overlaps significantly with the list in Article 3 of the 1975 Order, itemising situations in which the registered person proposes to consider the applicant's suitability for a specified position of trust or sensitivity.

10. Both in relation to a CRC and an ECRC, s. 117 of the 1997 Act allows an applicant to apply to the DBS for an amended certificate on the ground that it is inaccurate. The differences in approach between a CRC and an ECRC are that for the latter, in addition to there being a requirement to include 'soft intelligence', pursuant to s. 117A of the 1997 Act (added by s. 82(5) of the Protection of Freedoms Act 2012), there is a right of challenge to the independent monitor (who then seeks a review by the relevant chief officer of police) in relation to the inclusion of information on the grounds that it is not relevant for the purpose described, or ought not to be included in the certificate. Guidance to the chief officer can be provided pursuant to s. 117A(4).

11. The scheme originally required a CRC and ECRC to disclose all convictions and cautions, whether current or spent, and whatever the nature or the offence(s) to which they related. The revised scheme, amended by the 1997 Act Amendment Order and the 1975 Order, no longer requires disclosure of every spent conviction and caution but, from 29 May 2013, requires disclosure only in the following circumstances.

    i) Any current conviction or caution, currency depending upon the period which has elapsed since the date of the conviction or caution and which differs, as a consequence of the operation of the 1974 and 1997 Acts, depending on whether, at the time of the conviction or caution, the person concerned was under 18 years of age or aged 18 or over: see the definition of 'relevant matter' in s. 113A(6)(a)(iii) and (d), a current conviction in s. 113A(6E)(c) and a current caution in s. 113A(6E)(d) of the 1997 Act and articles 2A(1) and 2A(2) of the 1975 Order.

    ii) Any spent conviction or caution in respect of certain specified offences (including a number of identified offences but, of more significance, all offences specified in Schedule 15 of the Criminal Justice Act 2003 which includes, for example, assault occasioning actual bodily harm): see the definition of 'relevant matter' in s. 113A(6)(a)(i) and (c) and the list of specified offences in s. 113A(6D) of the 1997 Act and articles 2A(1), (2) and (3)(a) read together with article 2A(5) of the 1975 Order ('the serious offence rule').

    iii) Any spent conviction in respect of which a custodial sentence or sentence of service detention was imposed: see the definition of 'relevant matter' in s. 113A(6)(a)(ii) of the 1997 Act, of conviction in s. 113A(6E)(a), caution in s. 113A(6E)(b) and custodial sentence and sentence of service detention in s. 113A(6E)(e) and articles 2A(2), 2A(3)(b) and 2A(4) of the 1975 Order.

    iv) Any spent conviction where the person has more than one conviction: see the definition of relevant matter in s. 113A(6)(b) of the 1997 Act and articles 2A(2) and 2A(3)(c) of the 1975 Order ('the multiple conviction rule').

12. The effect of the changes was summarised in the first of the cases under appeal (*R (P and A) v Secretary of State for Justice and others* [2016] EWHC 89 (Admin); [2016]

1 WLR 2009, hereafter referred to as "*P*") in which McCombe LJ set out its operation in these terms:

> "14. The effect is that where there are two or more convictions, they are always disclosable on a CRC or an ECRC. Further, where a conviction is of a specified kind or resulted in a custodial sentence, or is 'current' (ie for an adult within the last 11 years and for a minor within the last five years and six months), then it will always be disclosable.
>
> 15. The offences listed in subsection (6D) are extensive, and include murder and offences specified under Schedule 15 to the Criminal Justice Act 2003, ie more serious offences of violence (including assault occasioning actual bodily harm) and all sexual offences, but not, for example theft or common assault.
>
> 16. The primary feature of this new scheme which 'catches' the claimants in the present case is that where there is more than one conviction all of them are disclosable throughout the subject's lifetime. However, in the case of one of the claimants (P) one matter is not disclosable; that is, the theft which resulted in a caution alone and no conviction. That flows from the fact that that offence is neither a 'subsection (6D) offence' and is not 'current'."

13. The purpose of the amendment was to remove the criticism that the operation of the disclosure scheme (both under the 1994 Act as amended and the 1997 Act) was indiscriminate and provided no (or, in relation to the 1997 Act, very little) flexibility of approach, irrespective of the circumstances. This was at the core of the complaint advanced in *T v CCGMP* and accepted by the Supreme Court. The present cases challenge the adequacy of these amendments, and are based on the argument that the discrimination that has been introduced is insufficient, and inadequate, to address the failure of the scheme to comply with Article 8 ECHR.

14. As an alternative to challenging the disclosure of cautions in relation to affected adults and reprimands or warnings in relation to children, it is also contended that the retention of the data which comprises this information itself represents a breach of Article 8 ECHR and that, as a consequence, a failure to expunge or delete the caution, reprimand or warning on reasonable request is actionable. Thus, in addition to the challenges directed to the Home Secretary and the Secretary of State for Justice (hereafter described as "the Secretaries of State") as to the compatibility of the statutory scheme with Article 8, in two of the present appeals, there are challenges addressed to the relevant chief constable (as the holder of the data) in relation to its retention.

15. In the circumstances, I shall first address how the law was reviewed and articulated in *T v CCGMP*, before considering the impact of the amendments to the scheme and, in particular, whether it is 'in accordance with the law' and if so, whether it is

structurally disproportionate (both being within the context of Article 8 of the ECHR). I will then deal with the individual challenges and, further:

i) whether the Chief Constable of Surrey Police acted unlawfully in refusing to erase reprimands imposed on G, in 2006, for sexual activity with a child, when he was 13 years old;

ii) whether the Metropolitan Police Commissioner acted unlawfully in refusing to erase a caution on Ms Krol, in 2007, for assault occasioning actual bodily harm;

iii) if the revised scheme does not comply with Article 8, whether the Divisional Court in *P* erred by refusing to grant a declaration that article 2A(3)(c) of the 1975 Order, as amended by the 2013 Order, was *ultra vires*; and

iv) If the revised scheme does not comply with article 8, whether Blake J erred in *G* by granting a declaration that the 1975 Order required amendment as a consequence of the declaratory relief granted in relation to the 1997 Act.

The Development of the Law

16. *T v CCGMP* concerned two cases. The first claim was brought by a young man (T) who, as an 11 year old, had been warned (being the equivalent for children of being cautioned) in respect of the theft of two bicycles. Some eight years later, T needed an ECRC in relation to enrolment on a sports studies course, whereupon the warnings were revealed. The second claim was in relation to a 41 year old cautioned for theft of a packet of false fingernails who, eight years later, was denied employment in the care sector following disclosure of the caution. Both challenged the compatibility of the statutory scheme with Article 8 of the ECHR.

17. The Court of Appeal held that the original scheme in relation to the disclosure of convictions and cautions was disproportionate in the way that it balanced, on the one hand, the legitimate aims of protecting the rights of employers, children and vulnerable adults for which they were responsible, and, on the other hand, the need to enable employers to assess an individual's suitability for a particular type of work. As a result, in this respect, the 1997 Act was declared incompatible with Article 8 and the 1975 Order (to the extent that it provided that an employee was required to answer questions in respect of spent convictions and cautions in the context of prescribed occupations and professions) was declared *ultra vires*.

18. Lord Dyson MR explained the approach of the court in these terms (at [38]):

> "The fundamental objection to the scheme is that it does not seek to control the disclosure of information by reference to whether it is relevant to the purpose of enabling employers to assess the suitability of an individual for a particular kind of work. Relevance must depend on a number of factors including the seriousness of the offence; the age of the offender at the time of the offence; the sentence imposed or other manner of disposal; the time that has elapsed since the offence was committed; whether the individual has subsequently re-

> offended; and the nature of the work that the individual wishes to do. These same factors also come into the picture when the balance is to be struck (as it must be) between the relevance of the information and the severity of any impact on the individual's article 8(1) right."

19. He recognised the value of a 'bright-line' rule which had the merit of simplicity, ease of administration and also the impact of the observations of Lord Bingham of Cornhill (in *R (Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] UKHL 15; [2008] 1 AC 1312 (at [33]). This was to the effect that drawing a line inevitably meant that hard cases would arise which fell on the wrong side, but that this should not invalidate the rule if, judged in the round, it was beneficial. But Lord Dyson equally pointed to *R(F (a Child)) v Secretary of State for Justice* [2010] UKSC 17; [2011] 1 AC 331 which struck down the inability to review the indefinite requirement to remain on and comply with the terms of the Sex Offenders' Register. Lord Dyson went on (at [43]):

> "A proportionate scheme would not require the individual consideration of each case. Just as in the case of R (F), so here Parliament could produce a proportionate scheme which did not insist on an examination of the facts of every case. A number of options have been suggested, including a range of what might be called 'bright-line' sub-rules. At page 22 of her initial report, Mrs Mason gave examples of criteria that could be used for a filtering process. These were (i) a spent conviction for certain specified offences must always be disclosed; (ii) a spent conviction for certain specified offences must never be disclosed irrespective of any other considerations; and (iii) some spent convictions might or might not be disclosed depending on a set of factors such as age when one committed the offence, whether it was a single offence, how long ago it was committed etc."

20. On appeal, the Supreme Court in *T v CCGMP* went further: see [2014] UKSC 35; [2015] AC 49. Although the revised scheme was then available (which demonstrated the inescapable difficulty of arguing that it was impossible to devise a more calibrated system for identifying material which should be the subject of disclosure: see per Lord Wilson at [48]), it reviewed the lawfulness of the original scheme from first principles. In particular, Lord Reed analysed the judgment of the European Court of Human Rights ("ECtHR") in *Rotaru v Romania (App No 28341/95)* (2000) 8 BHRC 449, which concerned storage and disclosure of a criminal record in circumstances in which there was no mechanism to correct information held on the database and *MM v United Kingdom (App No 24029/07)* (2013), which concerned the disclosure by the police of a caution for child abduction to organisations to which MM had applied for employment as a family support worker. In the latter case, the ECtHR observed (at [204]):

> "No distinction is made based on the seriousness or the circumstances of the offence, the time which has elapsed since the offence was committed and whether the caution is spent. In short, there appears to be no scope for the exercise of any

> discretion in the disclosure exercise. Nor, as a consequence of the mandatory nature of the disclosure, is there any provision for the making of prior representations by the data subject to prevent the data being disclosed either generally or in a specific case. The applicable legislation does not allow for any assessment at any stage in the disclosure process of the relevance of conviction or caution data held in central records to the employment sought, or of the extent to which the data subject may be perceived as continuing to pose a risk such that the disclosure of the data to the employer is justified."

21. It went on:

> "206. In the present case, the court highlights the absence of a clear legislative framework for the collection and storage of data, and the lack of clarity as to the scope, extent and restrictions of the common law powers of the police to retain and disclose caution data. It further refers to the absence of any mechanism for independent review of a decision to retain or disclose data, either under common law police powers or pursuant to Part V of the 1997 Act. Finally, the court notes the limited filtering arrangements in respect of disclosures made under the provisions of the 1997 Act: as regards mandatory disclosure under section 113A, no distinction is made 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.
>
> 207. The cumulative effect of these shortcomings is that the court is not satisfied that there were, and are, sufficient safeguards in the system for retention and disclosure of criminal record data to ensure that data relating to the applicant's private life have not been, and will not be, disclosed in violation of her right to respect for her private life. The retention and disclosure of the applicant's caution data accordingly cannot be regarded as being in accordance with the law. There has therefore been a violation of article 8 of the Convention in the present case. This conclusion obviates the need for the court to determine whether the interference was 'necessary in a democratic society' for one of the aims enumerated therein."

22. Lord Wilson was critical of the reasoning of this judgment on the basis that the phrase 'in accordance with the law' required only clear and publicly accessible rules of law, invulnerable to arbitrariness: see [30-31] and per Lord Bingham of Cornhill in *R (Gillan and another) v Comr of Police of the Metropolis* [2006] UKHL 12; [2006] 2 AC 307 at [34], whose analysis of the law, as opposed to the result, was consistent with that of the ECtHR (see *Gillan v United Kingdom (App No 4158/05* (2010); 50

EHRR 45 at [76]-[77]). To the contrary, however, Lord Reed (with whom the other members of the Court, save Lord Wilson, agreed) concluded that the reasoning in *MM* appeared to be based on settled law (see *T* [2014] UKSC 35; [2015] AC 49 at [113]). He went on (at [114]):

> "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."

23. Lord Reed recognised that the issue of what was 'in accordance with the law' appeared to overlap with the question of whether the interference was 'necessary in a democratic society' (within article 8 of the ECHR), observing that the focus of these questions was different. In the case of the former, there had to be safeguards which had the effect of enabling the proportionality of the interference in general to be adequately examined. Whether the interference in a given case was in fact proportionate was a separate question: see [114]. Dealing with the case of *T*, Lord Reed went on (at [119]):

> "In the light of the judgment in *MM v United Kingdom*, it is plain that the disclosure of the data relating to the respondents' cautions is an interference with the right protected by article 8(1). The legislation governing the disclosure of the data, in the version with which these appeals are concerned, is indistinguishable from the version of Part V of the 1997 Act which was considered in *MM*. 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."

24. Before leaving *T*, it is worth adding that the Court was of the unanimous view that the scheme violated Article 8 rights on the grounds that, not being based on any rational assessment of risk, it went further than was necessary to accomplish the statutory objective, was disproportionate, and failed the test of being necessary in a democratic society: see [50], [121] and [158].

25. The effect of this decision has been considered in the cases now the subject of appeal and others. In *P*, a case of the Divisional Court, McCombe LJ described it in these terms:

> "84. In my judgment, in taking the step that it did in the T case, the Supreme Court moved our domestic understanding of the requirement for an interference with Article 8 rights to be 'in accordance with the law'

> a significant distance from what had previously been understood. ..."
>
> 85. As I understand it, the question must now be whether the present statute affords the individual adequate protection against arbitrariness, but also, in order for an interference with Article 8 rights to be 'in accordance with the law' there must be adequate safeguards which have the effect of enabling the proportionality of the interference to be adequately examined."

26. Similarly, in the second appeal before this court, *R(G) v Chief Constable of Surrey Police* [2016] EWHC 295 (Admin); [2016] 4 WLR 94 ("*G*"), Blake J followed the approach of McCombe LJ. He concluded that this approach explained the central importance of Lord Reed's analysis of *MM*, going on to observe (at [43]):

> "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 scheme 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."

27. A similar approach has been taken in Northern Ireland in *Re Gallagher* [2016] NICA 42 (although it is to be noted that leave has been granted to appeal this decision to the Supreme Court). The framework of the legislation then under consideration was broadly equivalent to the legislative provisions here under review. The case concerned a person's convictions in 1996 and 1998 for a total of six offences of carrying children without a seat belt when, in 2014, she wished to work as a care assistant for adults with learning difficulties. Gillen LJ referred to the above cases and concluded that, insofar as the scheme mandated disclosure by the State of one or more than one conviction indefinitely, it was not in accordance with the law, there being no adequate safeguard to enable the proportionality of the interference adequately to be examined (see [68]). He also referred to the failure to draw distinctions on the basis of the nature of the offences, the terms of disposal, the time elapsed since the offences and their relevance to any employment sought (see [70]).

28. Another aspect of the position in Northern Ireland is also illuminative because, with effect from 1 March 2016, an independent review scheme (with a filtering mechanism) has been introduced in respect of criminal record disclosures: see Schedule 8A to the Police Act 1997, as inserted by Schedule 4 to the Justice Act (Northern Ireland) 2015. Although not all information is eligible for review (so that, for example, a necessary pre-requisite for review will be that the conviction is spent), it will not be disclosed where the independent reviewer is satisfied, first, that disclosure would be disproportionate and, second, that non-disclosure would not undermine the safeguarding or protection of children and vulnerable adults, or pose a risk of harm to the public. The factors to be considered include:

i) The nature of the position being applied for;

ii) The seriousness of the offence(s);

iii) How long ago the offence(s) occurred;

iv) How many offences are being disclosed and, if more than one, whether or not they arose out of a single court hearing;

v) When the information would fall to be considered for filtering; and

vi) The age of the applicant at the time of the offence(s), including, in those cases where the applicant was under the age of 18 years, the need to have the best interests of children as a primary consideration.

29. For the sake of completeness, it is appropriate to mention the position in Scotland where disclosure is governed by the 1974 Act, the 1997 Act and the Protection of Vulnerable Groups (Scotland) Act 2007. In short, an executive agency of the Scottish Government operates a filtering scheme for 'higher level disclosures'. There are no blanket rules regarding the disclosure of multiple convictions, as each spent conviction is treated separately in the following stages. Thus, the type of offence is considered with certain offences listed in Schedule 8A of 1997 Act always being disclosed. Offences which are to be disclosed "subject to the rules" ('the rules list') will only be disclosed in certain circumstances. If the spent conviction is for an offence that does not appear on either of the lists, it will not be disclosed.

30. For the offences on the rules list, passage of time will be considered so that there will be no disclosure in relation to an individual over 18 when convicted where conviction occurred over 15 years ago, with half that lapse of time for those under 18 when convicted (although convictions on the rules list resulting in admonition or absolute discharge will not be disclosed). Furthermore, for a spent conviction for an offence on the rules list, which otherwise falls to be disclosed under the rules, the individual has a right to apply to a sheriff to have that conviction removed from their certificate.

31. This scheme fell for consideration in *P(AP) v Scottish Ministers* [2017] CSOH 33 which concerned a challenge by a 42 year old male who wished to work in the care sector but who, as a 14 year old boy, had been referred to a children's panel in respect of lewd, indecent and libidinous practices (once being found masturbating in a bush and, once, in his own home, exposing himself to a younger sister). As a result, he was subject to supervision for a year. At 22 years old, he had a conviction for theft by shoplifting of two bottles of wine (apparently when drunk), but had not otherwise come to the attention of the authorities. The offence of lewd, indecent and libidinous practices falls within Schedule 8A and, as such, fell to be disclosed.

32. In the Outer House, Lord Pentland concluded that the scheme "failed to provide any (or at least any sufficient) safeguards to enable the proportionality of the admitted interference in the petitioner's case to be evaluated fairly and objectively" (at [45]). It was "too sweeping and indiscriminate" and "without a mechanism for testing the proportionality of the interference with Article 8 rights in the light of the individual circumstances of the case" (at [47]). In the circumstances, as it operated in this case, it was not in accordance with the law (at [58]).

"In accordance with the law"

33. Decisions subsequent to *T v CCGMP* in this jurisdiction and the approach to the case in other jurisdictions provide a window on its proper construction, but it is necessary to return to the precise articulation of the decision and the conclusions that it expressed. Thus, before this court, there has been a fundamental disagreement between the parties as to the *ratio* of *T* in the Supreme Court. Hugh Southey Q.C. for P argued that it was contained in [114], to the effect that, for a scheme to be in accordance with the law, there had to be safeguards which enabled proportionality to be examined. Thus, absent some sort of appeal mechanism, to allow for individual consideration of the circumstances of any individual case, the system could not be in accordance with the law. James Eadie Q.C. for the Secretaries of State argued that the *ratio* was to be found in [119], and that the critical analysis that had to be undertaken was to consider the cumulative effect of a number of features of the scheme (there set out) so that none, on its own, could be considered determinative.

34. It is not surprising that Mr Eadie was driven to that argument because the critical weakness (if such it is) in the revised scheme, even taking into account the cumulative effect of such features as have been incorporated to remove its indiscriminate operation, is that, in a number of cases, there is simply no mechanism for undoing the damage done by the inclusion of a conviction or caution. This is irrespective of the triviality of the circumstances, the lapse of time since the events, or the lack of its relevance to the future pursuit of the employment or other activity sought to be undertaken.

35. Thus, Mr Eadie submits that it is (and was) open to Parliament to establish a scheme without individual review, and that the provision of a right of challenge is not a prerequisite of compatibility with article 8. He argued that it is well established that a system involving the drawing of bright lines is acceptable in principle: see the observations of Lord Dyson at [18] above, and recent decisions such as: *R (Tigere) v Secretary of State for Business, Innovation and Skills* [2015] UKSC 57; [2015] 1 WLR 3820 per Baroness Hale at [36]; and *R (AM) v Secretary of State for Work and Pensions* [2015] UKSC 47; [2015] 1 WLR 3250 per Lord Wilson at [27]. Even in the cases concerning blanket deprivation of voting rights for prisoners, the basis of the decision was disproportionality because of indiscriminate operation of the bright line, and where it had been placed, without it being suggested that a scheme required individual consideration: see *Hirst v UK (App No 74025/01)* (2006) 42 EHRR 41. He also relied on *Gaughran v Chief Constable of the Police Service of Northern Ireland* [2015] UKSC 29; [2016] AC 345, recognising that an exceptional case procedure could be very narrow, and was simply one factor in the proportionality analysis.

36. Mr Southey and Tim Owen Q.C. (for G) argue that the attempts by Mr Eadie to broaden the focus beyond the mechanism for individual review into the cumulative effect of this with other safeguards amounted to an attack on the analysis of Lord Reed in *T*, which held that *MM* represented the settled approach of the ECtHR. Thus, adequate safeguards (including, but not necessarily limited to, means of enabling proportionality to be examined) were required for any scheme to be in accordance with the law. That conclusion was underlined by the concern expressed by other European states in relation to surveillance and the use of personal data by the state. This was particularly emphasised in *Rotaru* and *MM*, drawing on the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data

(Council of Europe 1981) and other instruments, including Recommendation No R (87) 15 regulating the use of personal data in the public sector (adopted 17 September 1987). The latter contains principles requiring an independent supervisory authority (Principle 1); as to the importance of restrictions of disclosure of personal data (Principle 5); and as to the deletion of information no longer necessary (Principle 7): see *T* [96] and [101]-[104].

37. Mr Southey also challenged the distinction that Mr Eadie sought to draw, between surveillance cases and the collection of personal data, as not one which was identified by Lord Reed (see *T* at [88]); neither, he argued, was it right to say that procedural safeguards were only required where the law lacked clarity. There was nothing unclear about the scheme: it imposed a rigid rule which allowed for no discretion. He also distinguished *Gaughran* on the basis that the potential harm resulting from retention of data in that case was limited (cf. the 'killer blow' to potential employment in this case: see *R(L) v Commissioner of Police for the Metropolis* [2009] UKSC 3; [2010] 1 AC 410 at [75]. Further, in that example, there was an 'exceptional case' procedure.

38. Mr Owen underlined the starkness of the revised scheme by reference to the position of children and the lifelong disclosure which arises for certain offences, irrespective of the circumstances in which they occurred and thus, potentially, more stark than the position in relation to adults: see *R(F) v Secretary of State for the Home Department* [2010] UKSC 17; [2011] 1 AC 331 at [66]. He also pointed to other legislative schemes whereby offenders and others have or have had the right of review of orders which impose restrictions or prohibitions upon them: see, in relation to Sexual Offences Prevention Orders, Risk of Sexual Harm Orders, Foreign Travel Orders (ss. 108, 125 and 118 of the Sexual Offences Act 2003 respectively); Anti-Social Behaviour Orders (s. 1(8) of the Crime and Disorder Act 1998 albeit now repealed); and Football Banning Orders (s. 14G of the Football Spectators Act 1989). As to the latter, however, it is important to underline that these imposed continuing obligations and limitations prohibiting conduct which would otherwise have been lawful, so that, if breached, would constitute a criminal offence.

39. In my judgment, the precise articulation of the ratio in *T* is contained in a combination of paras. [113], [114] and [119] of Lord Reed's judgment. At [113], Lord Reed finds that "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". In [114], Lord Reed goes on to address the overlap between assessing whether state use of personal data is, firstly, in accordance with the law and, secondly, necessary in a democratic society. He considers the safeguards that are required for an interference to be 'in accordance with the law', and concludes that they must "have the effect of enabling the proportionality of the interference to be adequately examined". Lord Reed then identifies in [119] the aspects of the scheme in *T* that meant that disclosure was indiscriminate: it was "the cumulative effect" of the lack of discriminators sufficient to draw appropriate distinctions, and ensure that there was a coherent and relevant link between the disclosure and the public interest to be safeguarded, and the absence of any mechanism for independent review, that rendered it arbitrary. Furthermore, it is a mistake to seek to construe Lord Reed's judgment as if it were an Act of Parliament and, equally, an error to present [114] and [119] as being, in some way, contradictory.

In short, Lord Reed regards a regime requiring disclosure by the state of personal data which it has collected and stored not to contain adequate safeguards to make it 'in accordance with the law' if features of the type that he identified in [119] are not present.

40. In that regard, there is no one particular safeguard that converts what is otherwise arbitrary into a scheme that is in accordance with the law, and the right of individual review is not a prerequisite in every case. Take a system that requires only that a murder conviction must always be disclosed to potential employers if work with children or vulnerable adults is sought. In my judgment, there would be no question but that such a system was neither arbitrary, nor without adequate safeguard. There is a clear link between offending of such seriousness, whenever committed, and the need to have regard to the interests of public protection, without the requirement of individual consideration of the merits of the specific individual affected. The absence of an independent review would not, in those circumstances, render such a scheme to not be in accordance with the law. However, the more tenuous the link or relationship between the offending and the public interest to be protected, the more likely that the scheme will tip over and fail this initial article 8 hurdle. It follows that there may be circumstances in which a mechanism for independent review is necessary for a scheme, or a particular rule, to be 'in accordance with the law'. If a rule, or sub rule, within a scheme does not discriminate by reference to *any* of the features *and* there is no mechanism for review, then it will not be in accordance with the law. For Lord Reed, such disclosure will be "indiscriminate".

41. Thus, the features listed by Lord Reed at [119] (distinctions based on "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") are individually neither necessary nor sufficient. A judgment has to be made as to the calibre of the filter mechanism in the context of the public interest to be protected. An independent review is not an absolute condition (as my example shows), but I underline that the less the discrimination in relation to the other features – the nature of the offence, disposal and lapse of time – the greater the need for some filter to ensure that the critical link to the public interest is not lost.

42. To that extent, I am not sure that McCombe LJ in *P* was right to say that *T* had the effect of moving "a significant distance" our domestic understanding of what is necessary for an interference with Article 8 rights to be 'in accordance with the law'. McCombe LJ referred to Lord Reed's statement in [114] that "there must be adequate safeguards which have the effect of enabling the proportionality of the interference to be adequately examined", and to the workability of individual review mechanisms (see [80]-[81], [85]-[88]). If his judgment and Lord Reed's statement are to be construed as suggesting that every case requires a mechanism for individual consideration of the facts (thereby preventing a bright line rule), in my view, the observations go too far. However, certain rules within a disclosure regime that generally does discriminate by reference to the relevant features may have to make provision for review at some stage if the particular sub rule does not discriminate by reference to those features.

43. What about the revised scheme? In amending the Regulations, Parliament has decided upon the calibre of the filter mechanism in the context of the public interest to be

protected, in order to prevent the system being condemned as arbitrary. The fact that Parliament has developed a series of rules which have the effect of 'weeding out' certain convictions, cautions or warnings (based on some of the views expressed by Mrs Sunita Mason and reflected in the revised scheme, endorsed by affirmative resolution in Parliament) is relevant to determining whether the revised scheme is 'in accordance with the law". However, strictly speaking (see Lord Reed in *T* at [115]) there is no margin of appreciation when it comes to the question of determining whether a system provides adequate safeguards against arbitrary treatment. Given my conclusion that a bright line rule is not necessarily incompatible with the prevention of the vice of arbitrariness, the task is to see whether the bright line rules suffice to prevent a disclosure requirement being regarded as "indiscriminate". Applying Lord Reed's test, it is proper for the court to determine whether these bright line rules are sufficiently calibrated to enable them to be 'in accordance with the law' in this unique context (for references to the relevant context, see Lord Reed in *T v CCGMP* at [88]-[89], [96] and [101]-[104]).

44. In my judgment, the two rules being challenged, the multiple conviction rule (see above at [11(iv)]) and the serious offence rule (see above at [11(ii)]), are not, without a mechanism for refinement, 'in accordance with the law'. The multiple conviction rule is indiscriminate in that it applies without consideration of *any* of the features identified by Lord Reed. If an individual has been convicted of more than one offence, the rule will apply automatically irrespective 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. Therefore, in my view, Lord Reed would conclude that it is not 'in accordance with the law', unless there is a mechanism for independent review.

45. The serious offence rule is not totally indiscriminate as it draws a distinction between offences that are in Schedule 15 to the Criminal Justice Act 2003 and offences that are not. However, in my judgment, it is insufficiently calibrated so as to ensure that the proportionality of the interference is adequately examined. The rule draws a bright line by reference to only one of the features identified by Lord Reed at [119], namely the seriousness (i.e. the nature) of the offence. If an individual has been convicted of a serious offence, the rule applies in a blanket way and the conviction will be disclosed automatically. There is no distinction based on 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. Given that Lord Reed emphasised the *cumulative effect* of the failure to draw distinctions or provide for a mechanism for independent review, and in the light of the startling consequences for the claimants in *G* and *W*, in my judgment there are insufficient safeguards to ensure that the rule does not operate in an arbitrary manner.

"Necessary in a democratic society"

46. That is not to say that the revised system is necessarily compatible with article 8 even if it overcomes the hurdle of being in accordance with law. The second limb of that provision is that there shall be no interference (with private life) except "as is necessary in a democratic society in the interests of national security, public safety …

for the prevention of … crime … or for the protection of the rights and freedoms of others". It is to that exception that I now turn.

47. The starting point is *T v CCGMP,* in which both Lord Wilson and Lord Reed discuss, in the context of the original scheme, the necessity of disclosing the cautions for theft of two bicycles (in the case of T) and of an item from a chemist's shop (in relation to the other case, B). The Supreme Court was unanimous that the disclosure of neither was necessary in a democratic society for the protection of the rights of others. The issue was the sole basis of Lord Wilson's judgment who, citing *R (Aguilar Quila) v Secretary of State for the Home Department* [2011] UKSC 45; [2012] 1 AC 621 at [45], articulated the legislative framework prior to May 2013 and identified (at [39]) the four questions which arose. The first was whether the objective behind the interference was sufficiently important to justify limiting the rights under Article 8. The second was whether the measures were rationally connected to the objective, and the third, whether they went no further than was necessary to accomplish it. Finally, "standing back" it was necessary to see whether they struck a fair balance between the rights of the individual on the one hand, and the interests of the community on the other.

48. He went on to identify the deference which the courts should pay to Parliament in relation to the exercise of an appropriate balanced judgement in this area in these terms (at [40]):

> "The objective behind the regime created by the 1975 Order and by Part V of the 1997 Act was supremely important. It was to protect various members of society, particularly vulnerable groups such as the elderly and children but also, for example, consumers of financial advice, from exposure to persons able and likely to mistreat, neglect or defraud them. On any view the contents of the Order and of the Act were rationally connected to the objective. The issue surrounds the third and fourth questions, in relation to both of which the Secretaries of State make a valid preliminary point. It is that whether the measures were necessary to accomplish the objective and whether the balance was fairly struck are issues of fine judgment which, by affirmatively approving the 1975 Order and by enacting the 1997 Act, Parliament itself determined and that the courts should therefore hesitate long before concluding that its judgments in these respects was wrong."

49. Lord Wilson then went through the recommendations made by Mrs Sunita Mason and went on (at [48]):

> "Nor, to take the present cases, can the Secretaries of State contend that it is impossible to devise a more calibrated system for identifying material which should be the subject of disclosure under the 1997 Act and the 1975 Order. For, in introducing the 2013 amendments, they duly devised it! Indeed back in 2010 the Secretary of State for the Home Department commissioned Mrs Mason's review. The Secretaries of State convincingly protest that Mrs Mason's commission was not born of any acceptance that the regime which then existed violated rights under article 8 … But it was the Secretary of State for the Home Department who chose to describe Mrs

> Mason's remit as being to scale back the criminal records system (obviously including disclosure under the 1997 Act) 'to common sense levels'."

50. He concluded that the disclosure of T's cautions "obviously" and, in the light of its triviality, also in relation to B, "went further than was necessary to accomplish the statutory objective and failed to strike a fair balance between their rights and the interests of the community", thereby violating Article 8 rights. The same view was expressed by Lord Reed, who put this conclusion in these terms (at [142]):

> "I cannot however see any rational connection between minor dishonesty as a child and the question whether, as an adult, the person might pose a threat to the safety of children with whom he came into contact. There is therefore no rational connection between the interference with article 8 rights which results from the requirement that a person disclose warnings received for minor dishonesty as a child, and the aim of ensuring the suitability of such a person, as an adult, for positions involving contact with children, let alone his suitability, for the remainder of his life, for the entire range of activities covered by the 1975 Order."

51. In the light of the concession made by Alex Offer, for W, that the revised scheme was in accordance with law, the most detailed analysis of the extent to which it was necessary in a democratic society (and, thus, in compliance with Article 8) is set out in the judgment of Simon J (as he then was) in that case. It concerned a 47 year old man who, when 16, was convicted of assault occasioning actual bodily harm ("ABH"), for which he was conditionally discharged for two years and bound over to keep the peace for 12 months. As ABH is specified within Schedule 15 to the Criminal Justice Act 2003, it is caught by the lifelong disclosure requirements of the revised scheme.

52. Simon J analysed the revised scheme with considerable care. Relying on the observations of Lord Dyson in *T v CCGMP* in the Court of Appeal at [43] (set out at [19] above), he concluded that Parliament was entitled to draw a line, above common assault but below ABH, because the latter was specified as a serious offence of violence in Schedule 15, sufficient to attract the dangerousness provisions of the Criminal Justice Act 2003. The introduction of an element of discretion as to what should be disclosed in relation to a particular applicant was neither practical, nor sufficiently certain ([64]). Having pointed to the difficulty of establishing what is a minor offence, he observed (at [71]) that it was a matter for Parliament to specify offences in respect of which disclosure should always be made, adding:

> "Simply to say that the line could have been drawn elsewhere does not demonstrate that the same policy objective could have been achieved by a less intrusive means."

He offered the same response (namely, that it was a matter for Parliament) to the alternative submission that disposal (in this case by way of conditional discharge) should always be a material consideration: see [76].

53. Similar arguments were advanced in *R(G) v Chief Constable of Surrey Police, R(G) v Secretary of State for the Home Department* [2016] EWHC 295 (Admin); [2016] 4 WLR 94 ("*G*"). Blake J allowed the claim on the basis that the revised scheme was not in accordance with the law, because he did not consider *P* to be wrong, and was thus bound by it (see [43]). He went on, however, to conclude that it was "at least … highly arguable" that despite the revised scheme, disclosure of the data to a third party was not relevant and proportionate. He said that although he was of the view that the scheme did not have sufficient flexibility by way of procedural safeguards, he made no determination as to justification and proportionality (at [50]). He did, however, provide twelve reasons based on the facts of the case for reaching this view. Although lengthy, these have been subject to detailed submissions, both on behalf of G and the Secretaries of State and repay analysis if only because of the extent to which a number go beyond what, in my judgment, constitute sufficient grounds for judicial intervention, and stray into what is properly within the margin of appreciation available to the legislature.

54. These reasons were as follows (at [47]):

> "In my judgment, the claimant has at least a highly arguable case that despite the statutory scheme as amended, disclosure of the data to a third party is not relevant and proportionate:
>
> (i) Until 1998 it is unlikely that a 12-year-old would have been held to have criminal responsibility for an act of sexual exploration with his peers. The UK has one of the youngest ages of criminal responsibility in Europe. It is necessary to temper the long arm of the criminal law with other measures designed to ensure that children do not become stigmatised as criminals for engaging in activity that might be seen as an ordinary part of the process of growing up.
>
> (ii) Given the investigator and prosecutor's assessment of the nature of the offending and the CPS guidance on sexual offences, the public interest did not require a prosecution and it was arguably a borderline line case for a reprimand. In reaching the decision that he did, the prosecutor did not consider that it was in the public interest to give G a record and did not intend to give him one and thereby damage his welfare and prospects of rehabilitation.
>
> (iii) Until March 2006, any reprimand given to a juvenile would have been weeded out under the terms of earlier document retention policy and therefore not available for mandatory disclosure.
>
> (iv) Until October 2009 such material would have been 'stepped down' after ten years because of the absence of any other conduct causing concern and thus, as the police understand the law, not available for automatic disclosure. This practice changed after the *Humberside case [2010] 1 WLR*

1136 but that case did not consider the justification of interference with article 8 by disclosure to a private employer.

(v) If the material had been weeded out and stepped down from central records but not deleted altogether, it would still be available for disclosure in an enhanced certificate if the chief constable considered it relevant and proportionate. This is the very judgment that the claimant submits is needed before a spent caution administered to a juvenile is ever disclosed.

(vi) Here the chief constable's own experienced disclosure officer considered that provision of the statutory information to an employer would have had a disproportionate effect. He sought to mitigate this by adoption of some explanation of the surrounding circumstance that tended to show that the offending was not abusive or exploitative and thus not evidence that G was a potential risk to young people.

(vii) Since 1974 Parliament has maintained the ROA scheme where offenders sentenced to less than four years imprisonment or detention can treat their sentences as spent. In 2008 Schedule 2 paragraph 1(1)(b) of the ROA provided that an unconditional caution as this reprimand is now considered to be lapses immediately that it is issued. The provisions of the ROA and the previous ‘weeding out’ and ‘stepping down’ practices all point to a starting point in the proportionality analysis that not all such matters should be automatically disclosed.

(viii) Filtering out of single minor convictions is one way of achieving proportionality. In that context, the policy choice of which classes of conviction should not be filtered out is a matter to which a margin of appreciation should be afforded to the executive and the legislature, for the reasons given in W. However, merely filtering out of single minor convictions is insufficiently sensitive a means of distinguishing between disclosures that are relevant, necessary and proportionate to the legitimate aim that would justify interference with significant aspects of private life (see Gallagher and R (P)).

(ix) In the present case, the issue is not multiple cautions, but an overall examination of relevance and proportionality. These considerations could be sufficiently addressed by treating spent convictions and cautions as intelligence data that should only be disclosed when relevant and proportionate to the purpose of the request rather than automatically.

(x) Further, even if different considerations should apply to adult offenders, who could be assumed to be mature enough to understand what they were doing at the time they offended and the need to make a persuasive case that they had changed, the case for procedural safeguards where reprimands have been

> administered to offenders under 14 is that much more compelling. An interference with article 8 rights that does not comply with the requirements of the international law obligations of the United Kingdom is unlikely to be justified. The requirements of international law relating to the welfare of the child generally are well known and have been applied in the article 8 context. They were reviewed by Baroness Hale of Richmond in Durham and Lord Reed JSC in T. Disclosure of a child's reprimand has a deleterious effect on subsequent social life and there are strong pointers that this should only take place where strictly necessary and proportionate.
>
> (xi) Contrary to the concerns of the Secretaries of State and Ms Foulds, there is no complexity or impracticality about devising a procedure that enables such a judgement to be made as the statutory mechanism already exists in section 113B cases.
>
> (xii) It is unfair to require the employer to make that kind of judgement, with no legal remedy available to the claimant to supervise errors of approach and ensure proportionality of decision making."

55. In my judgment, Blake J was importing into his judgment an assessment of social policy which goes beyond that required to pass through the filter of what is proportionate for the purposes of Article 8 of the ECHR. The age of criminal responsibility, the filtering decisions in relation to prosecution of children and young persons, the rehabilitation periods, the modifications to the weeding and 'stepping down' rules (themselves a consequence of the Bichard Inquiry following Ian Huntley's conviction for the murders of Jessica Chapman and Holly Wells and decisions such as *Humberside*) are all matters of social policy for Parliament. Mr Eadie submits that the granular analysis which Blake J undertook in relation to legislative choices reflects an error of approach and, as to sub-paragraphs (i) to (x), I agree.

56. Mr Eadie repeats the argument that a bright line scheme is entirely legitimate, and that the revised scheme is compatible with Article 8 without a process of review. It is for Parliament to decide the structure and system of such a scheme. Put shortly, it is not for the court to decide whether the bright lines are the right ones. The question is – in adopting the general measure and striking the balance – did the legislature act within the margin of appreciation properly afforded to it? (see *Animal Defenders International v UK* (2013) 57 EHRR 607 at [110], cited in *Gaughran* (*supra*) at [45].

57. Thus, Mr Eadie strongly supports the two rules that are challenged in these cases, that is to say, the multiple conviction rule (challenged in *P*), and the serious offence rule (challenged in *G* and *W*). As to the former, he submits that there is nothing unreasonable, arbitrary, or outside the proper bounds of reasonable legislative judgment about such a rule, based on convictions only, not least because of the view of Mrs Sunita Mason that more than one conviction could demonstrate a pattern of offending behaviour. That may indeed be the case, and, in those circumstances, disclosure would be entirely justifiable. On the other hand, it may well not be so, and the strength of the argument to the contrary is the failure to ensure that there is some

mechanism to differentiate one from the other, given that the legitimate objective being preserved (and, thus, the appropriate balance to be kept in mind) is the protection of the public.

58. As to the serious offence rule, it is recognised that certain serious offences, including violent and sexual offences, ought to be disclosed, even balancing the needs of the individual with those of wider public protection. In the context of the scheme as a whole, especially the public interest requirements to protect the vulnerable, even if the circumstances or consequences in any particular case point to the less serious end of the spectrum, Mr Eadie argues that, in the round, the rule is beneficial. Furthermore, the cost, administrative complexity and potential difficulty of investigating how serious the circumstances of any specific offence might have been, themselves point to the legitimate legislative decision that a bright line is justifiable, and within the margin of appreciation. In any event, as Mr Eadie points out, that was the conclusion of Mrs Mason and the Independent Advisory Panel for the Disclosure of Criminal Records.

59. In relation to all aspects of the revised scheme, Mr Eadie also makes the general point that it is wrong to equate disclosure with preclusion to employment which observation is particularly relevant if the convictions are old and for minor offences. This goes to the effect of disclosure and the potential impact on the individual concerned. The difficulty with that argument, however, is the riposte of Lord Wilson in *T* (at [45]):

> "In these days of keen competition and defensive decision-making will the candidate with the clean record not be placed ahead of the other, however apparently irrelevant his offence and even if otherwise evenly matched? More fundamentally, the regime reflects an exception to the eradication of the offence under the 1974 Act and it is the fact, or even the potentiality, of disclosure, whatever its ultimate consequences, which causes the interference and for the person creates, as a minimum, embarrassment, uncertainty and anxiety."

60. The generic response to these submissions is to revert to the necessary link that must exist and the balance that has to be struck between the rights of the individual on the one hand, and the interest of the community, in particular, public protection (representing what is necessary in a democratic society) on the other. Mr Southey, Mr Owen and Mr Offer, for P, G and W, respectively, all point to the indefinite nature of the requirement for disclosure, and the complete absence of relevance of the offending identified in their cases (whether as a result of the two conviction rule, or the serious offence rule) to any job application literally years, if not more than a decade, or longer, thereafter.

61. They point to the observations of McCombe LJ, Carr J and Blake J who considered it difficult to see why a better scheme could not be found not necessarily to require review before any CRC or ECRC is sought but, rather, to allow for an application for exemption from automatic disclosure. This could be in line with the system dealing with removal of the requirements to comply with life time sex offender registration set out in the Sexual Offences Act 2003 (Remedial) Order 2012 (SI 2012/1883), enacted following *R(F) v Secretary of State for the Home Department* [2010] UKSC 17; [2011] 1 AC 331, which condemned the absence of any mechanism for review (albeit with a suitably high threshold: see Lord Phillips at [74]). That system permits

appeal to the Magistrates' Court against an adverse decision following application to the relevant chief officer of police. As identified in [38] above, other schemes have also built in a right of review when restrictions or prohibitions have been imposed.

62. It is further argued that these submissions are more powerful because of the emphasis, both in domestic law and in Strasbourg, on the importance of rehabilitation, particularly of young persons who, while growing up, may come into conflict with the criminal law but, as adults, need to be encouraged to put their past behind them. Mr Owen refers to various contemporaneous reports emanating from the Ministry of Justice, the Standing Committee on Youth Justice and other bodies to this effect. These features, however, all point to considerations of policy for the legislature and to its responsibilities, rather than to outcomes which can (or, necessarily, should) be achieved by the construction in law of what is necessary in a democratic society.

63. In my judgment, the proper approach to the balance between the rights of individuals to put their past behind them, and what is necessary in a democratic society is to go back to the purpose for which criminal record certificates or enhanced criminal record certificates are required and provided. Given the information that can be put into an ECRC (which need be no more than 'soft intelligence'), Parliament has made it clear that it is not an answer to the need to protect the public (whether reference is made to children or the vulnerable on the one hand, or the needs of the state in relation to the handling of sensitive material on the other) that references should be limited to criminal convictions. Neither is the contrary argued. Similarly, it is not necessarily sufficient to filter by lapse of time or, indeed, penalty; at the time, there may have been many reasons for a particular approach to a case which does not reduce the need for public protection.

64. If there is to be a filter beyond a bright line position, it can only be because of the realistic possibility that, in certain cases, it is demonstrable that issues of public protection are simply not engaged. The difficulty in identifying a filter, however, is that depending on the employment sought, different public interests might be engaged. Different considerations might also apply depending, for example: on the nature of the offence; the disposal (whether out of court, fixed penalty or sentence and, if the latter, its nature); age at the time of the offence; and lapse of time since the offence; or since the time it was spent under the 1974 Act. Having said that, however, ascribing weight to these features, it would not necessarily be difficult to fashion a system which did not depend on individual review, but which would allow material which would not otherwise be included in a CRC (because of the filter) to be included in a ECRC, and, thus, subject to possible challenge through the relevant chief officer of police, should the applicant wish to challenge its relevance.

65. Thus, it is entirely plausible to visualise a system that differentiates between the offending of children (that is to say, those under 14), young persons (up to 18) and, possibly, adults, on the basis that, by way of example, an identified number of years (perhaps different) in each case after a warning, reprimand, caution or penalty notice, that fact is removed from the CRC, but open to be included in an ECRC which can be subject to challenge and, in the event of an adverse decision, appealed to a Magistrates' Court. In the event of a conviction, that (or another) period of years could start to run after the conviction is spent (so that, as is the effect of the 1974 Act, further convictions put back the date on which earlier convictions become spent). Such an approach would have the effect of discriminating offending by children

which it was never thought necessary to bring to court or which the court does not consider it is appropriate to punish but is satisfied that it is appropriate to order an absolute or conditional discharge.

66. Having said that, it is not for the court to fashion a solution and, ultimately, it is a matter for the legislature to ascertain whether as a matter of practice rather than legal theory, what system is appropriate. It must be appreciated, however, that without some mechanism to ensure that disclosure is proportionate and linked to the protection of the public (therefore being necessary in a democratic society), it is difficult to see how challenges of the type raised in these cases can be avoided. It is not that the concept of the revised scheme necessarily offends Article 8, but it may be that in its operation in individual cases, it does so. If left to the courts as the scheme is presently devised, in my judgment, it will generate many challenges which will require resolution on a case by case basis: such an approach cannot possibly be in the public interest.

Expunging Cautions, Warnings and Reprimands

67. An additional or alternative way of approaching the same problem is to provide a mechanism whereby misconduct at the least egregious end of the spectrum (not involving a criminal conviction) can be expunged from whatever records are kept. In that regard, there has always been a mechanism to 'weed out' material from criminal records: in September 2006, it was governed by the ACPO Retention Guidelines for Nominal Records on the Police National Computer ("PNC"), which formed part of the Code of Practice for the Management of Police Information, issued by the Home Secretary pursuant to s. 39A of the Police Act 1996; it dealt with removal of DNA, fingerprints and PNC records. In short, it provided that records should be retained until the person identified had nominally attained the age of 100 years subject to 'step down' which would then provide access to those records only to police officers. Step down took place after a period which depended on the age of the offender at the time of the offence, the type of offence and the outcome (which included cautions, reprimands and warnings, as well as penalty notices for disorder, acquittals and other types of contact with the police).

68. In addition, an Exceptional Cases Procedure identified that chief officers of police had "the discretion to authorise the deletion of any specific data entry on the PNC 'owned' by them". It is suggested that the discretion should only be exercised in "exceptional circumstances", in respect of which there is elaboration in terms:

> "Exceptional cases will by definition be rare. They might include cases where the original arrest or sampling was found to be unlawful. Additionally, where it is established beyond doubt that no offence existed, that might, having regard to all the circumstances be viewed as an exceptional circumstance."

69. The 'step down' process was abandoned following the decision of this court in *Chief Constable of Humberside Police v Information Commissioner* [2009] EWCA Civ 1079; [2010] 1 WLR 1136. The guidance has since been replaced by the National Police Chiefs' Council (as successor to ACPO), in a document entitled 'Deletion of Records from National Police Systems', issued pursuant to s. 63AB(2) of the Police and Criminal Evidence Act 1984, as amended by the Protection of Freedoms Act

2012. The result is that a National Record Deletion Unit has been established to co-ordinate requests for record deletion on grounds articulated in Appendix A, intended primarily with the consequences of *S & Marper v United Kingdom* (2009) 48 EHRR 50, where biometric information and PNC record have come into being where it is later learnt, for example, that there was no crime, the individual is eliminated from the inquiry or (not covered by *S & Marper*) there has been a judicial recommendation to that effect. Included, however, is "incorrect disposal" or the product of review within the criminal justice process (for example, the withdrawal of a caution) and, of particular significance, where there is a wider public interest to do so.

70. In that way, the law sought to deal with the balance between the public interest, and offending that "recedes into the past" becoming part of the person's private life, thereby breaching Article 8 rights: see *R(L) v Commissioner of Police for the Metropolis* [2009] UKSC 3; [2010] 1 AC 410, per Lord Hope at [27]. It is important to underline, however, that it is a balance, for such interference may be justified in the interests of public safety for the prevention of crime or for the protection of the rights and freedoms of others. As is clear from *R(L)*, the Commissioner is obliged to balance the competing factors: see also *R(AR) v Chief Constable of Greater Manchester* [2013] EWHC 2721 (Admin).

71. In my judgment, not only does this policy deal with retention of material lawfully seized but which should no longer be retained (following *S & Marper* in the ECtHR), these options also provide a degree of elasticity to the previously more rigid operation of the police deletion policy in relation to out of court disposals. The absence of any mechanism to challenge a decision, however, creates the risk that those who wish to do so will be driven to judicial review; this is to be compared with the more detailed mechanism in place (with the limits on the timing of further review following refusal), created by the Sexual Offences Act 2003 (Remedial) Order 2012 (SI 2012/1883) (see [61] above).

72. With that analysis of the issues which have been raised in argument, I pass on to deal shortly with the four appeals that have been collected together for the purposes of this hearing.

R (P and A) v Secretary of State for Justice and others

73. In 1999, P committed two offences of theft by shoplifting while suffering from undiagnosed schizophrenia. She was cautioned for the first offence, and prosecuted for the second. Owing to her condition and homelessness at the time, P failed to appear at court and, in the event, was convicted of the second theft offence and an offence under s. 6(1) of the Bail Act 1976. She was discharged conditionally in respect of each offence, but acquired two convictions. P's disclosable convictions militate against her getting paid employment as a teaching assistant, and carry with them a requirement to explain her past mental health history.

74. On 10 December 2014, joined with another claim, P challenged the revised scheme under the 1997 Act and the 1975 Order, insofar as it required disclosure of all spent convictions where an individual had more than one spent conviction. It was held ([2016] EWHC 89 (Admin); [2016] 1 WLR 2009) that the revised scheme can give rise to some "very startling consequences", which could properly be described as "arbitrary". The Divisional Court held that when the rules were capable of producing

such questionable results on their margins, there ought to be some machinery for testing the proportionality of the interference if the revised scheme is to be "in accordance with the law", under the wider understanding of that concept that emerges from the case of *T*. As the revised scheme was found not to be in accordance with the law, there was no question of the state having a "margin of appreciation" and it was held (at [88]), that questions of administrative convenience could have no place; in any event, McCombe LJ was "far from convinced" that a review scheme would be unworkable.

75. He went on to conclude that there was no reason for thinking that, for P's entire lifetime, the convictions in issue bore a rational relationship with the objects sought to be achieved by the disclosure provisions of the Act, simply because there was more than one conviction. Neither was there a rational connection between the interference with the Article 8 rights of P (or of A), and the aim of ensuring suitability for the remainder of their lives across the entire range of activities covered by the Order: see [89]. Carr J added (at [94]):

> "The facts of the Claimants' cases here can be said to be extreme or at the margin. But they cannot be said to be unique in terms of what they illustrate."

Having so concluded, it was declared that the 1975 Order could not be read or given effect in a way which was compatible with P's rights under Article 8.

76. The Secretaries of State appealed the substantive decision, arguing that it was wrong in two respects. The first was in finding that, for an interference with article 8 rights to be "in accordance with the law", there had to be a review mechanism for testing the proportionality of disclosure in each individual case (or in each individual case where such disclosure might be considered to be arbitrary). The second error was in finding that the consequences of the multiple conviction rule in the 1997 Act were arbitrary. This was on the grounds that there was no rational connection between the interference created by the 1997 Act and the 1975 Order, on the one hand, and the legitimate aims they pursued on the other, so that the interferences were not justified under Article 8(2). A's claim has been stayed at his request.

77. For the reasons outlined above, I agree with the conclusion of the Divisional Court that the revised scheme was not in accordance with the law, albeit for slightly different reasons. I do not accept that the only mechanism for ensuring compliance with the ECHR is necessarily an individual right of appeal. Although it is a matter for the legislature, in my judgment, it should be possible to devise a filter which is more granular, in the sense that it takes into account lapse of time, disposal, and both timing and nature of the two convictions; the alternative would be to introduce a mechanism for potential review in specified circumstances (with preconditions and parameters broadly of the type that are prescribed for removal from the Sex Offenders' Register). Although the question does not strictly fall to be answered, I also consider that the operation of the multiple conviction rule in this case has been disproportionate, and otherwise than as is necessary in a democratic society. The effect of disclosure may not preclude employment in the relevant field but, as Lord Wilson observed in *T* (at [44]), it requires the employer to sift the wheat from the chaff and not to indulge in defensive decision making.

78. As Mrs Sunita Mason identified, the purpose of the two conviction rule is specifically (and legitimately) intended to target inclusion of those cases which reveal a pattern of offending behaviour. I recognise that where a pattern of offending behaviour is demonstrated, it is entirely legitimate to conclude that such information should be available to potential employers. The difficulty with the bright line, however, is that it is not a necessary inference that two convictions do represent a pattern of offending behaviour: indeed, on very many occasions, they will not. Even where convictions are discrete in time, the nature of the offence and the circumstances may reveal beyond argument that they do not reveal a pattern of any sort. In this case, the convictions (the first theft resulting in a caution) were for theft and failing to answer bail. Although connected because of P's mental health issues, they do not reveal anything like a pattern.

79. Thus, in this case, whatever might be said in different circumstances, the justification simply collapses and the bright line rule has produced an answer which is simply disproportionate (however wide the margin of appreciation) to the interference in P's private life, because it does not generate interests of public safety so as to make it arguably necessary in a democratic society. In the circumstances, albeit for slightly different reasons, I would dismiss this appeal.

R (on the application of G) v Chief Constable of Surrey

80. On 5 September 2006, when G was 13 years old (having been born in July 1993), he was reprimanded by the police (following a police inquiry which involved the Crown Prosecution Service) for behaviour that has been described as sexual curiosity and experimentation. More particularly, on various occasions over a period of months, he engaged in sexual touching and anal intercourse with two boys, one of whom had been born in July 1996 and the other in January 1997, which was consensual in the sense that the younger boys participated in what is described as appearing to have been a form of "dares". These boys did not have legal capacity to consent but G was not prosecuted for child sexual offences; rather, for reasons connected with his age, the out of court disposal of two reprimands was chosen as the appropriate way to proceed.

81. At the time, it was believed that the reprimands would be 'weeded' from the police records five years after he received them, or when G reached the age of 18, whichever was the later. By March 2006, however, practice had changed, and the five-year term had been extended to ten years which would have had the result that the reprimand would then be 'stepped down'. That is to say, they would only be liable to be disclosed pursuant to enhanced disclosure on an ECRC certificate. In 2009, the ACPO policy changed again, requiring all reprimands issued to juveniles to remain on central records, and subject to mandatory lifelong disclosure.

82. In 2011, now over the age of 18, G worked for an employment agency at the library of a local college. He was asked for an ECRC because his work involved contact with children. He was told that the reprimands would be disclosed (although his observations were sought). There was clearly concern about the circumstances in which the reprimands had been administered and the relevant disclosure officer recorded:

> "This was a rather unusual case in that the proposed disclosure

> regarding the enhanced CRB check essentially had the intention of assisting the applicant by replacing the information held on the PNC in a fairer context. … There was also a concern that automatic disclose of the reprimand particularly in view of the nature offence would likely cause an employer more concern than perhaps the circumstances actually warranted. …
>
> This is a strange situation in that it is the automatic disclosure of the PNC record that would likely provide an unfair picture of events causing the potential adverse effect on the applicant. In view of the lack of a specific risk this potential adverse effect is disproportionate when viewed alongside the applicant's rights."

83. In the light of the policy, however, the application was rejected, as a result of which G withdrew his application for an ECRC. In 2014, the issue was pressed again and G's solicitors wrote outlining the circumstances, claiming that the reprimands should be expunged: reliance was placed on the observations set out above, but the Chief Constable decided that they were lawfully administered and that there was no sufficient reason within the terms of the applicable exceptional cases policy to do so. The decision was, of course, for the Chief Constable.

84. On 11 May 2015, G challenged the decision to administer the reprimands in the first place by failing adequately to consult G or his mother, while proceeding on a material misunderstanding which, in any event, invalidated any consultation. It was also argued that there was a failure to take into account statutory and international obligations to protect the welfare of the child given the true position on disclosure, in light of the CPS Guidance. The revised scheme was also challenged insofar as it required disclosure of his juvenile reprimands.

85. Blake J rejected the challenge to the decision to issue the reprimands in the first place, but held ([2016] EWHC 295 (Admin); [2016] 4 WLR 94 at [43]) that, despite the existence of the filtering process, there were insufficient safeguards to ensure that the data retained was relevant to, and necessary for, the purpose for which it was disclosed to the third party. He then set out (at [48]) what he described as "a compelling case" that a review mechanism was "needed and practicable", before concluding (at [50]) that the revised scheme for disclosure could not be said to be in accordance with the law. As a result, he declared that the provisions of Part V of the 1997 Act were incompatible with G's rights under Article 8 to the extent that they require mandatory disclosure of his reprimands and that the Regulations made under the 1974 Act required amendment. He refused leave to appeal to G in relation to the challenge to the Chief Constable, but granted it to the Secretaries of State as to whether the revised scheme was in accordance with the law.

86. It is first appropriate to deal with the renewal by G of his application for leave to appeal, relating to the exercise by the Chief Constable of Surrey of her discretion as to the expunging of the reprimands, for reasons connected with the circumstances in which they were administered. Blake J concluded (at [30]):

> "I am not satisfied that the prosecutor in 2006 failed to have regard to the guidance or that he otherwise reached a decision that was irrational or unlawful. In my judgment, the CPS

> guidance must be read as a whole and no single paragraph is dispositive. The fact that no force was used, the younger boys agreed to participate in the dare or sexual experiment and the complainants may have had some previous sexual encounters before voluntarily engaging in the activity with G, are relevant but not conclusive factors against a reprimand being issued. The prosecutor was also entitled to note that C and D were under 13, incapable of giving consent and it is the policy of the law that children of such a young age needed particular protection from sexual experiences they are unlikely to have fully understood at their early age. The activity was not confined to a single incident or a single child but had carried on for a year or so suggesting that some expression of official concern was needed."

87. Developing the application, Mr Owen pointed to the misunderstanding as to the disclosure of the reprimand (along with the failure properly to consult G's parents) which might have led to a different decision, given the prosecutor's expressed intention not to give G a criminal record, the failure to consider the requirements of s. 11 of the Children Act 2004 (to promote the best interests of the child and his or her rehabilitation), underlined by similar international obligations. Although that challenge should, on its face, have been addressed to the Crown Prosecution Service (responsible for the decision to issue reprimands), it was directed to the Chief Constable of Surrey, on the basis that it was also grounds to expunge the reprimands that were issued.

88. In response, Anne Studd Q.C. for the Chief Constable submitted (as appears to be the fact) that the leaflet issued to G's parents at the time, although containing out of date information about retention, made it clear that the police would not have to disclose the reprimands to employers "unless specifically asked about reprimands/final warnings/cautions". The alternative was a court process for what was strict liability offending, not least because of the gravity of the conduct (even for a 11 year old who was 12 for the majority of the period that the activity took place), and the fact that it involved children under ten years old. Consent (from the child or his parents) is not required: see *R(R) v Durham Constabulary* [2005] UKHL 21;[2005] 1 WLR 1184, per Lord Bingham at [7]; also, on the wider ECHR issue, per Baroness Hale at [44], as long as "the consequences of a decision not to prosecute do not amount to a penalty" at [47]. Neither is knowledge of the consequence of being placed on the Sex Offenders Register (*ibid* in the Divisional Court: [2002] EWHC 2486 (Admin); [2003] 1 WLR 897 at [31]). In short, the issue of the reprimands was lawful. Furthermore, international obligations do not alter that analysis.

89. Blake J found that the relevant CPS guidance was properly applied, and that this required the prosecutor to consider G's rights as a child pursuant to the ECHR and international treaties. In my judgment, in the light of the authorities, the material error as to the length of retention of the reprimands (still less the subsequent changes to that policy) does not render the decision contrary to the rights of the child. Further, although I recognise that the best interests of the child are the primary consideration (see, in a different context, *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4; [2011] 2 AC 166 at [21]-[28]), it was obviously in the

best interests of G that his serious sexual activity with children, one of whom was 3½ years younger than him, was both recognised and addressed in order to ensure that he did not continue to develop entrenched inappropriate behaviour towards those who, in the context of their respective ages, were very much younger (and, thus, more pliable) than he was. Neither am I satisfied that any different decision (such as would now improve G's position) would have been made. The refusal of the Chief Constable to expunge the reprimands for these reasons was squarely within the policy, and, in the circumstances, I would refuse G leave to appeal on this ground.

90. Turning to the appeal brought by the Secretaries of State in relation to disclosure of these cautions should a CRC or ECRC be sought, Mr Eadie argued that Blake J was wrong to conclude that, in order for an interference with Article 8 rights to be in accordance with the law, there must be a review mechanism for testing the proportionality of disclosure in each individual case (or, at least in each individual case where it is said to be arguable, that such disclosure might not be relevant and proportionate). As to the first limb, I repeat the conclusion that the revised scheme was not in accordance with the law (see [44] above). As I have explained, it is for the court to assess the adequacy of the bright lines chosen by Parliament to determine whether they are sufficiently calibrated. It is particularly noteworthy, in the case of *G*, that the rule provides no opportunity for the age of the individual at the time of the offence to be taken into account. However, I reject the reasons advanced by Blake J as to why there was a compelling case for a review mechanism (see [53]-[54] above): there is no requirement for there to be an exercise of discretion in every case.

91. Although I do not accept that there has to be such a review mechanism for every case, the appeal of the Secretaries of State also fails because, in my judgment, in the specific circumstances of G's case, nine years after the reprimands were administered, disclosure is not necessary in a democratic society. This has to be judged against the background of the circumstances in which Mr Owen, in his skeleton argument, conceded was an offence which was "extremely serious" although he goes on to argue that there is a "striking disconnect" between the offence and the "actual criminality". Mr Owen submits that there is no rational connection between G's behaviour in engaging in consensual sexual experimentation as a 12 year old child, and the risk that he might create to children over a decade later (although the application to expunge the record was in July 2014, that is to say, eight years after it was effected).

92. These reprimands fall to be disclosed on the basis that they are for the offence of sexual activity with a child, contrary to s. 13 (in conjunction with s. 9) of the Sexual Offences Act 2003, which is listed in Schedule 15 of the Criminal Justice Act 2003 as serious. The revised scheme maintains lifelong disclosure of such offences (as it does for multiple convictions but not multiple cautions for offences that are not listed); there is no filter, however much time has passed, and irrespective of the behaviour of the person concerned or the risk that he poses or may pose. It is in that context that the observations of the disclosure officer are relevant, not in relation to the discretion of the Chief Constable under the policy, but as to the almost inevitable consequences of disclosure of sexual offending, irrespective of its proportionality or its relationship to the public interest of reducing risk to children.

93. The critical element of this serious offending is G's age at the time; under 14, he was a child. It is this feature that clearly exercised the disclosure officer who was anxious to minimise the potential damage to G, likely to result solely from the identification of

the offence without any of the surrounding detail. Had G been slightly older, even maintaining the age gap between him and the boys involved, it may be that reprimands would not have been appropriate and convictions would have followed with different issues as to disclosure. Although the issue is more finely balanced, for all the reasons identified by Mr Owen, I accept the proposition that this child's behaviour with younger children cannot, of itself, rationally demonstrate a risk to the public which required identification in a democratic society. If he sought an ECRC, depending on the nature of the employment sought, it may be justifiable to include it as 'soft intelligence', so that he could demonstrate to the police (and, if necessary, the court) that his earlier conduct was truly irrelevant. In that way, however, the public is protected, but the necessary flexibility is introduced.

94. In the circumstances, albeit for different reasons to those identified by Blake J, I would dismiss this appeal.

R (W) v Secretary of State for Justice

95. In November 1982, when 16 years of age, W was convicted of ABH contrary to s. 47 of the Offences Against the Person Act 1861. He received a conditional discharge for two years, and was bound over to keep the peace for 12 months. ABH is a relevant matter under the 1997 Act, and, as a result, must be disclosed on any criminal record certificate.

96. In the 31 years that have passed, W has committed no further offence, and has made a success of his life. He now wishes to obtain a qualification teaching English as a second language and, to that end, in 2013, he began a training course with a view to obtaining a Certificate in English Language Teaching to Adults. He applied through his College to the DBS for a CRC. That certificate showed his conviction for ABH: given that it is a serious offence, set out in Schedule 15 of the 2003 Act, it must be disclosed under the current statutory regime for disclosure.

97. It is clear from the decision at first instance that W did not challenge the revised scheme itself: see [2015] EWHC 1952 (Admin); [2015] ACD 139. Thus, Simon J was solely concerned whether or not the disclosure scheme was compatible with W's Article 8 rights to a private life. He found that Parliament was entitled to adopt a filtering-in approach, which included particular offences which would be disclosed. It was relevant to the intensity of the court's review that the legislation in issue had been approved by affirmative resolutions of both houses of Parliament, and subject to vigorous debate, which had analysed the ways in which a revised disclosure scheme might be "recalibrated". Violent or sexual offences were specifically considered: see [55]-[57].

98. Simon J accepted (at [64]) that the introduction of an element of discretion, as to what should be disclosed in relation to a particular applicant, was neither practical, nor sufficiently certain. Almost any system which could be devised may lead to harsh results at the margins. However, he concluded that Parliament was fully entitled to draw a "bright line" between ABH, an offence which should be disclosed, and common assault, which should not. The investigation required in order to make a judgement that, in a particular case, the offence was sufficiently 'minor', even though a serious offence had been charged, was found to be unworkable (at [69]).

99. Having accepted that Parliament was entitled to specify certain offences in respect of which disclosure must always be made, at [71], Simon J re-framed W's complaint as concerning the line drawn by Parliament between those offences and other offences**.** Parliament proceeded on the basis that all violent and sexual offences which were sufficiently serious to have been included in Schedule 15 of the 2003 Act should be disclosed**.** Furthermore, if the question was to be answered by reference to the sentencing disposal, it was difficult to see where the line was to be drawn, because the facts of each case would require analysis; this would be disproportionate and unworkable, leading to the conclusion that the revised scheme would be uncertain: see [79]. Furthermore, as the relevant information available for each case would vary, that also could potentially lead to unfairness.

100. As a result, the claim was rejected, as was permission to appeal, both by Simon J and, in this court, Floyd LJ. The latter was on the basis that Parliament was entitled to draw the line where it did, such that it was "inevitable that this scheme will produce hard cases at the margins". Following the decision of the Divisional Court in *P*, however, in keeping with the highest traditions of public service, the Government Legal Department wrote to W's solicitor, proposing that permission be granted in W, so that the issues were considered in the wider context: Beatson LJ endorsed that approach, and granted permission.

101. As a consequence of the decision in *P*, Mr Offer for W sought to add the argument that the revised scheme was not in accordance with the law. Although not advanced before Simon J, for the reasons set out above (at [45]), I would accept the submission. While Parliament may be entitled to draw bright lines, the court is entitled to assess whether these lines are sufficiently calibrated. The serious offence rule takes insufficient account of the features identified by Lord Reed, such that it can properly be described as arbitrary.

102. In addition, Mr Offer has argued that Simon J erred in deciding first, that the accepted interference was proportionate and necessary in a democratic society and, second, that the prospect that the facts in every case would require analysis led to an unworkable conclusion.

103. Applying the principles to which I have previously referred, whereas I recognise the force of the arguments in favour of the bright line that Simon J accepted, in my judgment, it is difficult to see how publication of this detail, 31 years on, is relevant to the risk to the public, or proportionate and necessary in a democratic society. In the circumstances, I would allow this appeal, and make a declaration accordingly.

R (Krol) v Commissioner of Police of the Metropolis

104. On 4 February 2007, police were on patrol and witnessed Ms Krol hitting her three year old daughter: she explained that it was because the child was refusing to do her homework. There was evidence of redness to the face and swelling to the arm but it is right to say that the extent of injury is disputed. In the event, Ms Krol was cautioned for ABH.

105. Since 2011, Ms Krol has applied for a number of positions (including as a befriender, and as a psychologist): none involve working with children, but, during the course of necessary CRB checks, the caution has been disclosed to potential employers which,

it is claimed, has restricted her chances of obtaining preferred employment. An application to the Metropolitan Police Commissioner to expunge her caution has been refused, most recently in 2013, although the police have expressed a willingness to review its retention five years thereafter (i.e. in 2018), if Ms Krol were to so request.

106. These proceedings constitute a challenge to the decision to refuse to expunge the caution: the compatibility with the ECHR of the revised scheme relating to the disclosure of convictions, cautions and other conduct is not in issue. As to the issue, William Davis J said ([2014] EWHC 4552 (Admin) at [23]):

> "I do not conclude that the filtering rules mean that it is impossible, unlawful or otherwise impracticable for a police commissioner in the position of the defendant to delete or expunge a caution, should he decide that that was the appropriate course. I am fortified in that conclusion in part by the fact that the claimant himself in his grounds applies for an order to delete the caution. The defendant has a unit which is entitled The Early Deletion Unit which would hardly need to exist if the power did not exist. I am quite satisfied that there is such a power in the event that the Commissioner seeks to exercise it. The filtering rules and the policy set out behind those rules is not the provision which, in law, involves the retention of this caution. The provision in law which so involves the retention of the caution is the 2013 amendment order. That order was considered by the Supreme Court in *T*, in my judgment, is in accordance with law."

107. The judge found (at [24]-[26]) that there was no basis for concluding that a review by the Unit would be anything other than objective and proportionate; the mere fact that the criteria to be adopted during the review are not specified does not render it unlawful *per se*. Although constituting an interference with Ms Krol's rights under Article 8, William Davis J considered that the measures were rationally connected to the objective of providing potential employers with relevant information about a person who, potentially, might be employed by them. He went on to say that somebody employing the claimant as a befriender, or as a psychologist, would have good reason to know of the conviction for ABH in its context, that is, of a serious assault on a vulnerable child, the lapse of time since the offence in 2007 being relatively modest. Thus, the decision was held (at [35]) to be both necessary and proportionate, with the result that the claim was dismissed. She now appeals by leave of Bean LJ.

108. In the grounds of appeal, the compatibility of the new filtering rules with Article 8 is challenged; the compatibility of the revised scheme, the 1997 Act, and the 1975 Order are not. Mr Al Mustakim also argued that the court erred in finding that blanket disclosure and indefinite retention was in accordance with the law, or proportionate (notwithstanding that these points were not in issue before William Davis J). In addition, on the facts, there is also a challenge to the basic allegation that Ms Krol hit her daughter in the face: this, again, was not pursued before William Davis J. As to the wider issues, the Home Secretary has intervened in order to explain why the compatibility of the revised scheme with Article 8 does not arise.

109. On the factual challenge, Mr Mustakim asserted that Ms Krol denied many of the police allegations, and that, in the event of dispute, her views should be sought. That submission conflates different propositions. As for the caution, there can now be no dispute as to the facts. There was clear evidence of the assault from the police officer who witnessed it, and saw evidence of injury; on interview, in the presence of her solicitor, Ms Krol admitted striking her child, accepted that she had done so before, and recognised that her behaviour was inappropriate: her anger and the age of the child undermined any defence of reasonable chastisement. More important, following legal advice, Ms Krol accepted the caution; neither was it challenged within the permitted time frame. The observations in *R(L)*, to the effect that views should be sought, concerns the very different circumstances of 'soft intelligence' which would otherwise be included within an ECRC.

110. On the merits of retaining the caution, the very young age of the child and Ms Krol's anger meant that the incident could not be considered trivial; further, it was later learnt that she had provided a false name to the police, at least in part to prevent discovery of her previous involvement with Lambeth Social Services, which had led to the child being removed for a period. Furthermore, subsequent to the caution, in September 2012, there were further allegations of violence, which did not lead to action by the police although the child was taken into care and, subsequently, made subject to a care order.

111. For the reasons set out above, I entirely agree with William Davis J: the retention of this caution was in accordance with the law; and, in the context of this case, proportionate and necessary for the protection of the rights of others. Neither was the approach of the Commissioner (prepared to review the matter after a further five years) either arbitrary or disproportionate. Far from denying Ms Krol's Article 8 rights, it affirmed them.

112. As for disclosure in the meantime, there is a clear connection between the caution, and the needs of public protection and safeguarding, not least because of the circumstances set out above. Because ABH is listed at para. 20 of Schedule 15 to the 2003 Act, it is not filterable pursuant to s. 113A(6D)(e), if it remains after 2018, disclosure will still be triggered. If, on the other hand, it is expunged, in relation to a request for an ECRC, I agree with the submissions of Miss Alison Hewitt for the Commissioner, that a post which triggers such a request would be likely to place Ms Krol in a position of trust and to involve contact with the vulnerable, whether patients, other vulnerable adults or children and could (subject to a potential challenge to the independent monitor) still lead to its disclosure. Such an enhanced check might also give rise to discretionary disclosure of the other matters to which I have referred.

113. In my judgment, the decision of the Commissioner was proportionate, entirely appropriate, and William Davis J was correct to dismiss the claim. Indeed, the flexibility shown by the Commissioner's expression of his willingness to review the decision in the future demonstrates precisely what is required in relation to cases which are potentially at the margin. Whether it will then be appropriate to expunge the caution is not a matter which falls for consideration today.

Remedy

114. The final issue that arises for decision concerns the cross appeal advanced by Mr Southey, on behalf of P, in relation to the relief that should be granted in the event (as is the case) of his success. He argues that the 1975 Order can be rendered compatible by deleting article 2A(3)(c) of the 1975 Order (the two conviction rule) and, further, that given that the 1975 Order is secondary legislation, the appropriate remedy is a declaration that this specific clause is *ultra vires*, and therefore of no effect. In the alternative, the appropriate remedy is a declaration that the 1975 Order in its entirety is *ultra vires*.

115. In support of this proposition, it is clear that, in general, where subordinate legislation is *ultra vires*, a court should set it aside. Thus, in *Grunwick Processing Laboratories Ltd and Others Respondents v Advisory, Conciliation and Arbitration Service and Another Appellants* [1978] AC 695, Lord Diplock (at 695) concluded that it would only be in exceptional circumstances that a court would not set aside subordinate legislation if it concluded that it was *ultra vires*.

116. That is not, however, the course that was followed in *T v CCGMP*, in which it was made clear that it does not necessarily follow that there is only a binary choice when it comes to determining the remedy. I endorse Lord Wilson's observation at [64] in *T*, that:

> "It is therefore wrong for courts to assume that, where a person's human rights have been violated by the application of subordinate legislation in circumstances in which the application was not mandated by primary legislation, the appropriate remedy is always to declare the subordinate legislation to be ultra vires."

117. In *P*, the court refused to declare that the 1975 Order was *ultra vires*, but limited itself to a declaration that the 1975 Order "cannot be read or given effect in a way which is compatible with the Claimant's rights under Article 8 ECHR to the extent it excludes from the definition of a person with a protected conviction, a person with more than one conviction". Mr Southey suggests, and concluded, that the court should have declared that article 2A(3)(c) of the Order was *ultra vires*, or, that the 1975 Order generally was *ultra vires*. He goes on to argue that the declaration confuses the position, by suggesting that the Order was lawful, whereas, it was not, and that no adequate reason had been identified for rejecting the 'blue pencilling' remedy.

118. The question of the 1975 Order also arose in relation to *G*. Blake J declared that Part V of the Police Act was incompatible with G's rights under Article 8 ECHR, to the extent that they required mandatory disclosure of his juvenile cautions, administered for an offence contrary to s. 13 of the Sexual Offences Act 2003, but, he went on also to declare that the Regulations made under the Rehabilitation of Offenders Act 1974 (i.e. the 1975 Order) required amendment as a consequence.

119. In fact, Blake J had not determined that the 1975 Order was disproportionate, and it had not been argued that it was not in accordance with the law. As to the linkage, Lord Reed in *T* was clear (at [140]) that the conclusion reached in relation to the 1997 Act:

> "… could not 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 … and it may be arguable that the requirements in the context of the 1975 Act are somewhat less stringent."

To that extent, there was no basis for this aspect of the declaration made by Blake J. As to the declaration of incompatibility, it is important to underline that it is carefully focussed on the particular circumstances as they arise in G.

120. The appropriate approach was analysed in *T* by Lord Wilson, who, using the example of *A v HM Treasury* [2010] UKSC 2; [2010] 2 AC 534, recognised (at [58]) that, if the operation of a piece of subordinate legislation violated fundamental rights, in circumstances in which the logic of the decision meant that its operation would always violate fundamental rights, those specific provisions (but not as a necessary consequence the whole order) would be *ultra vires*. He went on, however, to make it clear (at [59]) that:

> "The conclusion about T in the present case is, however, of an entirely different character. It is that, in the light of the circumstances surrounding his receipt of the warnings, the requirement in the 1975 Order that he should disclose them to the college and its entitlement to act in reliance on them violated his rights under article 8. It cannot possibly be said that the operation of the order will always be such as to violate the rights of those required to make disclosure of spent convictions and cautions under it: for in some, perhaps many, cases the circumstances of the conviction or caution will not render its disclosure disproportionate to the objective behind the order."

121. If the entire order was declared *ultra vires*, Lord Wilson went on to raise the spectre of there being no valid application for a CRC or ECRC. He referred to the articulation of the powers of the court in s. 8 of the Human Rights Act 1998, to the effect that the court is entitled to grant such remedy or relief within its powers "as it considers just and appropriate"; and to s. 31(2) of the Senior Courts Act 1981 to determine whether "it would be just and convenient for the declaration to be made". He concluded with the observation (at [64]) which is set out at [116] above.

122. Mr Southey did not suggest that the operation of article 2A(3)(c) of the 1975 Order would contravene Article 8 rights in all (or, indeed, in many) cases. As I have explained, the vice lies at the margins of its operation. As Mr Eadie argued, however, the effect of a declaration would be that no disclosure could lawfully be made pursuant to that provision. That would be to provide a remedy beyond that which is required. In my judgment, the Divisional Court took entirely the right line. The declaration makes clear to Parliament that there is a problem with the operation of the scheme (at the margins), but defers to the legislature as to how to remedy the problem. I would dismiss the cross appeal.

Conclusion

123. In the circumstances, I would dismiss the appeals by the Secretaries of State in *P* and *G* (albeit for different reasons to those advanced by the Divisional Court, and the Administrative Court, respectively). I would dismiss the cross appeal in relation to remedy which Mr Southey mounted in *P*, and refuse permission to appeal the challenge by G to the refusal to expunge the reprimands. Further, I would allow the appeal in W, but dismiss the appeal brought by Ms Krol.

124. I repeat that there is nothing in this judgment that requires the adoption of a bespoke system providing an individual right of review; devising a filter system which ensures that cases that are at the margin and no longer require disclosure may be entirely feasible. Alternatively, some filter with a mechanism for review of the type that applies to removal from the Sex Offender Register may equally be practicable, and not unduly demanding. Decisions of this nature, however, are not for the court. Nothing that I have said should be taken to be prescriptive of the way in which the executive, and the legislature, address the way more finely to balance the individual Article 8 rights of individuals to put their past behind them, and the entirely legitimate requirements of a democratic society to ensure that the public are kept safe from those who, by reason of their past behaviour (extending beyond convictions), might remain a risk.

Lord Justice Beatson:

125. I agree.

Lady Justice Thirlwall:

126. I also agree.