Neutral Citation Number: [2020] EWCA Civ 1346

Case No: C1/2018/0064

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
Lord Justice Fulford & Mr Justice Green
[2017] EWHC 2586 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/10/2020

Before:

LORD JUSTICE UNDERHILL
(VICE PRESIDENT OF THE COURT OF APPEAL, CIVIL DIVISION)
LORD JUSTICE MALES
and
LORD JUSTICE STUART-SMITH

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Between:

THE QUEEN (on the application of RD) **Respondent**

- and –

(1) SECRETARY OF STATE FOR JUSTICE
(2) SECRETARY OF STATE FOR THE HOME DEPARTMENT

(3) NATIONAL POLICE CHIEFS' COUNCIL **Appellants**

Kate Gallafent QC & Christopher Knight (instructed by **the Government Legal Department**) for the **Secretaries of State**
Jason Beer QC & Robert Talalay (instructed by **Directorate of Legal Service, Metropolitan Police** for the **National Police Chiefs' Council**
Adam Straw (instructed by **Sonn Macmillan Walker**) for the **Respondent**
Hugh Southey QC & Jennifer Twite (instructed by and on behalf of **Just for Kids Law as Interveners**) by written submissions only

Hearing dates: 7th & 8th October 2020

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 20/10/2020 at 10.30 a.m.

Lord Justice Males:

Introduction

1. A 13 year old girl, RD, together with three of her friends, steals a sarong worth £20 from Primark. She is arrested and admits the offence. The police decide not to prosecute and instead administer a reprimand. After completing her schooling, RD goes to university and obtains a degree in criminology. She decides to pursue a career in the police service and applies to South Wales Police for a job as a service support officer, with a view to gaining experience in order to apply to become a police constable in due course. She is asked to disclose whether she has any convictions or cautions and discloses the reprimand, by now eight years in the past. She has had no other contact with the criminal justice system in the meanwhile and, apart from the reprimand, is of unblemished good character. Her application is rejected out of hand ("rejected at an early stage in our recruitment process, purely on the strength of this reprimand") and, for good measure, she is told that it is unlikely that she would be successful in any future recruitment process for the police service. The rejection not only means that she is unable to pursue her chosen career in public service, but also brings on a major depressive illness. Her consultant psychiatrist advises that it is essential for her mental health that the reprimand is removed from her records, but her application for its deletion is refused. Instead the Chief Constable decides that it should be retained on the Police National Computer until she is deemed to have reached the age of 100.

2. These are the stark facts which have given rise to this appeal.

3. It is now common ground between the parties to this appeal that the rejection, by reason of the reprimand, of RD's application for the position of police support officer was unlawful. The reprimand which RD received was "spent" (in fact it was spent as soon as it was issued) and she should not have been asked to disclose it when she applied in 2015 to become a police support officer. While there are some positions to which the Rehabilitation of Offenders legislation does not apply, the position of police support officer is not (and since 29th May 2013 has not been) one of them. But the exceptions to the legislation do apply when a person applies to become a police constable or a police cadet to undergo training with a view to becoming a constable. The legislation requires such an applicant, if so requested by the employer, to disclose all convictions and cautions, even those which are spent.

4. On RD's application for judicial review the Divisional Court (Fulford LJ and Green J) held that the rejection of RD's application was unlawful under Article 8 of the European Convention on Human Rights, not only because she should not have been asked about reprimands when applying for a position as a support officer, but also because in substance it served to preclude her from seeking employment as a constable or a cadet within the police service; and that the policy which then applied to deal with such applications ("the ACPO 2012 vetting policy") was unlawful for the same reasons. The court granted a declaration that the Rehabilitation of Offenders 1974 (Exceptions) Order 1975 as amended, the statutory instrument which requires aspiring police constables to disclose spent convictions and cautions, was incompatible with Article 8 to the extent that (in substance) it requires an applicant for a position as a police constable or cadet to disclose what the court described as "low level, historical cautions".

5. The Divisional Court decided not to grant any declaration relating to the ACPO 2012 vetting policy. That was because the court was informed, after circulation of its draft judgment to the parties, that a new Vetting Code of Practice was about to be placed before Parliament. That new Code of Practice has since been issued.

6. The Divisional Court granted permission to appeal but, because it was aware that the decisions of the Court of Appeal in *R (P, G, W and Krol) v Secretary of State for Justice* [2017] EWCA Civ 321 ("*P*") and of the Northern Ireland Court of Appeal in *Re Gallagher* [2016] NICA 42, where related issues were raised, were proceeding to the Supreme Court, it ordered that the declaration should not take effect until after that appeal had been determined and, anticipating that the judgment of the Supreme Court would indicate what the answer to this appeal should be, suggested that this appeal should await that judgment.

7. The Supreme Court has now given judgment in *P* [2019] UKSC 3, [2020] AC 185, but the parties disagree about its impact on the present appeal.

The issues

8. The Secretaries of State, supported by the National Police Chiefs' Council ("NPCC") appeal against the order made by the Divisional Court. However, the appeal comes before us in what is in some respects an unsatisfactory way. Consideration in the round of the issues raised by the facts of this case would involve three matters, that is to say (1) the policy governing *retention* of records of reprimands given to children, (2) the legislation relating to *disclosure* of such reprimands by those applying to become police constables, and (3) the police policy on the *use* to which such disclosure may be put when dealing with an application.

9. In the event, although RD initially challenged the retention of her reprimand on the Police National Computer ("the PNC"), before the Divisional Court she conceded that its retention was not unlawful for all purposes. She accepted that it was lawful to retain the reprimand permanently so that it would be available to the sentencing judge in criminal proceedings in the event of her committing any further offence. Her challenge was to its retention for the purpose of disclosure to prospective employers. However, the Divisional Court was persuaded that this was not a suitable case in which to review the legality of the retention of a record of the reprimand and did not do so (and we were told that, since the judgment of the Divisional Court, RD's reprimand has in fact been deleted from the PNC by South Wales Police). The court focused instead on its disclosure to a prospective employer, here the police[1], and the use which that employer could make of it in assessing an employment application. The result is that as this appeal reaches this court, the issue of retention is not before us; the ACPO 2012 vetting policy on use has been held to be unlawful and there is no appeal from that decision; that policy has now been superseded; but the new policy, the 2017 Vetting Code, post-dated the decision of the Divisional Court and is not the subject of any challenge (or submissions) before us.

10. This appeal has therefore been concerned only with the issue whether the legislation requiring an applicant for a position as a police constable to disclose any reprimand

[1] Strictly, of course, a police constable holds an office and is not employed, but it is convenient to use this terminology.

received as a child[2], regardless of the circumstances, is compatible with Article 8. However, that is to some extent an artificial question. The police will of course have access to the information on the PNC and, as part of the necessary process of vetting any applicant, will therefore learn of any convictions or cautions which the applicant may have, whether or not he or she is required to disclose them. A critical question, therefore, concerns the use to which that information may be put when considering the application. But that question is not before us.

11. It is not disputed that Article 8 ECHR is engaged. Accordingly there are two issues. The first is whether the legislation requiring disclosure by would-be police constables of reprimands received as a child is "in accordance with the law" within the meaning of Article 8(2). The second is whether it is "necessary in a democratic society … for the prevention of disorder or crime … or for the protection of the rights and freedoms of others".

12. Ms Kate Gallafent QC for the Secretaries of State submits that the reasoning of the Supreme Court in *P*, holding that a legislative scheme designed by reference to categories of case, and with the expectation of employers having careful regard to disclosed information, was both "in accordance with the law" and (with two exceptions) proportionate, is equally applicable in the present case; and that the Supreme Court's exception of "warnings and reprimands administered to a young offender" does not apply when the position being applied for is one for which the utmost integrity is required, including that of police constable. She submits that it is essential in order to maintain public trust and confidence in the police that any offending, however trivial or ancient, should at least be disclosed. What the police then do with that information is a separate matter.

13. Mr Jason Beer QC for the National Police Chiefs' Council supports the appeal by the Secretaries of State, submitting that there are compelling reasons why the police service should be entitled to know about all criminal offences committed by an applicant for the office of constable. He drew our attention also to the ways in which, since the decision of the Divisional Court, the regime governing police vetting has changed materially as a result of the introduction of a statutory Vetting Code of Practice in 2017.

14. Mr Adam Straw for RD submits that the legislative scheme in issue in *P* was materially different to the scheme in the present case, and that there is no material difference between the scheme in the present case and that which has been held by the European Court of Human Rights in *MM v United Kingdom* (Application 24029/07, 13th November 2012) ("*MM*") and by the Supreme Court in *R (T) v Chief Constable of Greater Manchester Police* [2014] UKSC 35, [2015] AC 49 ("*T*") to be not "in accordance with the law"; and that the requirement for RD to disclose her reprimand, received as a child, is unnecessary and disproportionate.

15. In written submissions on behalf of Just for Kids Law, who were given permission to intervene in this appeal, Mr Hugh Southey QC and Ms Jennifer Twite supported the submissions of Mr Straw. In addition they drew attention to the fact that there are sensitive positions in (for example) the prison or probation services where full disclosure of spent convictions and cautions is not required; to the chilling effect on

[2] The Crime and Disorder Act 1998 distinguishes between a "child" (under 14) and a "young person" (under 18). I use the word "child" to mean any person under 18.

applications which the requirement of full disclosure may have; to the fact that this requirement may impact on the recruitment of BAME (and especially black) applicants, bearing in mind the disproportionate number of BAME children who receive reprimands, and thereby make it harder to achieve the recruitment of police officers from diverse backgrounds; and to the distinct nature of childhood offending.

The legislation

16. With effect from 1st July 1975, the Rehabilitation of Offenders Act 1974 introduced a new statutory regime, intended (as its title indicates) to promote rehabilitation, whereby convictions would become spent – and therefore need not be disclosed to (among others) prospective employers – after a certain period of time. The legislation was extended by the Criminal Justice and Immigration Act 2008 ("the 2008 Act") to apply to cautions in December 2008. A caution (which includes a reprimand issued to a child under 18 under sections 65 and 66 of the Crime & Disorder Act 1998: see section 135(5) of the Legal Aid Sentencing & Punishment of Offenders Act 2012) becomes spent as soon as it is administered: para 1 of Schedule 2 of the 1974 Act as amended.

17. Paragraph 3(1) of Schedule 2 of the 1974 Act (introduced by the 2008 Act to mirror the provisions relating to convictions) provides that a person who has been given a caution shall, from the time the caution is spent, be treated for all purposes as not having committed the offence in question. The effect of paragraphs 3(3) to (5) of the Schedule is that, in general, an applicant for employment need not disclose that he or she has received a caution, even if asked:

> "(3) Where a question seeking information with respect to a person's previous cautions, offences, conduct or circumstances is put to him or to any other person otherwise than in proceedings before a judicial authority—
>
> (a) the question shall be treated as not relating to spent cautions or to any ancillary circumstances, and the answer may be framed accordingly; and
>
> (b) the person questioned shall not be subjected to any liability or otherwise prejudiced in law by reason of any failure to acknowledge or disclose a spent caution or any ancillary circumstances in his answer to the was asked.
>
> (4) Any obligation imposed on any person by any rule of law or by the provisions of any agreement or arrangement to disclose any matters to any other person shall not extend to requiring him to disclose a spent caution or any ancillary circumstances (whether the caution is his own or another's).
>
> (5) A caution which has become spent or any ancillary circumstances, or any failure to disclose such a caution or any such circumstances, shall not be a proper ground for dismissing or excluding a person from any office, profession, occupation or employment, or for prejudicing him in any way in any occupation or employment."

18. So far, therefore, the effect of these provisions is that an individual who commits an offence as a child, which is not sufficiently serious to warrant prosecution but who does receive a reprimand, need not disclose that reprimand when applying for a job as an adult and, to that extent, will not have his or her employment prospects blighted indefinitely.

19. However, the Secretary of State is authorised to disapply these paragraphs or provide for exceptions to them by paragraph 4 of Schedule 2. He has done so by the Rehabilitation of Offenders 1974 (Exceptions) Order 1975 (SI 1975/1023) ("the 1975 Order") as extended to cautions by the 2008 Act.

20. The 1975 Order disapplied paragraphs 3(3) to (5) of Schedule 2 where a question was asked in order to assess the suitability of an applicant for admission to a number of specified professions or appointment to certain positions, or who sought to work with children or vulnerable adults. These included not only the office of police constable but also employment as police support staff. An applicant for such a position was required, if asked, to disclose the caution received, regardless of its age, the offence for which it was received and the circumstances in which that offence was committed.

21. When the 1975 Order was introduced in the House of Commons on 23rd June 1975, the Minister of State at the Home Office explained as follows:

> "We recognised also that in the administration of justice, in the case both of the judiciary and of those who administer the law under the judiciary, and in relation to the treatment of offenders after conviction, the public are entitled to expect that there shall be no hint that any criminal behaviour in the past has not been brought to the attention of the authorities administering justice in this way. A good many of the exemptions, therefore, come within that category. …"

22. The 1975 Order was amended with effect from 29th May 2013 by the Rehabilitation of Offenders 1974 (Exceptions) Order 1975 (Amendment) (England and Wales) Order 2013 (SI 2013/1198) ("the 2013 Order"). This introduced a more nuanced regime, including the concept of a "protected caution" which, in broad terms, is a caution for a less serious offence where a specified period (depending on the age of the person at the time) has passed since the caution was administered. In the case of a reprimand given to a child for an offence other than one of the more serious "listed offences", it qualifies as a protected caution once two years have passed since the date on which the reprimand was given.

23. RD's reprimand for theft was therefore a protected caution. It was for theft, which was not a listed offence, and more than two years had passed since it was given.

24. In general, a protected caution did not have to be disclosed, even when (for example) applying for jobs which would involve working with young people. However, the 2013 Order retained a specified range of positions, narrower than those in the unamended 1975 Order, to which the concept of a protected caution (or conviction) did not apply. In these cases all spent cautions (or convictions) were excluded from the protection of the 1974 Act and therefore had to be disclosed, if requested by the employer. This was the effect of Articles 3ZA and 4ZA of the 2013 Order, read together with Schedule 1

of the 1975 Order. These positions did not include employment as a police support officer. Hence the acknowledgement in these proceedings that the request by South Wales Police that RD disclose any cautions when she applied for such a position in 2015 was unlawful: her reprimand was a protected caution and therefore did not have to be disclosed.

25. However, the provisions of the 2013 Order did still require an applicant for a position as a police constable or cadet to disclose any caution, whenever received, for whatever offence and in whatever circumstances. It is apparent that there was a deliberate legislative decision to draw a distinction in this respect between the position of a police constable or cadet on the one hand and a police support officer on the other.

26. The full list of positions where all convictions and cautions must still be disclosed (described by Ms Gallafent as positions requiring the utmost integrity) is as follows:

(1) judicial appointments;

(2) constables and persons appointed as police cadets to undergo training with a view to becoming constables and naval, military and air force police;

(3) any office or employment in the Serious Fraud Office or in the National Crime Agency;

(4) the Commissioners for Her Majesty's Revenue and Customs and any office or employment in their service;

(5) the Official Solicitor and his deputy;

(6) certain appointments to the office of Public Trustee;

(7) any office, employment or other work which is concerned with the establishment of, operation of, or access to a database under section 12 of the Children Act 2004;

(8) firearms dealer; and

(9) a person who is required to obtain an explosives certificate.

27. The Explanatory Memorandum published with the draft 2013 Order stated that:

> "The Exceptions Order creates exceptions to the Act with the effect that, in some circumstances, all convictions and cautions must be disclosed and may be taken into account when assessing a person's suitability for certain positions. This reflects that, while it is generally desirable to facilitate ex-offenders into employment, the public must remain adequately protected. Those areas of activity included in the Exceptions Order are activities requiring a high degree of trust, often involving vulnerable persons, and therefore where it is appropriate that an employer should know a person's full criminal history before an offer of employment is made and consideration can be given to any necessary safeguards to be put in place."

28. When the 2013 Order was debated in the House of Commons the Parliamentary Under Secretary of State for Justice stated:

> "… I want to emphasise our commitment to maintaining public protection and national security. For example, full disclosure of spent cautions and convictions will still be required in respect of employment and other decisions in relation to safeguarding national security and recruitment to the police service."

29. Both the 1975 Order and the 2013 Order were adopted under the affirmative resolution procedure.

30. It is clear, in the light of what I have set out, that although no specific reference was made to the issue of cautions received as a child, Parliament has been well aware that would-be police officers would be required to disclose all convictions or cautions received by them.

The NPCC policy on retention and disclosure

31. In England and Wales provision is made for the collection and retention of records of convictions and cautions by section 27 of the Police and Criminal Evidence Act 1984. The National Police Records (Recordable Offences) Regulations 2000 (S.I. 2000/1139), made pursuant to that section, provide for the recording by the police of convictions, cautions, reprimands and warnings given in respect of any offence punishable with imprisonment plus certain further specified offences.

32. The NPCC has issued guidance regarding deletion of records held on the PNC. The guidance, produced in 2015 (updated in 2018) and replacing earlier guidance, is so far as concerns the present issues non-statutory. It provides, in outline, that all "conviction data" (which includes cautions and reprimands) will be retained until the record subject is deemed to have reached 100 years of age. Chief Officers have a discretion to delete records, but it appears that this is only expected to be exercised in exceptional circumstances – in practice, where the record is inaccurate or where there is some wider public interest involved.

The ACPO 2012 vetting policy

33. The non-statutory guidance in the Association of Chief Police Officers' National Policy for the Police Community ("the ACPO 2012 vetting policy") which was in force until October 2017 provided that "recruitment vetting" should take place for all police officers, police staff and others before an application is accepted. Checks had to be conducted of various police databases including the PNC, for all conviction data, which includes spent convictions, cautions and reprimands irrespective of age.

34. It was apparent from the terms in which RD's 2015 application was rejected that a check of the PNC had been carried out in her case and had confirmed the existence of her reprimand. As the letter rejecting the application stated:

> "NPIA Circular 02/2011 and the ACPO Vetting Policy, state that if a person has a conviction or caution for … theft … they should

> be rejected unless there are exceptionally compelling circumstances."

35. Thus, when a person applied to be a police constable (or for that matter, a police support officer) a check on the PNC would reveal the existence of any caution, including any reprimand received as a child, whether or not disclosed by the applicant. If the applicant, like RD, had received a reprimand for theft committed as a child, the application would be rejected unless there were "exceptionally compelling circumstances". This was the policy which the Divisional Court held to be unlawful.

The 2017 Police Vetting Code of Practice

36. The 2012 policy was replaced by the 2017 Police Vetting Code of Practice. This was laid before Parliament and issued in October 2017 pursuant to section 39A of the Police Act 1996 as amended. It applies to all police forces in England and Wales. It emphasises the importance of maintaining high ethical and professional standards and of police officers acting with the utmost integrity, for which purpose a thorough vetting regime is essential. It sets out a number of principles, including Principle 12 as follows:

> "Public confidence may be affected if an officer has a previous conviction or caution, therefore there is a rebuttable presumption that a person will not be suitable for appointment as a police officer or special constable if they have a previous conviction or caution for a criminal offence, especially if it relates to dishonest or corrupt practices, or violence. Factors that may weigh against this presumption being applied in individual cases include the nature and severity of the offence, the person's age at the time they committed the offence, and the length of time since the offence was committed. Each case must be considered on its own merits including both the individual's role in the offence and the nature of the conviction or caution. This presumption applies to police staff roles with designated powers or roles where there is a likelihood of being in the evidential chain."

37. The Code adds that an application for a position as a police officer, or as a member of police staff where the person may be in the evidential chain, are to be rejected in all cases where an offence, whether committed as an adult or a child, resulted in a custodial sentence (including a suspended sentence) or where the applicant is a registered sex offender or subject to a registration requirement.

38. In addition the Code provides, at paragraph 6.5:

> "Vetting decision-makers must take account of the requirements of the Crown Prosecution Service (CPS) Disclosure Manual, which deals with revealing and disclosing relevant matters during judicial proceedings. Where forces find that a person cannot be relied on to act as a witness of truth in court proceedings, they should not grant vetting clearance for appointment to a post where the role would require that person to provide evidence at court."

39. The reference to the CPS Disclosure Manual is to paragraph 18.53 of the Manual, which provides that police officers making statements in criminal proceedings must inform the CPS of the existence of any convictions or cautions for recordable offences, whether spent or otherwise. The Manual goes on, in paragraphs 18.79 to 18.84, to provide guidance to prosecutors about when such convictions or cautions should be disclosed to the defence. In short, they must be disclosed if they have any bearing on the issues in the case and any doubt about that question must be resolved in favour of disclosure.

40. The Vetting Code was supplemented by guidance issued by the College of Policing ("the APP Vetting") which, in the form as amended in May 2019, provides that:

> "7.3.1 It is not appropriate to identify a prescriptive list of convictions and cautions that should lead to a vetting rejection. Each case should be considered on its own individual merits in relation to the role being undertaken and assets being accessed, subject to the rejection criteria highlighted below. The Rehabilitation of Offenders Act 1974 (Exemptions) Order 1975 does not apply to any police officer posts, but it does apply to all police staff posts, including PCSOs, and non-police personnel, in respect of protected cautions and protected convictions only. These do not need to be disclosed by applicants for police staff and non-police personnel roles, and if they are, must not be considered as part of the vetting process.
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> 7.3.2 Applications for a position as a police officer; a special constable; or as a member of police staff where that member of staff may be in the evidential chain are to be rejected in all cases where:
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> * offences were committed as an adult or juvenile which resulted in a prison sentence (including custodial, suspended or deferred sentence and sentences served at a young offenders' institution or community home); or
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> * the applicant is a registered sex offender or is subject to a registration requirement in respect of any other conviction.
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> 7.3.3 For all other convictions or cautions there is a rebuttable presumption that applications should be rejected except where the exemptions of the ROA apply for police staff and non-police personnel (see 7.3.1). In particular, the following should result in rejection:
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> * offences where vulnerable people were targeted
>
> * offences motivated by hate or discrimination
>
> * offences of domestic abuse.
>
> …

> 7.3.5 Particular care should be taken where an individual has been convicted of (or cautioned for) offences of dishonesty, corrupt practice or violence. Although the rebuttable presumption is that these should lead to rejection, there will be cases where this may be disproportionate in the circumstances. For instance, where the offence was committed as a juvenile, it was not serious and the individual has demonstrated a commitment to help individuals or communities in the subsequent years, their vetting acceptance may be justified."

41. In summary, therefore, the current vetting regime establishes a rebuttable presumption that a person will not be suitable for appointment as a police constable if he or she has a caution (which includes a reprimand received as a child); that presumption is reinforced if the caution is for dishonesty (as RD's reprimand was) or violence; but the circumstances of each individual case must be considered, including the nature and severity of the offence, the person's age at the time, and the length of time which has elapsed since. Some offences, even if committed as a child, mean that an application must be rejected. Further, in all cases consideration should be given to whether a conviction or caution means that an officer cannot be relied on to act as a witness of truth in court proceedings. In that case the application should also be rejected.

The case law

42. There have been a number of cases, in the European Court of Human Rights and the Supreme Court, in which the compatibility of exceptions to the Rehabilitation of Offenders legislation and the retention of "conviction data" with Article 8 ECHR has been considered. The cases have also been concerned with the similar but not identical regime established pursuant to Part V of the Police Act 1997 in which convictions and cautions are disclosed to a prospective employer in the form of a Criminal Record Certificate by the Disclosure and Barring Service. It will be enough to refer to three of these cases.

MM

43. *MM* was concerned with the legality of the retention and disclosure in the context of a criminal record check of a record of a caution received by the applicant for child abduction in Northern Ireland. The case pre-dated the amendments introduced by the Northern Ireland equivalents of the 2013 Order and the corresponding changes made to the regime for criminal record checks under Part V of the Police Act 1997. It is relevant to note that in Northern Ireland, in contrast with the position in England and Wales, the recording and retention of cautions, as distinct from convictions, was not governed by any statutory provisions.

44. The Strasbourg court stated the requirement that any interference with Article 8 rights must be "in accordance with the law" at [193] as meaning, in accordance with established case law, "that the impugned measure must have some basis in domestic law and be compatible with the rule of law" and that it must be both "accessible and foreseeable". It added that, where there is a discretion to be exercised, domestic law must "indicate with sufficient clarity the scope of discretion conferred … and the manner of its exercise". The court emphasised at [202] the absence of any statutory law governing the collection and storage of data regarding the administration of cautions

and concluded at [206] and [207] that the requirements of Article 8(2) were not satisfied:

> "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. …"

T

45. *T* was concerned with the regime for the provision of criminal record checks relating to cautions received as an adult and warnings received as a child, as it stood before the 2013 amendments. Applying *MM*, the Supreme Court held that this regime was not "in accordance with the law" and in any event was disproportionate to the legitimate aim of protecting children.

46. On the first issue Lord Reed, with whom Lord Neuberger, Lady Hale, and Lord Clarke agreed, said that:

> "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."

P

47. The Supreme Court decision in *P* contained an extensive review of the previous case law and has overtaken much of the reasoning of the Divisional Court in the present case.

48. There were four separate claimants, three of whom had convictions for relatively minor offending while one (G) had a reprimand, received as a 13 year old, for sexual assault (in fact, consensual sexual experimentation with two younger boys). All four sought employment which involved working with children. Because of the offences which they had committed, all four were required, even under the more nuanced version of the legislation as it stood after the 2013 Order, either to disclose their convictions and cautions despite the fact that they were spent or to apply to the Disclosure and Barring Service for a Criminal Record Certificate under Part V of the Police Act 1997 which would result in their convictions or cautions being disclosed to their prospective employer. They challenged the statutory rules under which disclosure of records was required as being incompatible with Article 8 ECHR.

49. The principal judgment was given by Lord Sumption, with whom Lord Carnwath and Lord Hughes agreed. Lady Hale gave a concurring judgment with which Lord Carnwath also agreed.

50. Lord Sumption began by identifying two competing public interests which the legislation needed to balance:

> "2. Such cases raise problems of great difficulty and sensitivity. They turn on two competing public interests. One is the rehabilitation of ex-offenders. The other is the protection of the public against people whose past record suggests that there may be unacceptable risks in appointing them to certain sensitive occupations. The importance of both public interests needs no emphasis. The ability of ex-offenders to obtain employment is often an essential condition of their successful reintegration into law-abiding society at what, especially in the case of young offenders, may be a critical period of their lives. On the other hand, in some employment sectors a more cautious approach is indispensable. The Bichard Inquiry (2004) (HC 653) into child protection procedures and vetting practices was a stark reminder of the importance of ensuring that the rehabilitation of offenders does not undermine proper standards of public protection when those with criminal records apply for jobs involving contact with children. The Inquiry had been set up after two young girls had been murdered by a caretaker employed at their school, about whom there had been substantial intelligence in police files, not retained or disclosed to the school, suggesting a pattern of sexual interference with women and young girls."

51. Lady Hale also referred to these competing public interests at [75], and referred also to the importance of "ensuring the integrity of the practice of certain occupations and activities" as well as of "devising a scheme which is practicable and works well for the great majority of people seeking positions for which a CRC is required".

52. Lord Sumption recognised that the way in which these interests should be balanced involved a policy decision for Parliament, and that Parliament had determined that there would be some occupations which required convictions or cautions to be disclosed, notwithstanding that this might prejudice an application for such a position:

> "10. Section 4(2) and (3) of the Rehabilitation of Offenders Act 1974 are not in terms confined to disclosures in the course of job applications. These are, however, much the most significant occasions on which the disclosure of a criminal record is likely to be required, and it is clear that it was primarily with that context in mind that Parliament enacted section 4. It follows that in conferring power on the Secretary of State, by section 4(4), to exclude the operation of sections 4(2) and 4(3) in specified circumstances, Parliament envisaged that there would be occupations in respect of which convictions should be disclosed to a potential employer, professional body or appointing authority notwithstanding that they were spent and notwithstanding that the convicted person might be prejudiced by their disclosure. The scheme for the disclosure of criminal records by the Disclosure and Barring Service (or AccessNI in Northern Ireland) under the Police Act 1997 is carefully tailored to match the disclosure obligations of the person whose record is in question. Under sections 113A(6) and 113B(9) of the Police Act 1997, where the question is asked in circumstances excluded from the operation of the Rehabilitation of Offenders Act 1974 under section 4(4) of the latter Act, it will fall to be disclosed by the Disclosure and Barring Service (or AccessNI in Northern Ireland) notwithstanding that it is spent. This is a coherent scheme of legislation which acknowledges both of the competing public interests to which I have referred, and seeks to achieve a balance between them. Those interests are not only competing but incommensurate. In the nature of things, wherever the line is drawn, it will not be satisfactory from every point of view. The whole issue raises classic policy dilemmas. The underlying policy is precautionary, in line with strong public expectations. The question is whether in adopting that approach the appellants contravened the European Convention on Human Rights."

53. He then turned to the two issues arising under Article 8 ECHR.

54. The first issue was whether the provisions requiring disclosure of convictions or cautions were "in accordance with the law". It was not sufficient in this respect that the provisions were to be found in legislation. They "must not only have some legal basis in domestic law, but must be authorised by something which can properly be characterised as law" a matter on which Convention states have no margin of

appreciation. What this meant was established by long-standing Strasbourg authority. It includes two related requirements, accessibility and foreseeability:

> "16. It is well established that 'law' in the Human Rights Convention has an extended meaning. In two judgments delivered on the same day, *Huvig v France* (1990) 12 EHRR 528, at para 26, and *Kruslin v France* (1990) 12 EHRR 547, para 27, the European Court of Human Rights set out what has become the classic definition of law in this context:
>
> > 'The expression "in accordance with the law", within the meaning of article 8.2, requires firstly that the impugned measure should have some basis in domestic law; it also refers to the quality of the law in question, requiring that it should be accessible to the person concerned, who must moreover be able to foresee its consequences for him, and compatible with the rule of law.'
>
> *Huvig* and *Kruslin* established a dual test of accessibility and foreseeability for any measure which is required to have the quality of law. That test has continued to be cited by the Strasbourg court as the authoritative statement of the meaning of 'law' in very many subsequent cases: see, for example, most recently, *Catt v United Kingdom* (Application No 43514/15, 24 January 2019) .
>
> 17. The accessibility test speaks for itself. For a measure to have the quality of law, it must be possible to discover, if necessary with the aid of professional advice, what its provisions are. In other words, it must be published and comprehensible. The requirement of foreseeability, so far as it adds to the requirement of accessibility, is essentially concerned with the principle summed up in the adage of the American founding father John Adams, 'a government of laws and not of men'. A measure is not 'in accordance with the law' if it purports to authorise an exercise of power unconstrained by law. The measure must not therefore confer a discretion so broad that its scope is in practice dependent on the will of those who apply it, rather than on the law itself. Nor should it be couched in terms so vague or so general as to produce substantially the same effect in practice. The breadth of a measure and the absence of safeguards for the rights of individuals are relevant to its quality as law where the measure confers discretions, in terms or in practice, which make its effects insufficiently foreseeable. Thus a power whose exercise is dependent on the judgment of an official as to when, in what circumstances or against whom to apply it, must be sufficiently constrained by some legal rule governing the principles on which that decision is to be made. But a legal rule imposing a duty to take some action in every case to which the rule applies does not necessarily give rise to the same problem. It may give rise to a different problem when it comes to necessity

> and proportionality, but that is another issue. If the question is how much discretion is too much, the only legal tool available for resolving it is a proportionality test which, unlike the test of legality, is a question of degree."

55. There followed an extensive review of the Strasbourg and domestic case law, including *MM* and *T*, the cases on which Mr Straw relied. That review demonstrated that the principles summarised in the paragraphs cited above had continued to represent the approach of the Strasbourg court; and that *T* had been an application of those principles, which was not "authority for the proposition that a measure may lack the quality of law even where there is no relevant discretion and the relevant rules are precise and entirely clear, if the categories requiring to be disclosed are simply too broad or insufficiently filtered" (see at [37]). Rather, these were matters which went to the issue of proportionality.

56. Applying these principles, Lord Sumption concluded at [42] that (with one exception not relevant here) the rules governing the disclosure of criminal records, both by ex-offenders themselves under the Rehabilitation of Offenders legislation and by the Disclosure and Barring Service under the Police Act 1997 were highly prescriptive and exactly defined, and with no discretion governing what was disclosable. Accordingly:

> "44. In these circumstances, the only basis on which it could be said that the legislation lacks the quality of law is that the content of the classes of criminal record available for mandatory disclosure is itself uncertain, because of the uncertain or discretionary character of the rules governing their retention in the Police National Computer …"

57. That had indeed been the position in *MM*, which had been decided by reference to the position under the unamended 1975 Order, before the amendments made by the 2013 Order, but the argument had been rejected in the English cases. Since the 2013 amendments, however:

> "44. … It is no longer correct to say, as Lord Reed quite rightly did about the unamended scheme considered in *T* (para 119), that the statutory scheme fails to draw distinctions by reference to the nature of the offence, the disposal of the case or the time which has elapsed since the offence took place. It is still the case that it fails to draw distinctions based on the relevance of the conviction to a potential employer on more general grounds; and it still does not provide a mechanism for the independent review of disclosure. However, even on the most expansive view of what was decided in *T* , nothing in that case suggests that these two factors are on their own enough to deprive the legislation of the quality of law. The current legislation distinguishes, for the purpose of disclosure, between different categories of conviction or caution, depending on the gravity of the offence, the age of the offender at the time and the number of years which have passed. Of course, there may be arguments for more or fewer, or wider or narrower categories, but the legality test is a fundamentally unsuitable instrument for assessing differences of

> degree of this kind. A decision that the current regime governing retention and disclosure of criminal records lacked the quality of law would mean that it would be incompatible with the Convention even if, hypothetically, it could be shown that nothing short of it would sufficiently protect children and vulnerable adults from substantial risks of abuse or protect the public interest in the appointment of suitable people to highly sensitive positions. I decline to accept that proposition. It would have the practical effect of equating the right of privacy with such absolute provisions of the Convention as the prohibition of torture and slavery, when the terms of article 8 show that the right of privacy is qualified."

58. In the result, therefore, the current (i.e. from 2013) regime is "in accordance with the law" for the purposes of Article 8.

59. Turning to the issue of proportionality, Lord Sumption identified two issues at [46]. The first was "whether the legislation can legitimately require disclosure by reference to pre-defined categories at all, as opposed to providing for a review of the circumstances of individual cases". If so, the second was "whether the boundaries of these categories are currently drawn in an acceptable place".

60. As to the first of these questions, at [50] Lord Sumption identified two consequences of concluding that it was legitimate to legislate by reference to pre-defined categories. The first was that "there will inevitably be hard cases which would be regarded as disproportionate in a system based on case-by-case examination". The second was that "the task of the court in such cases is to assess the proportionality of the categorisation and not of its impact on individual cases". Recognising these consequences, Lord Sumption held that legislation by reference to pre-defined categories was legitimate, commenting that:

> "50. … In my judgment, the legislative schemes governing the disclosure of criminal records in England and Wales and Northern Ireland provide as good an example as one could find of a case where legislation by reference to pre-defined categories is justified."

61. This comment concerned the justification for legislating by reference to pre-defined categories and not the subsequent issue whether the boundaries of the categories had been drawn in an acceptable place.

62. Lord Sumption gave four reasons for his conclusions. In summary, these were that (1) the final decision about the relevance of a conviction to an individual's suitability for some occupations should be that of the employer who should therefore at least be told about "any criminal record which might reasonably influence him, even if further consideration or discussion of the circumstances with the candidate may ultimately cause him to disregard or attach limited weight to it" [51]; (2) employers can in general "be trusted to take an objective view of the true relevance of a conviction", even if "some employers will take the line of least risk, and decline to employ ex-offenders on principle" [52]; (3) the value of certainty in this context is particularly high [53]; and (4) in view of the large numbers of employment applications requiring a Criminal

Records Certificate, a system which required individual assessments to be made would be impractical [54].

63. Again, these were reasons why it is legitimate to legislate by reference to pre-defined categories, and did not address the later question whether the boundaries of the categories have been drawn in an acceptable place.

64. Finally, Lord Sumption turned at [56] to the question whether the legislation drew the boundaries of the relevant categories in an acceptable place, an issue on which (as he had noted at [46]) "the legislature and ministers exercising statutory powers have a margin of judgment, within limits". The legislation would not be disproportionate, therefore, merely because a court might have drawn the boundaries differently. His conclusion at [61] was, with two exceptions, that it did, allowing for the margin of judgment properly allowed to the legislature or the Secretary of State. One of those exceptions however, is of particular relevance to the present case:

> "64. The second exception concerns warnings and reprimands administered to young offenders under sections 65 and 66 of the Crime and Disorder Act 1998 replaced, since 2013, by youth cautions under section 66ZA. Warnings and reprimands were not a penal procedure. As Lord Bingham put it in relation to warnings in *R (R) v Durham Constabulary* [2005] 1 WLR 1184 (HL), although they required the offender to have admitted the offence, they constituted a 'preventative, curative, rehabilitative or welfare-promoting' disposal: see paras 14-15. A caution administered to an adult requires consent. However, a warning or reprimand given to a young offender whose moral bearings are still in the course of formation, requires no consent and does not involve the determination of a criminal charge. Its purpose is wholly instructive, and its use as an alternative to prosecution is designed to avoid any deleterious effect on his subsequent life. Its disclosure to a potential employer would be directly inconsistent with that purpose. In my view the inclusion of warnings and reprimands administered to a young offender among offences which must be disclosed is a category error, and as such an error of principle. I would expect the same to be true of the current regime governing youth cautions, but we were not addressed on that question and it is neither necessary nor appropriate to decide it on this appeal.[3]"

"in accordance with the law"

65. Mr Straw submitted that regime considered in *MM* and *T* which had been held to be not "in accordance with the law" was in all material respects the same as the regime here. He founded this submission on two factors: first the absence of a statutory framework for the collection and retention of data relating to cautions; and second the requirement that all cautions be disclosed by an applicant for a position as a police constable, without

[3] Nor have we been addressed on that question. For that reason, and because it is what RD received, I have continued to refer to reprimands.

discriminating between those which were potentially relevant to that position and those which were not, either because of their circumstances or the time which had elapsed.

66. The first of these factors fell away in the course of submissions. As Ms Gallafent pointed out, and as I have noted at [30] above, in England and Wales there is a statutory framework for the collection and retention of such data. Moreover, as Lord Sumption said in *P*, this cannot in itself be a decisive consideration. Indeed, in *MM* itself it was only one factor which, together with others, resulted cumulatively in the Northern Ireland scheme there in issue not being "in accordance with the law".

67. Mr Straw's second factor begs the question, in my judgment, whether there are some cautions (including reprimands) which are not at least *potentially* relevant to the position of a police constable. As I shall explain when dealing with the issue of proportionality, the submission of the Secretaries of State and the NPCC is that it is essential to maintain public confidence in the police that all convictions and cautions are at least disclosed, so that they can be taken into account in the recruitment decision. That is not to say that they should operate to disqualify an applicant, but only that their relevance can be considered and that the public can be confident that this has been done. To that extent it can be said that all convictions and cautions are potentially relevant.

68. In any event, the regime for disclosure of such convictions and cautions is in my judgment the same as was considered in *P*. The regime for collection and retention of conviction data in England and Wales has been unchanged throughout. Since the 2013 Order the defects identified in *MM* and *T* have been corrected, as Lord Sumption pointed out in *P*. The scheme does now distinguish, in general, according to the gravity of the offence, the age of the offender at the time and the number of years which have passed, while making clear that these distinctions do not apply in the case of an applicant to become a police constable.

69. Applying the test stated in *P*, which was itself no more than a reiteration of well-established case law, there can be no doubt that the requirement of Article 8(2) that any interference be in accordance with the law is satisfied. The disclosure regime has a legal basis in domestic law: it is entirely statutory, consisting of primary legislation together with regulations which have been subject to the affirmative resolution procedure and whose operation as it applies to the police has been explained to Parliament in clear terms. It is accessible: although the regulations are somewhat convoluted (in particular, in providing that even a protected caution has to be disclosed by a would-be constable, Articles 3ZA and 4ZA constitute an exception to an exception), it is ultimately entirely clear that an applicant for the position of police constable must, if asked, disclose any conviction or caution, regardless of its age or circumstances, including any reprimand received as a child. It is foreseeable: there is no exercise of discretion involved, let alone one which is so broad as to be unpredictable.

Proportionality

70. As in *P*, the question whether the requirement to disclose any reprimand received as a child is "necessary in a democratic society… for the prevention of disorder or crime … or for the rights and freedoms of others", in short whether it is proportionate, involves two issues. The first is whether it was legitimate to legislate by reference to pre-defined categories, the category in this case consisting of applicants for the office of police constable. The second is whether, if so, it was proportionate to require such applicants

to disclose all cautions received, including those received as a child, instead of some less onerous requirement.

71. Before addressing these issues, I should summarise the evidence on which the Secretaries of State and the NPCC rely as showing that disclosure of all cautions is proportionate. The Divisional Court had before it evidence from (1) Julia Gerrard, the policy lead within the Ministry of Justice on the 1974 Act, (2) Alison Foulds, her predecessor, (3) Chief Constable Martin Jelley, the Chief Constable of Warwickshire Police and the NPCC Lead on Vetting, and (4) Deputy Chief Constable Richard Morris, the NPCC Lead on the Police National Computer. Between them, these witnesses make the following points as demonstrating the need for full disclosure by aspiring police constables.

72. Their over-arching point is that police officers should be and be seen to be persons of the utmost integrity in view of the responsibilities which they have and in order that the police may command public confidence. They point out that Parliament has since 1975 consistently required that those applying to become police officers should be required to disclose any conviction or caution, and that this regime was maintained by the 2013 Order when the scope of the exceptions to the 1974 Act was narrowed. They say that it is critical that public protection should be ensured and public confidence in the police service maintained, by enabling police forces to vet thoroughly those applying for the office of constable, and that this objective can only be achieved by the regime currently provided in the 2013 Order. The "bright line rule" applying to police constables is therefore necessary.

73. First, constables enforce the law, exercising serious compulsive and intrusive powers over other citizens, sometimes in relation to vulnerable people. It is necessary to ensure that those who take recruitment decisions in relation to those who wish to become constables know about *all* of the criminal offences committed by such applicants in order to be able to make informed and balanced recruitment decisions.

74. Second, public trust in the integrity of those who enforce the law and exercise such powers is of critical importance, particularly in a society where the model is one of policing by consent. The public legitimately expects that those who hold the office of constable are persons of good standing whose probity and trustworthiness is of the highest standard. The preservation of public trust and confidence in the police service is enhanced if the public is assured that, before they become constables, disclosure of *all* of the criminal offences committed by the constable has occurred and been taken into account in recruitment decision-making; conversely, such trust would be damaged without that assurance. In this regard, Her Majesty's Inspectors of Constabulary have repeatedly emphasised the need for integrity in the police service. The present Chief Inspector stated in 2013 that:

> "With considerable power – devolved to police officers by the community they are sworn to protect – comes not only considerable responsibility, but also high expectations. Those expectations are that police officers will adhere to the standards of honesty and conduct which are appreciably higher than those demanded of most others."

75. Third, it is necessary that a constable's full criminal record is disclosed to the CPS in the course of criminal proceedings in order that the CPS can properly discharge its disclosure responsibilities within the criminal proceedings. There is a danger that a constable with a criminal record would be a tainted witness, thereby jeopardising any investigation in which he or she was involved or, in order to avoid that risk, severely limiting the ways in which he or she could be deployed.

76. I return now to the two questions which I have identified above.

77. In my judgment it follows from Lord Sumption's reasoning in *P*, and from the facts which I have summarised above, that it was legitimate to legislate by reference to pre-defined categories, that is to say to have a "bright line rule" as to the disclosure required by applicants for the office of police constable. I emphasise again that we are concerned only with disclosure and not with the use which may be made of the information in reaching a recruitment decision.

78. Lord Sumption's first reason, that the employer should be told of any criminal record which might reasonably influence him, and his third reason, the importance of certainty, apply with equal force to the recruitment of police constables as they do to those wishing to work with children. However, his fourth reason, the impracticability of requiring an individual assessment of what should be disclosed in view of the large numbers who apply for a CRC, has less application to the recruitment of constables.

79. It is, however, necessary to say something more about his second reason, that in general employers can be trusted to take an objective view of the true relevance of a conviction or caution. He supplemented this by pointing out that employers in the public sector must comply with a Code of Practice which requires them to have a written policy concerning the suitability of ex-offenders, to notify candidates of the potential impact of a criminal record and to discuss with candidates the content of any disclosure before withdrawing an offer of employment. That reasoning was in the context of a CRC revealing a conviction or caution after a provisional offer of employment has been made.

80. The regime applicable to the police is different. The disclosure must be made by the applicant at the outset of the application. There are then policies which apply to govern the use which the police may make of that disclosure before making a recruitment decision. Until 2017 the applicable policy was the ACPO 2012 vetting policy. Thereafter it was the 2017 Police Vetting Code of Practice. The Divisional Court held that the 2012 policy was unlawful. That decision has not been challenged before us but, for my part, I agree with it. It means, in effect, that until 2017 the police could not (in Lord Sumption's words) be trusted to take an objective view of the true relevance of what the Divisional Court described as "low level, historical cautions". But this does not mean that a "bright line rule" governing disclosure is illegitimate. Rather, it means that it is essential to ensure that a lawful policy as to the use of such information is in place and that it is rigorously applied. We have not been asked to rule on whether the 2017 Code of Practice is such a policy and I do not do so.

81. Further, there can be no doubt that the integrity of police constables is of vital importance, as is the existence of public confidence in that integrity. These factors likewise point to the need for a clear and certain rule as to what must be disclosed by those applying for such a position.

82. The real question, as it seems to me, is whether the boundary of the bright line rule which requires disclosure of all convictions and cautions, including reprimands received as a child, is drawn in an appropriate place, bearing in mind that a margin of judgment is accorded to the Secretary of State.

83. Mr Straw's first submission on this question is that we are bound by what Lord Sumption said in *P* at [64] to hold that it is not. For ease of reference I set that out again:

> "64. The second exception concerns warnings and reprimands administered to young offenders under sections 65 and 66 of the Crime and Disorder Act 1998 replaced, since 2013, by youth cautions under section 66ZA. Warnings and reprimands were not a penal procedure. As Lord Bingham put it in relation to warnings in *R (R) v Durham Constabulary* [2005] 1 WLR 1184 (HL), although they required the offender to have admitted the offence, they constituted a 'preventative, curative, rehabilitative or welfare-promoting' disposal: see paras 14-15. A caution administered to an adult requires consent. However, a warning or reprimand given to a young offender whose moral bearings are still in the course of formation, requires no consent and does not involve the determination of a criminal charge. Its purpose is wholly instructive, and its use as an alternative to prosecution is designed to avoid any deleterious effect on his subsequent life. Its disclosure to a potential employer would be directly inconsistent with that purpose. In my view the inclusion of warnings and reprimands administered to a young offender among offences which must be disclosed is a category error, and as such an error of principle. I would expect the same to be true of the current regime governing youth cautions, but we were not addressed on that question and it is neither necessary nor appropriate to decide it on this appeal."

84. I would accept that this is general reasoning which, on its face, appears to mean that disclosure to any potential employer of a reprimand given to a young offender can never be required as that would be inconsistent with the nature and purpose of such a reprimand. It reads, in effect, as if it were a judicially-created bright line rule rather than a legislative one. However, it is clear that the Supreme Court was not concerned with or focusing on the rule applicable to would-be police constables (or indeed the other positions where full disclosure is still required) and did not have before it any of the evidence relating to the need for constables to be people of undoubted integrity and the importance of public confidence in police recruitment procedures which I have summarised. It is axiomatic that broad and general statements of principle, even by the Supreme Court, must be understood in the context in which they are made. The context in *P* did not include the position of a would-be police constable who had committed criminal offences as a child. Accordingly I do not accept that we are bound by *P* to hold that to require disclosure of a reprimand is necessarily unlawful.

85. It is necessary, therefore, to apply the familiar test for necessity and proportionality. This was set out by Lord Wilson in *T* at [39]:

> "In this respect one asks first whether the objective behind the interference was sufficiently important to justify limiting the rights of T and JB under article 8; second whether the measures were rationally connected to the objective; third whether they went no further than was necessary to accomplish it; and fourth, standing back, whether they struck a fair balance between the rights of T and JB and the interests of the community *(R (Aguilar Quila) v Secretary of State for the Home Department* [2011] UKSC 45, [2012] 1 AC 621, para 45)."

86. Mr Straw's submissions focused on the facts of RD's case, that is to say a reprimand for shoplifting of goods of low value received at a very young age. But the question is not whether the importance of maintaining police integrity and public confidence is sufficient to justify requiring disclosure of RD's reprimand. Rather it is whether it is sufficient to justify requiring an applicant for the position of police constable to disclose any reprimand received as a child. Once it is concluded that it was legitimate to have a bright line rule as to the disclosure required of would-be police constables, it is the proportionality of that rule which must be assessed and not its application on the particular facts of RD's case.

87. Taking the first and second issues together, I have no doubt that the importance of maintaining police integrity and public confidence is of fundamental importance and that the requirement that all cautions should be disclosed, including reprimands received as a child, is rationally connected to that objective. It promotes public trust to know that nothing in an officer's background has been held back before he or she is entrusted with the powers which a constable has, and that anything potentially relevant has been taken into account even if, in the end, it did not prevent an offer of employment. Some reprimands will be given for entirely trivial matters, such as in RD's case, but others may be more serious. For example, as Ms Foulds pointed out in her evidence, even the offence of theft may be committed in a wide range of circumstances, varying from minor shoplifting to serious abuse of trust, while any attempt to draw a line based on the value of goods taken would necessarily be arbitrary. Similarly, reprimands may be given in circumstances which say something about the character of the applicant. The example was given of a 17 year old child involved in county lines drug supply who was reprimanded rather than prosecuted because he had been acting under pressure from others: it would be relevant for the police at least to know that a potential constable had succumbed to blackmail in this way.

88. While I would accept that there is no rational connection between RD's minor shoplifting at the age of 13 and her suitability to be a police constable as an adult at the time of her application, that is not the relevant question. That is for two reasons. First, because we are concerned, as I have explained, with the rule that all reprimands should be disclosed. Second, because the question is not whether a reprimand rendered her unsuitable to be a police constable, but rather whether it was something which the police ought to know before deciding whether she was a suitable person to be a constable.

89. As to the third issue, Mr Straw submitted that the requirement to disclose all reprimands went further than was necessary. He suggested a number of different ways in which the line could have been drawn which would have resulted in RD's reprimand not having to be disclosed. For example, he suggested that disclosure of protected cautions could have been dispensed with; or that a different regime could have applied depending on

the age of the applicant. No doubt these would have been possibilities, but none of them would be capable of satisfying what I regard as the legitimate legislative objective of ensuring public confidence that anything of potential relevance has been taken into account in police recruitment decisions.

90. Mr Straw suggested also that if there was concern that an applicant's record would have to be disclosed to the CPS and might prejudice a prosecution, the applicant could be deployed in a role which would not form part of any evidential chain. I regard that as thoroughly unrealistic. It would create two categories of constable, those who can be fully deployed to all the roles which police officers perform and those whose careers in the police will be highly restricted. A careful judgment needs to be made. There will be some reprimands which, if disclosed to the CPS and then to the defence, may prejudice a criminal prosecution. In other cases that possibility will be far-fetched, as the Divisional Court concluded (and I agree) would be the position in RD's case. But that is not an argument for saying that some reprimands should not be disclosed when applying to become a constable. It would be extremely difficult, if not impossible, to formulate a rule which required disclosure only of reprimands which the CPS might think would need to be disclosed to the defence and which a judge might think should be admitted in evidence under section 100 of the Criminal Justice Act 2003. The only safe rule is that the reprimand should be disclosed so that a sensible and informed view could be reached – or at least, the Secretary of State was entitled so to conclude.

91. Finally, the question is whether the bright line rule requiring full disclosure strikes a fair balance between the interests of would-be constables and the interests of the community. On the one hand, the public has a strong interest in ensuring the integrity of police constables and in the assurance that all matters of potential relevance have been taken into account when making recruitment decisions. On the other hand, we are concerned only with the requirement to disclose and a policy exists which governs the use which may be made in the recruitment process of the information thus disclosed. In considering the overall question of fairness, it is necessary to take account not only of the requirement to disclose, but also the existence of safeguards as to the use which may be made of the disclosed information. If those safeguards are inadequate, as the Divisional Court has held that they were before 2017, an otherwise suitable applicant who is refused employment by reason of a reprimand will have a remedy. But his or her proper complaint will not be that the reprimand should not have been disclosed. Rather it will be that the police have misused the disclosure in rejecting the application, either because the policy itself is unlawful or because it has not been properly applied. In those circumstances I conclude that the requirement for full disclosure does strike a fair balance between the interests involved.

Conclusion

92. For these reasons I would hold that the requirement for full disclosure by a would-be police constable of all convictions and cautions, including reprimands received as a child, is in accordance with the law within the meaning of Article 8 ECHR and that it is necessary in a democratic society for the prevention of disorder or crime or for the protection of the rights or freedoms of others. I would therefore allow the appeal and set aside the declaration made by the Divisional Court.

93. I add three final comments. The first is that, as was common ground by the conclusion of the argument before us, it would not in any event have been right to uphold the

declaration in the terms made by the Divisional Court. That declaration used a formula which, as I understand it, was agreed by the parties in the light of the decision of the Court of Appeal in *P*, but the reference to "low-level, historical cautions" is of uncertain application. Had I been minded to dismiss the appeal, it would have been necessary to express any declaration in more precise terms. As it is, the point does not arise.

94. Second, it will be particularly important that police recruitment material, and especially any form which applicants must complete, makes clear that a reprimand received as a child is not an automatic disqualification for appointment as a constable and that all the circumstances of any reprimand will be taken into account fairly in assessing any application. That is necessary to counteract as far as possible any chilling effect on applications which the requirement to disclose may have. It is all the more important in view of the disproportionate number of reprimands issued to BAME children when compared to the population as a whole and the impact which the requirement of full disclosure may have on the vital social objective of recruiting a more diverse police force which commands the confidence of all sections of society.

95. Third, while this judgment has necessarily focused on the position of would-be police constables in general, it is important not to lose sight of the undoubted fact that this claimant was shabbily treated by the South Wales police. Sadly, it may be too late, in her case, for a fulfilling career within the police service, but it seems to me that any policy which resulted in the application of an otherwise well qualified candidate like RD being peremptorily rejected because of a reprimand received for minor shoplifting at the age of 13 is highly unlikely to be lawful.

Lord Justice Stuart-Smith:

96. I agree.

Lord Justice Underhill:

97. As Males LJ explains, the shape of the issues on this appeal is rather odd. There is no question that the refusal of RD's application by South Wales Police was unlawful, because she was applying for employment as a police support officer but they applied to her a policy applicable only to the recruitment of constables (and cadets); or that that policy was in any event unlawful. I would also add that the way in which she was treated appears to have been unreasonable and insensitive. That is not in issue before us, and to that extent she has won her case. However, the Divisional Court did go on to consider whether the regime that would have been applicable to her if she had been applying to be a constable was compatible with article 8 of the Convention; and we must decide whether the declaration that it made in that regard was correct.

98. For the reasons that he gives, I agree with Males LJ that the exclusion of applicants to become a constable from the "protected caution" provisions of the 1975 Order (as amended) is both "in accordance with the law" and proportionate and accordingly that it gives rise to no breach of article 8; and I would accordingly allow the appeal. However, I would wish, like him, to emphasise that the question whether it is lawful, in the case of an application to become a constable, to require the *disclosure* of all past reprimands is a quite separate question from how that information should be *used*; and the outcome of the appeal does not imply that such an application can be refused on the basis of any past reprimand, however trivial the offence and whatever the age of the

applicant at the time. The current Vetting Code of Practice gives guidance to decision-makers about how to treat past convictions and youth cautions. The lawfulness of that Code is not challenged on this appeal; but I would associate myself entirely with what Males LJ says at the end of para. 95 of his judgment.