Trinity Term
[2014] UKSC 35
On appeal from: [2013] EWCA Civ 25

JUDGMENT

R (on the application of T and another) (Respondents) *v* Secretary of State for the Home Department and another (Appellants)

before

Lord Neuberger, President
Lady Hale, Deputy President
Lord Clarke
Lord Wilson
Lord Reed

JUDGMENT GIVEN ON

18 June 2014

Heard on 9 and 10 December 2013

Appellants
James Eadie QC
Jason Coppel QC
(Instructed by Treasury Solicitors)

Respondent (T)
Hugh Southey QC
Nick Armstrong
(Instructed by Stephensons)

Respondent (JB)
Stephen Cragg QC
Azeem Suterwalla
(Instructed by Howells LLP)

Interveners (Financial Conduct Authority; Prudential Regulation Authority)
Jenni Richards QC
(Instructed by Financial Conduct Authority and Prudential Regulation Authority)

Intervener (Equality and Human Rights Commission)
Caoilfhionn Gallagher
Conor McCarthy
(Instructed by Equality and Human Rights Commission)

Intervener (Liberty)
Timothy Pitt-Payne QC
(Instructed by Liberty)

LORD WILSON

INTRODUCTION

1. The Rehabilitation of Offenders Act 1974 ("the 1974 Act") provides that, after a period of time, the criminal convictions of a person, say of a man, are in many cases "spent". This means, among other things, that he is not obliged to disclose them in response to a question by, for example, a prospective employer and that the prospective employer is not entitled to make a decision prejudicial to him by reference to them or to any failure on his part to disclose them. The same goes for cautions (which include warnings given to a child: section 65(9) Crime and Disorder Act 1998). Subject to an immaterial exception, cautions are "spent" as soon as they have been given: para 1(1)(b) of Schedule 2 to the 1974 Act, added by paragraph 6 of Schedule 10 to the Criminal Justice and Immigration Act 2008. But the law identifies exceptions to a person's protection from reference to spent convictions and to cautions. In these proceedings the two respondents, T and JB, claim that the reference in certificates issued by the state to cautions given to them violated their right to respect for their private life under article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"). T further claims that the obligation cast upon him to disclose the warnings given to him violated the same right. To the extent that the claims of T and JB are valid, another important question arises in relation to the width of the appropriate remedy.

2. The Secretary of State for the Home Department has responsibility for the Disclosure and Barring Service ("the DBS"), an executive agency charged with the issue of certificates relating to a person's criminal record pursuant to the Police Act 1997 ("the 1997 Act"). The Secretary of State for Justice has responsibility for the working of the 1974 Act. The two Secretaries of State appeal against orders made by the Court of Appeal (Lord Dyson MR, Richards and Davis LJJ) on 29 January 2013: [2013] 1 WLR 2515. It upheld T's appeal against the dismissal of his claim for judicial review and, in his case, declared first, pursuant to section 4 of the Human Rights Act 1998 ("the 1998 Act"), that the provisions of Part V of the 1997 Act were incompatible with article 8 "insofar as they require the disclosure of all convictions and cautions that are recorded on central records on certificates"; and second that the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 (SI 1975 /1023) ("the 1975 Order") was incompatible with article 8 "and ultra vires the 1974 Act". A judge had refused to grant JB permission to apply for judicial review and, in her case, the Court of Appeal allowed her appeal, granted permission, upheld her claim and declared, pursuant to section 4 of the 1998 Act, that the provisions of Part V of the 1997 Act were incompatible with article 8 "for the reasons set out in [its] judgment".

3. In both cases the Court of Appeal provided that its declarations should not take effect pending application by the Secretaries of State to this court for permission to appeal. On granting permission, this court extended the stay until its determination of the appeals. In particular, therefore, the result is that there is no presently effective declaration that the 1975 Order is ultra vires. In these circumstances one would expect the Secretaries of State to have awaited the determination of the current appeals before exercising powers under the 1974 Act to amend the 1975 Order and powers under the 1997 Act to amend that Act itself, with a view to eliminating the incompatibilities and indeed invalidities identified by the Court of Appeal. On 22 May 2013, however, no doubt for reasons which they considered to be good, the Secretaries of State made the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 (Amendment) (England and Wales) Order 2013 (SI 2013/1198) and the Police Act 1997 (Criminal Record Certificates: Relevant Matters) (Amendment) (England and Wales) Order 2013 (SI 2013/1200) with a view to eliminating the identified incompatibilities and invalidities. In paras 13 to 15 below I will, in effect in parenthesis, summarise the effect of the recent orders, which took effect on 29 May 2013. These appeals, however, concern the provisions of the 1975 Order and of the 1997 Act as they stood prior to the amendments wrought by the recent orders and, unless the context otherwise requires, references to the 1975 Order and to the 1997 Act should be understood accordingly. The appeals therefore lose some, but only some, of their practical significance. There would be a piquancy about any conclusion by this court that the 1975 Order and the 1997 Act were not, after all, incompatible with the respondents' rights. But the court must beware of allowing its knowledge of the recent orders to lead it to avoid such a conclusion otherwise than on a principled basis.

FACTS

4. In 2002 the police issued two warnings to T, who was then aged 11, in respect of the theft of two bicycles. Like a caution issued to an adult, a warning to a child can be given only following his admission of guilt. T has no other criminal record. In 2008 a football club, to whom he had applied for part-time employment, required him to obtain an enhanced criminal record certificate ("an ECRC") under section 113B of the 1997 Act (as inserted by section 163 of the Serious Organised Crime and Police Act 2005 and amended by section 97(2) of the Policing and Crime Act 2009 and section 82(1) of the Protection of Freedoms Act 2012). The certificate disclosed the warnings but, following the intervention of T's M.P., the police agreed to apply to the warnings their policy of "stepping down" in some cases. The effect was that, while the warnings remained on police files, they were not automatically to be disclosed on certificates. This seems to have resolved any problem between T and the football club. In 2010, however, T applied for enrolment on a sports studies course, which was to entail his contact with children. The college required him to obtain an ECRC. No doubt T was unaware that in the interim the police had acknowledged that their policy of "stepping down" contravened the 1997 Act: *Chief*

Constable of Humberside Police v Information Comr (Secretary of State for the Home Department intervening) [2009] EWCA Civ 1079, [2010] 1 WLR 1136, at para 3. In the event, therefore, the ECRC issued in relation to T again disclosed the warnings. The college responded that T's place on the course was at risk. It was only as a result of representations by his solicitor that it accepted T for enrolment on the course notwithstanding the warnings.

5. In 2001 the police issued a caution to JB, then aged 41, in respect of the theft from a shop of a packet of false fingernails. She has no other criminal record. In 2009 she completed a training course arranged by the Job Centre for employment in the care sector. The provider of the course asked her to obtain an ECRC, which disclosed the caution. It thereupon told her that it felt unable to put her forward for employment in the care sector.

THE 1974 ACT AND THE 1975 ORDER

6. Section 4(2) and (3)(b) of the 1974 Act applies to such convictions as are treated as spent under the Act; and para 3(3) and (5) of Schedule 2 to it applies analogously to cautions. Broadly summarised, section 4(2) and para 3(3) provide that, where a question is asked of a person about his criminal record, it shall be treated as not extending to them and he is entitled not to disclose them and cannot be liable for failure to do so. Also thus summarised, section 4(3)(b) and para 3(5) provide that a person's spent conviction or his caution, or a failure to disclose it, cannot justify his exclusion or dismissal from a profession or employment or any action prejudicial to him in the course of his employment. But the 1975 Order makes exceptions to these provisions: article 3 of it specifies the exception to section 4(2) and to para 3(3) of the Schedule and article 4 specifies the exception to section 4(3)(b) and to para 3(5). In the light of the Court of Appeal's declaration that the whole order was ultra vires, it is important to note the width of the two articles.

7. Article 3 of the 1975 Order (as amended by article 3 of the Rehabilitation of Offenders Act 1974 (Exceptions) (Amendment) Order 2001 (SI 2001/1192) and article 4 of the Rehabilitation of Offenders Act 1974 (Exceptions) (Amendment) (England and Wales) Order 2008 (SI 2008/3259) ("the 2008 Order")) provides that a person's entitlement not to disclose either spent convictions or cautions in answer to questions does not extend to situations in which the questions are asked in order to assess his suitability in any one of 13 specified respects. Six examples are his suitability, at (a) of the article, for admission to certain professions and for entry into certain types of employment, all specified in Schedule I to the Order; at (aa), for his assignment to work with children in specified circumstances; at (b), for his assignment to work which impacts on national security; at (e), for his proposed adoption of a child; at (f), for his assignment to the provision of day care; and, at

(g), for the grant to him by the Financial Conduct Authority of specified permissions and approvals.

8. Analogously article 4 of the 1975 Order (as amended by article 5 of the 2008 Order) provides that the inability to exclude or dismiss a person from a profession or employment or to take action prejudicial to him in the course of his employment, by reference to a spent conviction or to a caution or to a failure to disclose it, does not apply: at (a) and (b) of the article, to the professions and types of employment specified in Schedule 1 to the Order; at (c), to any action taken for the purpose of safeguarding national security; at (d), to any one of 16 specified decisions of the Financial Conduct Authority; and at (e) to (n), to ten specified decisions of other authorities.

9. The shape of the 1975 Order is therefore clear. It is the circumstances in which the question is asked which dictate whether an exception from protection under the 1974 Act arises; and when it arises, the duty to disclose in response to the question and the entitlement of the questioner to act in reliance upon the disclosure or upon a failure to do so are both absolute, being unrelated to the circumstances in which the spent conviction or the caution arose.

THE 1997 ACT

10. Sections 113A and 113B of the 1997 Act identify the circumstances in which the DBS must issue a criminal record certificate ("a CRC") and an ECRC respectively. The only substantive difference between the two certificates is that an ECRC must include not only, as must a CRC, relevant matters recorded on the Police National Computer but also, by way of enhancement, information about the person on local police records which they reasonably believe to be relevant and ought to be included (conveniently described as "soft intelligence"): contrast section 113A(3)(a) with section 113B(3)(a) and (4). It is only where the certificate is required "for the purposes of an exempted question asked for a prescribed purpose" that an ECRC, rather than a CRC, is available. The present appeals concern ECRCs and, since in any event the greater includes the lesser, it will be convenient to address the circumstances in which the DBS must issue an ECRC.

11. In summary, section 113B provides that an ECRC must be issued in the following circumstances:

(a) The application for it is made by the person who is to be the subject of it (subsection (1)(a)).

(b) The application is countersigned by a person listed in a register, maintained by the DBS, of persons likely to ask "exempted questions" (subsection (2)(a), read with section 120).

(c) The application is accompanied by a statement by the registered person that the certificate is required for the purposes of an "exempted question" asked for a "prescribed purpose" (subsection (2)(b)).

(d) An "exempted question" is a question to which exemption from protection arises under the 1975 Order (subsection (9) and section 113A(6)).

(e) A "prescribed purpose" is a purpose prescribed in regulation 5A of the Police Act 1997 (Criminal Records) Regulations 2002 (SI 2002/233) which sets out a list overlapping with, but not co-extensive with, the list in article 3 of the 1975 Order, of situations in which the registered person proposes to consider the applicant's suitability for a specified position of trust or sensitivity.

12. In what follows it will be convenient to regard both the exceptional obligation of a person to disclose a spent conviction or a caution under the 1975 Order and the obligation of the DBS to make disclosure of it by an ECRC under the 1997 Act as running in parallel. But the parallel is not exact. For the obligation of the DBS to make disclosure under an ECRC is, at the same time, both wider than the obligation of the person in terms of its inclusion of soft intelligence and yet narrower in that it arises only in circumstances in which the application is countersigned by a registered person who states that the certificate is required for a prescribed purpose. There will therefore be cases in which, although the questioned person is not exempt from a duty of disclosure, the questioner is not entitled to call for an ECRC. Nevertheless the shape of the 1975 Order is certainly reflected in the 1997 Act: for, if the prescribed circumstances surrounding the application for the ECRC are present, the duty of the DBS is to disclose even spent convictions and cautions irrespective of the circumstances in which they arose.

THE 2013 AMENDMENTS

13. In that the 1975 Order removes the protection from disclosure and reliance afforded by the 1974 Act when questions are asked in the circumstances which I have described, the first order dated 22 May 2013, made by way of amendment of the 1975 Order, (SI 2013/1198), in effect reinstates protection in the case of what it calls a "protected caution" and a "protected conviction". A caution is protected if it was given otherwise than for any of 14 listed categories of offence and if at least six years have passed since the date of the caution (or two years if the person was

then a minor): article 4. A conviction is protected if it was imposed otherwise than for any of the listed categories; if it did not result in a custodial sentence; if the person has not been convicted of any other offence; and if at least 11 years have passed since the date of the conviction (or five and a half years if he was then a minor): article 4. But this new, more nuanced, regime does not apply when questions are asked in order to assess a person's suitability for a few specified types of employment: article 6. The entitlement of the questioner to act in reliance upon the disclosure of a spent conviction or a caution, or upon a failure to disclose it, is re-cast along the same lines: articles 8 and 9.

14. The second order dated 22 May 2013, made by way of amendment of the 1997 Act, (SI 2013/1200), narrows the content of a CRC and of an ECRC analogously. The obligation of the DBS is to include in the certificate details of every "relevant matter" (sections 113B(3)(a) and 113A(3)(a)); and, whereas the definition of "relevant matter" in section 113A(6) originally included all convictions including all spent convictions, the new order amends the definition so as to render the obligation of the DBS to make disclosure of spent convictions and of cautions under the 1997 Act broadly co-extensive with the new, narrower, obligation of the person to make disclosure under the amended 1975 Order: articles 3 and 4. It may be that information about the circumstances behind a spent conviction or a caution which is now no longer required to be disclosed on a certificate will nevertheless, in the case of an ECRC, be disclosed as soft intelligence; but that will occur only if the police reasonably believe it to be relevant (section 113B(4)(a)).

15. The recent orders, each approved by resolution of Parliament, therefore represent a departure from the former regime under which disclosure of all spent (as well, of course, as unspent) convictions and of all cautions was required if the question was put, or the application for a certificate made, in the specified circumstances. Even in those circumstances certain spent convictions and cautions, identified by their subject matter and in the case of a conviction also by the sentence, and also by the number and age of them, are no longer required to be disclosed.

WITHIN SCOPE OF ARTICLE 8

16. Did the cautions issued to T and to JB represent an aspect of their private life, respect for which, subject to qualification, is guaranteed to them under article 8 of the Convention? An authoritative affirmative answer is provided within the judgments of this court in *R(L) v Commissioner of Police of the Metropolis (Secretary of State for the Home Department intervening)* [2009] UKSC 3, [2010] 1 AC 410. The decision itself related to soft intelligence included in an ECRC under the precursor of section 113B of the 1997 Act. Mrs L was employed by an agency which provided staff for schools and the ECRC which it required her to obtain disclosed police intelligence to the effect that, two years previously, her

teenage son had been placed on the child protection register under the category of neglect, on the basis that Mrs L, with whom the son had not then been living, had little control over his behaviour and was not prepared to cooperate with social services. The agency then terminated her employment. Her claim against the police for infringement of her rights under article 8 failed but only on the basis that the interference with her rights had been justified. By reference to various decisions of the European Court of Human Rights ("the ECtHR"), Lord Hope of Craighead said:

> "24…it has been recognised that respect for private life comprises, to a certain degree, the right to establish and develop relationships with other human beings…Excluding a person from employment in her chosen field is liable to affect her ability to develop relationships with others, and the problems that this creates as regards the possibility of earning a living can have serious repercussions on the enjoyment of her private life: see *Sidabras v Lithuania* (2004) 42 EHRR 104, para 48. She is entitled also to have her good name and reputation protected… As Baroness Hale said in *R (Wright) v Secretary of State for Health* [2009] AC 739, para 36, the fact that a person has been excluded from employment is likely to get about and, if it does, the stigma will be considerable.
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> …
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> 27. This line of authority from Strasbourg shows that information about an applicant's convictions which is collected and stored in central records can fall within the scope of private life within the meaning of article 8(1), with the result that it will interfere with the applicant's private life when it is released. It is, in one sense, public information because the convictions took place in public. But the systematic storing of this information in central records means that it is available for disclosure under Part V of the 1997 Act long after the event when everyone other than the person concerned is likely to have forgotten about it. As it recedes into the past, it becomes a part of the person's private life which must be respected. Moreover, much of the other information that may find its way into an ECRC relates to things that happen behind closed doors. A caution takes place in private, and the police gather and record information from a variety of sources which would not otherwise be made public."

See also the judgment of Lord Neuberger of Abbotsbury at paras 68 to 72.

17. Building on the comments in those two main judgments in the *L* case, the Court of Appeal in the present cases held that, in that a caution takes place in private, the receipt of a caution was part of a person's private life from the outset. The proposition calls for careful thought but in the end I find myself in agreement with it. My receipt of a caution, whenever received, is a sensitive, certainly embarrassing and probably shameful, part of my history, which may have profound detrimental effects on my aspirations for a career; and the unchallengeable fact that I did commit the offence for which I was cautioned makes it no less sensitive but, on the contrary, more sensitive.

18. These appeals do not relate to the disclosure of a spent conviction which will have been imposed in public. But it might be helpful to refer to Lord Hope's comment in the *L* case at para 27, quoted at para 16 above, that "as it recedes into the past it becomes a part of the person's private life…". Liberty, an intervener in these appeals, suggests that the point at which a conviction recedes into the past and becomes part of a person's private life will usually be the point at which it becomes spent under the 1974 Act. It is a neat and logical suggestion which this court should adopt.

INTERFERENCE: THE 1997 ACT

19. In the *Sidabras* case, cited by Lord Hope in para 24 of his judgment in the *L* case quoted at para 16 above, the ECtHR addressed a law, passed following Lithuania's declaration of independence, that former KGB officers could not pursue certain types of employment in the private sector for ten years. It held that the law violated the rights of the two applicants under Article 8, taken in conjunction with article 14. The court said:

> "48. …Admittedly, the ban has not affected the possibility for the applicants to pursue certain types of professional activities. The ban has, however, affected the applicants' ability to develop relationships with the outside world to a very significant degree, and has created serious difficulties for them as regards the possibility to earn their living, with obvious repercussions on their enjoyment of their private life."

20. It was the *Sidabras* case, together with other authorities, which led Lord Hope to conclude in the *L* case at para 27, also quoted at para 16 above, that it was the disclosure of the information about L in the ECRC which represented the interference with her rights. Referring to the precursor of section 113B(3)(a), Lord Neuberger added, at para 75 of the *L* case, that "it is likely that an adverse ECRC, ie one falling within section 115(6)(a), will represent something close to a killer blow

to the hopes of a person who aspires to any post which falls within the scope of the section". In the present appeals it is true that, in the end, T was allowed to enrol on the sports studies course and it is possible, albeit unlikely, that, notwithstanding the refusal of the provider of the training course to put her forward for work in the care sector, JB could have secured it by direct application. But the point is that, in both cases, the disclosure in the ECRCs of the cautions issued to them significantly jeopardised entry into their chosen field of endeavour.

21. This court need therefore proceed no further before concluding not just that (as the Secretaries of State concede) the ECRCs, once issued, were capable of interfering with the rights under Article 8 of the two applicants but that they did interfere with them. It is, however, at least arguable that the state's *retention* of data about cautions (and spent convictions), even prior to their disclosure in a CRC or an ECRC, amounts to interference with Article 8 rights which thus requires justification. In *S v United Kingdom* (2009) 48 EHRR 1169 the Grand Chamber of the ECtHR held that the retention by the police, save in exceptional circumstances, of DNA samples and fingerprints taken from persons suspected, but never convicted, of a criminal offence represented an interference with their rights under Article 8: paras 77 and 86. It rejected the UK's argument that there was no interference until use was made of the retained material (para 70) and it held - persuasively - that the applicants' reasonable concern about its possible future use was relevant to whether an interference had already arisen (para 71). It is true that the Grand Chamber stressed the highly personal and sensitive nature of the material (para 72) and one could argue that a record of cautions and of spent convictions is not in that league. On the other hand, in *Bouchacourt v France*, Application No.5335/06, (unreported) 17 December 2009, which concerned material on a sex offenders' register, the ECtHR seemed to declare categorically that retention of data relating to private life by itself represented interference irrespective of its sensitivity (para 57). This court can leave open whether it should go as far as that.

POSITIVE OBLIGATIONS: THE 1975 ORDER

22. The Secretaries of State put forward a distinct – and undeniably seductive – argument in response to the challenge of T to the lawfulness of the 1975 Order. It relates to the difference between the imposition by the Convention upon a public authority of an obligation *not to act* in such a way as to violate a person's human rights (ie a negative obligation) and its imposition upon it of an obligation *to act* in such a way as not to do so (ie a positive obligation). In the case of the 1997 Act (they argue) the state has *done* something: for it has issued a certificate. If the court concludes that it has thereby interfered with the Article 8 rights of T and JB and proceeds also to conclude that the state has thereby violated them, it will hold that the state must *not* continue to do it. In other words the *positive* character of the state's violation attracts the imposition of a *negative* obligation. The argument is

that, in the case of the 1975 Order, the nature of the alleged violation of the Article 8 rights of T is opposite: it is that the state has *not done* something, specifically that it has *not* legislated so as to permit him to deny (let us not forget, falsely to deny) that, when aged 11, he received two warnings for stealing two bicycles and, equally, that it has *not* legislated so as to disable specified third parties from making decisions by reference to his receipt of them. Unlike, for example, Article 6(3), Article 8 of the Convention does not routinely oblige a member state to take positive action, whether it be to legislate or otherwise; and on any view (see para 24 below) it will pay special respect to the judgment made by the state before obliging it to do so.

23. An initial question is how the imposition of a positive obligation can arise at all under Article 8. Paragraph 2 prohibits interference with the exercise of the right except in the circumstances there specified. When it has omitted to do something, how can the state be said to have interfered? Happily the ECtHR does not seek to pretend that non-interference can amount to interference. In *Rees v United Kingdom* (1986) 9 EHRR 56, at paras 35 and 37, the court accepted that, by failing to confer on a transsexual a right to an amended birth certificate, the state was not guilty of "interference" with his rights under article 8. It noted that the article could nevertheless give rise to positive obligations but proceeded, in a decision later superseded, not to discern one in that situation. How, then, can the article yield a positive obligation? The answer is to be found in para 1 of the article, which is not cast in prohibitory terms. It provides that everyone has the right to "respect" for certain things and in some circumstances a state can "respect" them only by taking positive action: *Marckx v Belgium* (1979) 2 EHRR 330 at paras 31 and 43.

24. It is necessary therefore to address the argument of the Secretaries of State on its merits. They rely on the decision of the ECtHR in *Mosley v UK* (2011) 53 EHRR 1011. A domestic court had held that, in publishing an article about his participation in sexual activities, a newspaper had breached the applicant's privacy. Before the ECHtR he contended that, by failing to legislate so as to require a newspaper to give prior notice to a person of publication of material about his personal life, the UK had infringed his rights under article 8. The claim failed. The court said:

> "106... the words 'the right to respect for…private…life' which appear in article 8 require not only that the state refrain from interfering with private life but also entail certain positive obligations on the state to ensure effective enjoyment of this right by those within its jurisdiction. Such an obligation may require the adoption of positive measures designed to secure effective respect for private life even in the sphere of the relations of individuals between themselves.

> 107. The court emphasises the importance of a prudent approach to the state's positive obligations to protect private life in general and of the need to recognise the diversity of possible methods to secure its respect. The choice of measures designed to secure compliance with that obligation in the sphere of the relations of individuals between themselves in principle falls within the contracting states' margin of appreciation. However, this discretion goes hand in hand with European supervision.
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> 108… First, the court reiterates that the notion of 'respect' in article 8 is not clear-cut, especially as far as the positive obligations inherent in that concept are concerned: bearing in mind the diversity of the practices followed and the situations obtaining in the contracting states, the notion's requirements will vary considerably from case to case. Thus contracting parties enjoy a wide margin of appreciation in determining the steps to be taken to ensure compliance with the Convention. In this regard, the court recalls that by reason of their direct and continuous contact with the vital forces of their countries, the state authorities are, in principle, in a better position than the international judge to give an opinion on how best to secure the right to respect for private life within the domestic legal order.
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> 109. Secondly, the nature of the activities involved affects the scope of the margin of appreciation. …[A] serious interference with private life can arise where the state of domestic law conflicts with an important aspect of personal identity. Thus, in cases concerning article 8, where a particularly important facet of an individual's existence or identity is at stake, the margin allowed to the state is correspondingly narrowed. The same is true where the activities at stake involve a most intimate aspect of private life.
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> 110. Thirdly, the existence or absence of a consensus across the member states of the Council of Europe, either as to the relative importance of the interest at stake or as to the best means of protecting it, is also relevant to the extent of the margin of appreciation: where no consensus exists, the margin of appreciation afforded to states is generally a wide one."

25. From the foot of these observations the Secretaries of State argue that even a domestic court should afford considerable latitude to the state before interpreting article 8 as imposing upon it a positive obligation to legislate in the manner proposed; that T cannot claim that the issue surrounds the most intimate aspect of

his private life; and that there is no consensus among member states about the extent to which minor or ancient entries in a person's criminal record should be deleted.

26. The trouble is, however, that the classification of an obligation as positive rather than negative is not always as easy as in relation to the obligation proposed in the *Mosley* case. The boundaries between them are not susceptible of precise definition: *Garnaga v Ukraine*, ECtHR, (Application No.20390/07) (unreported) 16 May 2013, para 37. T argues, with only a limited degree of contrivance, that the state has already taken a positive step – namely to attach legal sanctions, civil and sometimes even criminal, to untruthful representations made in specified circumstances – and that the only question is whether its delineation of those circumstances has been so broad as to have violated his rights and whether it should therefore be the subject of a negative obligation, namely not to maintain rules of that breadth. He argues, analogously, that the state has already taken another positive step – namely by the 1974 Act to relieve a person from an obligation to refer to certain entries in his criminal record save where excepted by the 1975 Order – and that the only question is whether its delineation of the exceptions has been so broad as to have violated his rights and whether it should therefore be the subject of a negative obligation, namely not to maintain exceptions of that breadth. In this respect there is an analogy with the decisions of the ECtHR that, although the Convention does not require a state to establish, by article 6, a system for appeals (*Delcourt v Belgium* (1970) 1 EHRR 355) nor, by article 1 of Protocol 1, a welfare system (*Carson v United Kingdom* (2010) 51 EHRR 369), the system, if established, must not violate Convention rights.

27. If, which is therefore debateable, T's challenge to the 1975 Order is properly classified as a demand for the imposition of a positive obligation, I conclude that, of itself, the classification should not inhibit the court from further proceeding to determine the challenge and, if valid, from granting such remedy in respect of it as would otherwise be appropriate. In *Dickson v United Kingdom* (2008) 46 EHRR 927, the ECtHR said, at para 71, that, irrespective of whether the suggested obligation was positive or negative, the core issue was whether a fair balance had been struck between the competing interests. In so concluding I have an eye also to the paradox which would arise if treatment of the 1997 Act differed from treatment of the 1975 Order: it would make no sense to conclude that the state had violated T's rights by issue of the ECRC for the attention of the college but that it had not violated them by requiring him truthfully to answer its questions about his criminal record nor by permitting the college to act in reliance upon his answers in deciding whether to enrol him on the course. For an ECRC is in effect no more than the method of verification of a person's answers.

LEGALITY

28. In that, by the issue of the ECRCs under the 1997 Act and, in T's case, by the imposition upon him of the obligations of the 1975 Order, they interfered with the right of T and JB to respect for their private life, para 2 of article 8 casts upon the Secretaries of State the onus of establishing that the interference was "in accordance with law" (the requirement of legality) and "necessary in a democratic society…" (the requirement of necessity).

29. But for the decision of the ECtHR on 13 November 2012 in *MM v UK*, No 24029/07 *The Times* 16 January 2013, to which I will turn at para 35 below, there is in my view little reason to doubt that the issue of the certificates and the imposition of the obligations upon T were, at any rate, in accordance with law.

30. *R (Gillan and another) v Comr of Police of the Metropolis* [2006] UKHL 12, [2006] 2 AC 307, concerned a power given by statute to senior police officers, in the event that they considered it expedient for the prevention of acts of terrorism, to confer authority, limited by time and place, upon constables to stop and search pedestrians at random. In the domestic courts two innocent pedestrians, who had been stopped and searched, unsuccessfully argued that the stop and search regime had violated their Convention rights, including under article 8. They argued unsuccessfully that it was not in accordance with law. Lord Bingham of Cornhill said:

> "34. The lawfulness requirement in the Convention addresses supremely important features of the rule of law. The exercise of power by public officials, as it affects members of the public, must be governed by clear and publicly accessible rules of law. The public must not be vulnerable to interference by public officials acting on any personal whim, caprice, malice, predilection or purpose other than that for which the power was conferred. This is what, in this context, is meant by arbitrariness, which is the antithesis of legality. This is the test which any interference with or derogation from a Convention right must meet if a violation is to be avoided."

Lord Hope's analysis, at para 52, was only subtly different. He too stressed the need for the domestic law to be not only accessible but clear ("sufficiently precise to enable the individual to foresee the consequences") but he suggested that the need for the regime not to be arbitrary was a further factor as opposed to being the opposite side of the coin of clarity and precision. At all events, when the pedestrians took their case to the ECtHR, they secured a contrary determination, namely that the stop and search regime had not been in accordance with law and that their rights under article 8 had been violated: *Gillan v United Kingdom* (2010) 50 EHRR 1105. The court's analysis was in conflict not with the enunciation of legal principle by Lord Bingham but only with the committee's application of it.

> "76 …the words, 'in accordance with the law' require the impugned measure both to have some basis in domestic law and to be compatible with the rule of law, which is expressly mentioned in the preamble to the Convention and inherent in the object and purpose of article 8. The law must thus be adequately accessible and foreseeable, that is, formulated with sufficient precision to enable the individual – if need be with appropriate advice – to regulate his conduct.
>
> 77. For domestic law to meet these requirements it must afford a measure of legal protection against arbitrary interferences by public authorities with the rights safeguarded by the Convention. In matters affecting fundamental rights it would be contrary to the rule of law… for a legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate with sufficient clarity the scope of any such discretion conferred on the competent authorities and the manner of its exercise."

31. It could not seriously be argued that the way in which the regimes for the issue of certificates under the 1997 Act and for the obligation to answer questions (and for the questioner to act in reliance on them) under the 1975 Order worked were insufficiently accessible or foreseeable for them not to be "in accordance with law" as interpreted in the *Gillan* case both in the House of Lords and in the ECtHR.

32. There is no doubt that, in the light of the way in which the requirements of legality and necessity in article 8(2) have been developed, there is some overlap between them. To take the obvious example, rules which are insufficiently precise for the purposes of the former are likely to go wider than is necessary to accomplish their legitimate objective for the purposes of the latter. It is however important that we domestic judges, and particularly (if I may say so) our respected colleagues in the ECtHR, should not erode the distinction between the two requirements more than logic compels. It is particularly important that our colleagues should not do so because a cardinal feature of their court's jurisprudence in relation to necessity is to afford a margin of appreciation, of greater or lesser width, to the contours within which the member state has seen fit to draw the impugned rules. The ECtHR does not extend the margin of appreciation - and it is right that it should not do so –to its consideration of legality.

33. In *S v United Kingdom* (2009) 48 EHRR 1169, cited in para 21 above, concerning the retention of fingerprints and DNA samples taken from those suspected of a crime, the ECtHR observed, at para 99, that the statutory authority for the use of such material "for purposes related to the prevention or detection of crime" was in rather general terms. It went on to conclude that complaints about the absence of detailed safeguards in respect of the use (and storage) of the material

were more conveniently considered in terms of the necessity for the interference. In that it was to proceed to conclude that the nature of the statutory powers overstepped the margin of appreciation and failed to satisfy the requirements of necessity, it saw no need to decide whether it also failed to satisfy the requirement of legality. When the issues had been before the House of Lords, the committee had given short shrift to the argument that retention of the material had not been in accordance with law: *R (S) v Chief Constable of the South Yorkshire Police* [2004] UKHL 39, [2004] 1 WLR 2196, para 36. It would have been surprising if, whatever its other shortcomings, the statutory power had been held in the ECtHR to fail even the requirement of legality.

34. In *Kennedy v United Kingdom* (2010) 52 EHRR 207 the applicant failed to persuade the ECtHR that the state's possible past, and at any rate its potential future, interception of his telephone and email communications had violated his rights under article 8. The court held that there were sufficient safeguards in the interception regime, including in particular a right of complaint to a tribunal (which had rejected a complaint by the applicant), to justify interference with his rights. But the court took a significant step towards blurring the difference between legality and necessity: for it decided, at para 155, to address them jointly.

35. So we arrive at the *MM* case, cited above. The applicant, who lived in Northern Ireland, was a baby's paternal grandmother and was distressed at the prospect of the mother's removal of him to her native Australia. In order, apparently, to induce the mother and her son to reconcile their differences, the grandmother disappeared with the baby for more than a day. She accepted a caution for the offence of child abduction on the basis that, as the Northern Ireland police assured her in accordance with what was then their practice, the caution would be deleted from her record after five years, namely in 2005. At around that time, however, the Northern Ireland police changed their practice so as to retain adult cautions on file indefinitely and, in that year, they disclosed it to a potential employer of MM, who, in consequence, did not offer her employment. The disclosure was pursuant to the powers of the Northern Ireland police at common law for sections 113A and 113B of the 1997 Act did not come into force in Northern Ireland until 2008. The ECtHR nevertheless also considered the new, statutory regime for the issue of certificates on the basis that the grandmother was at risk of its future application to her.

36. In the *MM* case the ECtHR explained its conclusion that the Northern Ireland police had violated the grandmother's rights under article 8 as follows:

> "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."

37. In the present appeals the Secretaries of State argue that it is surprising that the ECtHR should have determined the grandmother's application by reference to the requirement of legality. The first of that court's three points in para 206 is criticism of lack of clarity about the extent of the common law powers of the Northern Ireland police, albeit circumscribed by the Data Protection Act 1998, to retain and disclose information about cautions. That criticism, well-founded or otherwise, is indeed one of inadequate precision. The court made its second point, namely the absence of mechanism for independent review, after, in particular, having noted at para 197 the stress laid by this court on that factor in its analysis of the regime for notifications by sex offenders in *R (F) (A Child) v Secretary of State for the Home Department (Lord Advocate intervening)* [2010] UKSC 17, [2011] 1 AC 331. But this court's analysis was specifically conducted in terms of necessity rather than legality (see para 41, Lord Phillips of Worth Matravers). It is hard to see how absence of review can affect either the accessibility or the precision of the legislation although, if safeguards against arbitrariness are a free-standing aspect of the principle, it might arguably qualify in that regard. But in my view the court's third and final point, namely its powerful criticism of the failure of the regime under the 1997 Act to regulate disclosure by reference to the circumstances of the caution, clearly addresses its proportionality and thus the necessity, as opposed to the legality, of the interference. Then in para 207 the court concluded that the consequence of these three points was an absence of "safeguards" which precipitated a violation of the grandmother's rights and that "accordingly" the retention and

disclosure of the information about her caution were not in accordance with law. So, although – significantly - the grandmother had not even disputed that the interference was in accordance with law (para 192), the court reached its determination on that basis and therefore without any reference to the margin of appreciation.

38. In my view the Secretaries of State raise a legitimate concern that issues which, when properly analysed, fall to be resolved in the ECtHR by reference to the principle of necessity, and therefore to attract extension to the member state of the margin of appreciation, should not instead be resolved by reference to the principle of legality. Although the first and perhaps also the second of the three points addressed above probably justified the resolution of the *MM* case by reference to it, I take the view, in respectful disagreement with the other members of this court, that the 1997 Act does not fall foul of the principle of legality. The Court of Appeal was in my view right to decline to conclude, even in the light of the *MM* case, that either the 1997 Act or the 1975 Order did so; and counsel for T and JB have been wise not to seek to uphold any part of its decision by reference to the principle of legality. The complaint in the *MM* case of an absence of a clear legislative framework in Northern Ireland and of lack of clarity in the contours of the common law powers of its police has no analogue in the present cases; and the instant proceedings demonstrate independent review of a most exacting character. Lord Reed suggests in para 114 that the question whether there are safeguards which enable the proportionality of the interference adequately to be examined affects legality, whereas the question whether the interference was proportionate affects necessity. But in my view the ECtHR's third point logically falls within the latter; and I deprecate its seepage into the former. There is also, if I may say so, a paradox about Lord Reed's conclusion on the one hand, at para 119, that the 1997 Act falls foul of the principle of legality but yet his disinclination to conclude on the other hand, at para 140, that the 1975 Order does so: for both the arrangement of the two provisions and the charge against them run in broad parallel and the different degree of their intrusiveness, to which Lord Reed refers at para 140, is pre-eminently a factor which relates to necessity.

NECESSITY

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).

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 judgement 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 judgement in these respects was wrong.

41. Nevertheless the nature of T's and JB's attack on the regime is obvious. It is that it operated indiscriminately. The exception (so the argument goes) from the eradication for practical purposes of certain entries from a person's record in accordance with the 1974 Act should be bounded by two sets of rules: rules which specify the type of request which should justify some disclosure and rules which identify the entries which should then be disclosed. The regime certainly contained rules of the former character. But there were none of the latter character. If the type of request was as specified, there had to be disclosure of everything in the kitchen sink. There was no attempt to separate the spent convictions and the cautions which should, and should not, then be disclosed by reference to any or all of the following: (a) the species of the offence; (b) the circumstances in which the person committed it; (c) his age when he committed it; (d) in the case of a conviction, the sentence imposed upon him; (e) his perpetration or otherwise of further offences; (f) the time that elapsed since he committed the offence; and (g) its relevance to the judgement to be made by the person making the request. The case of *T* is held up as an egregious example of the flaws in the regime. His theft of two bicycles before he even became a teenager was disclosed in connection with his proposed participation in sporting activities with children, to which (it is said) it had no conceivable relevance; indeed entries reflective of childish error should be a particular candidate for total elimination in the interests (in the words of article 40 of the UN Convention on the Rights of the Child 1989) "of promoting the child's reintegration and the child's assuming a constructive role in society".

42. T and JB fortify their attack by demonstrating that, long before they introduced the 2013 amendments, the Secretaries of State were actively contemplating the making of changes to the regime which would make its operation less indiscriminate. In 2010 the Secretary of State for the Home Department established the Criminal Records Review and set its terms of reference in arresting language as follows:

> "To review whether the criminal records regime strikes the right balance between respecting civil liberties and protecting the public and make proposals to scale back the use of systems involving criminal records to common sense levels."

Mrs Mason, the government's Independent Advisor for Criminality Information Management, was appointed to conduct the review in two phases, of which the first was to encompass disclosure under Part V of the 1997 Act. Mrs Mason published her *Report on Phase One* in February 2011 and aptly headed it "A Common Sense Approach". Her fifth recommendation was that the government should introduce a filter to remove old and minor conviction information from criminal record checks and that an advisory panel, which the government had already set up, should make recommendations about the optimum mechanism for filtering them. In December 2011 the government responded that it was considering the proposal and was in particular attempting to identify an appropriate and workable filtering mechanism: *Independent Review of the Criminal Records Regime – Government Response*, p 3. At about the same time the panel made its report; but, although all members of it were agreed on eight basic principles, they were not unanimous about how they should be applied. Evidence filed in these proceedings on behalf of the Secretary of State for the Home Office convincingly demonstrates the complexities of developing a satisfactory filter, with which the government was apparently continuing to wrestle until (so it seems to have considered) its hand was forced into making the 2013 amendments.

43. Against the attack on the regime the Secretaries of State raise three points by way of defence.

44. They say, first, that a filter mechanism was always in place in that it was only convictions and cautions for recordable offences that were entered on the Police National Computer and were therefore available for disclosure. About one half of all offences are not recordable and so are, in that sense, filtered out. An offence is recordable if it is punishable with imprisonment or is one of a number of disparate offences identified in the Schedule to the National Police Records (Recordable Offences) Regulations 2000 (SI 2000/1139). The trouble is however that the identification of an offence as recordable under the Regulations is not effected with a view to limiting disclosure under the 1997 Act to what might be relevant. An offence which is imprisonable but which in the event is visited with a minor penalty is recorded; but an offence which is not imprisonable but which is visited with a substantial fine is not recorded. A few offences relevant to suitability for certain occupations, such as causing unnecessary suffering to animals contrary to section 4(1) of the Animal Welfare Act 2006, are not imprisonable and are not identified as recordable. By contrast, a multitude of offences irrelevant to suitability are imprisonable and so are recordable.

45. The Secretaries of State say, second, that the regime reflected a conclusion by Parliament that it was preferable to make the prospective employer or other registered person the judge of the relevance of the disclosure to his decision. Rely on him (they say) to sift the wheat from the chaff. But will he do so? 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.

46. The Secretaries of State say, third, that the Convention can discern justification for an interference in a regime set within bright lines, which is simple and inexpensive to operate. In this regard they rely, in particular, on three authorities. The first is *Evans v United Kingdom* (2008) 46 EHRR 728, where the ECtHR held that a woman's rights under article 8 had not been violated by application of a "bright-line" rule that a frozen embryo which a woman and a man had created could no longer be implanted in the woman once the man had withdrawn his consent. The applicant had complained in particular of the lack of any mechanism for the rule to be disapplied but the court held at para 89 that the absolute nature of the rule promoted legal certainty and avoided the problems of individual assessment of the incommensurable interests of the man and the woman. The second is *R (RJM) v Secretary of State for Work and Pensions (Equality and Human Rights Commission intervening)* [2008] UKHL 63, [2009] AC 311, in which the House of Lords held that the application of a rule which disentitled a person from receiving a state disability premium when he became homeless had not violated his rights under Article 1 of the First Protocol to the Convention even though it was a blunt instrument and hard cases would fall on the wrong side of its line (Lord Neuberger, para 54). The third is *Animal Defenders International v United Kingdom* (2013) 57 EHRR 607, in which the Grand Chamber held that the rights under article 10 of an animal rights group had not been violated by the prohibition of their proposed television advertisement pursuant to a statutory prohibition on "political advertising", defined in wide terms. The difficulty of framing the legislation and the depth of prior consideration given to it had afforded the state a wide margin of appreciation, which the prohibition did not exceed.

47. Three other authorities, by contrast, reject bright-line rules. In *Hirst v United Kingdom (No 2)* (2006) 42 EHRR 849 the disenfranchisement of convicted prisoners, irrespective of the length of their sentence or of the gravity of their offence, was held to violate their rights under Article 3 of the First Protocol. "Such a general, automatic and indiscriminate restriction on a vitally important Convention right", said the ECtHR at para 82, "must be seen as falling outside any acceptable margin of appreciation". In the *S* case (2009) 48 EHRR 1169, cited at para 21

above, it was the "blanket and indiscriminate nature" of the powers of retention of the fingerprints and DNA samples which rendered the interference disproportionate and precipitated the violation (para 125). And in the *F* case [2011] 1 AC 331, cited at para 37 above, the obligation upon sex offenders sentenced to imprisonment for at least 30 months to notify the police of their changing circumstances for the rest of their lives following release violated their rights under article 8 because it failed to provide for review of whether they continued to pose a risk of re-offending (para 58).

48. It is easy to conclude that, of the above authorities referable to bright-line rules, the *F* case is closest to the present. The three situations in which interference was justified by bright-line rules related to complex areas of judgement in which it was far from obvious that a more calibrated system could operate more satisfactorily. The *F* case, like the present cases, addressed a regime which condemned people to suffer, like an albatross which they could never shake off, permanent adverse consequences of ancient wrong-doing notwithstanding completion of the ostensible punishment (if any) and irrespective of its continuing significance. 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. They point out, more broadly, that the fact that another, more specific, regime might be able to be devised does not, of itself, render the contested regime disproportionate: *Wilson v First County Trust Ltd (No.2)* [2003] UKHL 40, [2004] 1 AC 816, para 70. 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".

49. In the *L* case [2010] 1 AC 410, cited at para 16 above, the subject-matter was, as there explained, soft intelligence included in an ECRC. Lord Hope, at para 41, endorsed remarks made in *R (X) v Chief Constable of the West Midlands Police* [2004] EWCA Civ 1068, [2005] 1 WLR 65, para 20, in which, although that case also related to soft intelligence, Lord Woolf CJ seems to have accepted that the regime for disclosure under the 1997 Act, taken as a whole, did not violate rights under article 8. Lord Hope added that the question was whether the particular exercise of judgement required by the Act of the police in its disclosure of soft intelligence had been proportionate. Lord Neuberger, at para 76, was more specific. As a preface to his treatment of soft intelligence, he said that he was "prepared to proceed on the basis" that there was nothing objectionable about the inclusion in an ECRC of spent convictions and cautions, which reflected the actual commission of

crimes. There was no focus in the *L* case on the indiscriminate disclosure of spent convictions and cautions and, notwithstanding the eminence of their authors, the above remarks cannot represent a significant contribution to the decision for which the current appeals call.

50. In its application to the cases of T and JB the regime set up by the 1997 Act and by the 1975 Order failed the requirement of necessity. The disclosure of their cautions, obviously that of T but also in my view, in the light of the triviality of her one and only offence, that of JB, 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; and so it violated their rights under article 8.

THE 1997 ACT: DECLARATION OF INCOMPATIBILITY

51. Under article 34 of the ECHR the jurisdiction of the ECtHR is to determine an application from a person claiming to be the victim of a violation by a member state of his Convention rights. So its inquiry is into violation in the individual case before the court. When it concludes that the legislation of a state is incompatible with the Convention, the ECtHR is understood to mean not that the legislation will always operate incompatibly but that it operated incompatibly in its application to the individual case. In the *Hirst* case (2006) 42 EHRR 849, cited in para 47 above, the ECtHR appeared to depart from this understanding: it appeared to consider whether the disenfranchisement of prisoners was compatible with the Convention irrespective of the fact that the applicant was a life prisoner to whom denial of the vote could in any event scarcely amount to a violation. The court's approach was criticised first in a minority judgment of the court in that case and then by this court in *R (Chester) v Secretary of State for Justice* [2013] UKSC 63, [2014] AC 271. Lady Hale observed, at para 100, that "it would have been in accordance with the consistent practice of the court for the majority to indicate in precisely what way *Mr Hirst's* rights had been violated by the law in question". Then, relevantly to the present appeals, she added "it seems to me that the courts of this country should adopt that sensible practice when considering the application of the various remedies provided by the Human Rights Act 1998". Finally, in addressing the apparent width of the power to make a declaration of incompatibility under section 4 of the 1998 Act, she stated at para 102 that "the court should be extremely slow to make a declaration of incompatibility at the instance of an individual litigant with whose own rights the provision in question is not incompatible".

52. As Lady Hale's last statement makes clear, a declaration of incompatibility is not a declaration that the legislation *always* operates incompatibly with convention rights. It is a declaration only that it is *capable* of operating incompatibly and, almost always, that it *has* operated incompatibly in the case before the court. Thus, in *Bellinger v Bellinger* [2003] 2 AC 467, a statutory provision that a marriage was void if the parties to it were not respectively male and female was declared

incompatible even though it infringed the rights under Article 8 only of those who had undergone gender reassignment and wished to marry persons of their own genetic sex. In making a declaration of incompatibility of the 1997 Act with article 8, the Court of Appeal was therefore not suggesting that disclosure of spent convictions and cautions in certificates would always violate rights under article 8. Its order in T's case was appropriately qualified, namely that the provisions of the Act were incompatible only "insofar as they require the disclosure of *all* convictions and cautions ... recorded on central records" (emphasis supplied).

53. In relation to the 1997 Act the Court of Appeal was fully entitled, in the exercise of its discretion under section 4 of the 1998 Act, to make a declaration of incompatibility. It was impossible for it to read and give effect to its provisions in a way which was compatible with the rights of T and JB pursuant to section 3 of the 1998 Act. The beauty of its declaration was that, while it alerted Parliament to the fact that, for the reasons given in the court's judgment, the 1997 Act was capable of operating incompatibly with Convention rights and so required amendment (which the Secretary of State could then achieve by a remedial order under section 10 of the 1998 Act), it did not "affect the validity, continuing operation or enforcement" of the Act (section 4(6)(a) of the 1998 Act). Although the Secretary of State for the Home Department contends that, by her amendment of the Act in 2013, she has remedied the incompatibility identified by the Court of Appeal, its declaration, when made, was rightly made and it seems logical, in the context of an appeal, not now to set it aside. This court is informed that in future proceedings it may be argued that operation even of the amended regime under the Act will have precipitated a violation of rights under article 8. Today this court can say nothing about that.

THE 1975 ORDER: ULTRA VIRES?

54. No doubt the Court of Appeal considered that, had it been open to it to do so, the convenient course would have been to make an analogous declaration of incompatibility in relation to the 1975 Order. But it was not open to it to do so: for the order is subordinate legislation and it cannot be said, for the purposes of section 4(4)(b) of the 1998 Act, that the 1974 Act prevents removal of the incompatibility with article 8 rights to which its operation is capable of giving rise.

55. The Secretaries of State contended before the Court of Appeal, as, albeit faintly, they contend before this court, that in the case of the 1975 Order, it *is* possible to read it and give effect to it in a way which is compatible with Convention rights. The contention is that article 4 of the 1975 Order, which releases certain prospective employers and other specified decision-makers from the prohibition against acting in reliance on spent convictions and cautions, should be qualified by words such as "save where this would violate the article 8 rights of any person". No doubt it is true that many of the specified employers (such as public hospitals and

schools) and other decision-makers are public authorities for whom it is unlawful to act incompatibly with Convention rights and who therefore have in any event to make the judgements thereby required. Nevertheless, as the Court of Appeal held, it would be unsatisfactory for each individual decision-maker to be made the arbiter – albeit perhaps only the initial arbiter – of whether his proposed action would violate the rights of the person whom he has questioned. The 1975 Order is the responsibility of the Secretary of State for Justice. It is for him to devise a regime which is not capable of operating so as to violate rights under article 8 and the court should not lend itself to a construction which enables him to pass this buck to individual decision-makers.

56. So it was that the Court of Appeal exercised its discretion to grant a declaration that the 1975 Order was ultra vires.

57. When is subordinate legislation ultra vires? A leading, relatively recent, example is *Director of Public Prosecutions v Hutchinson* [1990] 2 AC 783. The Secretary of State for Defence made a byelaw prohibiting all entry into designated land at Greenham Common without authority. His statutory authority for doing so was expressed not to extend to interference with any right of common. It turned out that there were 62 commoners who had rights to take gravel and wood from, and to graze animals on, part of the land which he had designated. So he had no power to prohibit entry in such unqualified terms. Then the question arose whether the byelaw could be severed so that its validity could be retained in respect of people who, like the appellants, were not commoners yet had entered the land. To this the House of Lords gave a negative answer. It held, at p 811, that the fact that the invalid feature of the byelaw could not be excised with a blue pen did not preclude severance. What precluded it was that, if the byelaw was so construed as to allow the 62 commoners to enter the land, the legislative purpose behind it would be undermined: p 813. By way of contrast the House cited with approval *Dunkley v Evans* [1981] 1 WLR 1522, in which the Minister of Agriculture had made an order prohibiting fishing for herring in designated waters. One per cent of the area which he designated was a stretch of water off Northern Ireland which he had no power to include in his designation. The respondents had been fishing for herring in the remaining 99% of the area. The Divisional Court held that the order was severable and that the respondents should have been convicted. These then, are examples of the classic situation in which the width of the subordinate legislation exceeds the contours expressed in the authority for it to be made.

58. Sometimes the court decides that the operation of a piece of subordinate legislation has violated fundamental rights in circumstances in which the logic of the decision means that its operation will always violate fundamental rights. A good example is *A v HM Treasury* [2010] UKSC 2, [2010] 2 AC 534. By a subparagraph of an article of an order purportedly made pursuant to the United Nations Act 1946, the Treasury provided that any person listed by the Sanctions Committee of the

United Nations, on the basis that he was associated with an organisation threatening international peace, was a designated person for the purposes of another order, which dramatically deprived him of access to financial resources. Two of the parties before the court had been so listed. The Supreme Court held that the absence in the order of a facility for them to mount a domestic challenge to the basis of their listing by the Sanctions Committee ran counter to their fundamental rights. The court therefore held that the subparagraph was ultra vires but that a judge had been wrong to declare the whole order to be ultra vires: paras 81 and 83 (Lord Hope) and para 241 (Lord Mance). It is easy to see that the vice of the order was not related to the particular circumstances of the two parties who had been listed: the rights of every person listed by the Sanctions Committee would be violated by the absence in the order of a facility for challenge.

59. 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.

60. It is in the light of the above considerations that the Court of Appeal's declaration that the entire 1975 Order was ultra vires falls to be assessed. Its effect was that the operation of the entire order always violated article 8 rights and therefore that all actions taken by questioners in reliance on disclosures made pursuant to it since 2 October 2000, when section 1 of the 1998 Act came into force, had been unlawful in that, not having been permitted by the 1974 Act, they had not been the subject of any valid exception under the order. The Financial Conduct Authority, for example, which intervenes in the appeals to this court, complains unanswerably that it was given no notice of the Court of Appeal's intention to declare the order to be ultra vires and thus no opportunity to address it; and that only subsequently did it discover that the jurisdiction which it and its predecessor had long purported to exercise so as to withhold specified permissions and approvals in the discharge of its regulatory functions by reference to spent convictions and cautions had been declared non-existent. The Financial Conduct Authority points out that, as a public authority, it must not act incompatibly with a Convention right; that its decisions are reviewable, including for alleged violation of Convention rights, by the Upper Tribunal (Tax and Chancery Chamber**)** pursuant to section 133 of the Financial Services and Markets Act 2000; and that the Court of Appeal did not find, and could not have found, that in its case the operation of the 1975 Order violated rights under article 8.

61. But the effect of the declaration of ultra vires was still more astonishing: for, by a sidewind, its effect was to declare that the regime for the issue of certificates under the 1997 Act was also invalid. Application for a CRC and an ECRC can be made only if accompanied by a statement that it is required for the purposes of an "exempted question": see para 11(c) above. An "exempted question" is a question to which exemption from protection arises under the 1975 Order: see para 11(d) above. If the order is ultra vires, there is no valid definition of an "exempted question" and it follows that no valid application for a CRC or for an ECRC can be made. In that about four million certificates are issued each year, the declaration raises the spectre of the unlawful issue of many millions of certificates.

62. It follows that the Court of Appeal's declaration of ultra vires in relation to the 1975 Order was, apart from anything else, entirely inconsistent with its declaration of incompatibility in relation to the 1997 Act. As noted in para 53 above, it was a fundamental feature of the declaration of incompatibility that it would not affect the validity or continuing operation of the 1997 Act. Yet the declaration of ultra vires had precisely that consequence.

63. What was the source of the Court of Appeal's jurisdiction to make the declaration that the 1975 Order was ultra vires? Section 8(1) of the 1998 Act provides that:

> "In relation to any act… of a public authority which the court finds is… unlawful, it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate."

So the subsection does not confer powers. It refers to existing powers and confirms their applicability to unlawful acts of public authorities. The existing power to make a declaration in proceedings for judicial review is to be found in section 31(2) of the Senior Courts Act 1981, which provides that:

> "A declaration may be made… under this subsection in any case where an application for judicial review, seeking that relief, has been made and the High Court considers that, having regard to –
>
> (a) …
> (b) …
> (c) all the circumstances of the case,
>
> it would be just and convenient for the declaration to be made…"

In *Attorney General's Reference (No 2 of 2001)* [2003] UKHL 68, [2004] 2 AC 72, Lord Bingham suggested in para 24 that, in Convention terms, the words "just and appropriate" in section 8(1) above mean "effective, just and proportionate". Although the notion of convenience has been applicable to the grant of discretionary remedies ever since 1925, it may no longer be helpful and in particular it may sound insufficiently demanding; and Lord Bingham's Convention terms seem just as apt in extracting the meaning of the words "just and convenient" in section 31(2) above as they are in relation to the words in section 8(1). In my view the declaration of ultra vires was not "just" to all those who had been parties to the lawful operation of the order; was not "appropriate"; and on any view was not "proportionate".

64. 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. It was nevertheless appropriate for the Court of Appeal to indicate in its judgment, as the Secretaries of State have recognised in introducing the 2013 amendments, that the interlocking character of the 1997 Act with the 1975 Order demanded that the requisite amendments to the former should broadly be reflected in the latter.

65. So the question arises: should some other form of declaration in relation to the 1975 Order be substituted for that made by the Court of Appeal? Without affecting the validity of the order, might the court, for example, declare that the Secretary of State for Justice acted unlawfully between 2 October 2000 and 29 May 2013 in failing to cause it to be amended so as to render it compatible with article 8 of the Convention? I am grateful to Lord Reed for demonstrating at paras 148 and 149 that the answer is no. The obstruction lies in section 6(6)(a) of the 1998 Act which provides that a failure to lay before Parliament a proposal for legislation cannot amount to an unlawful act within the meaning of section 6(1). As Lord Reed points out, any order made by the Secretary of State by way of amendment of the 1975 Order is, by section 10(2) of the 1974 Act, made subject to approval by resolution of each House of Parliament so, speaking for myself, I am clear that the subject of the suggested declaration of unlawfulness would indeed be the Secretary of State's failure to lay before Parliament a proposal for legislation and would thus be impermissible. The rationale behind section 6(6) of the 1998 Act is the thread, central to the whole Act, of respect for Parliamentary supremacy (see the speech of the Lord Chancellor, Lord Irvine of Lairg, in the House of Lords, 24 November 1997, vol.583, cols 814-5) but whether respect for Parliamentary supremacy truly requires protection to be given to the Secretary of State in circumstances such as the present is an interesting question.

66. Lord Reed proceeds to conclude at para 157 that no judicial remedy in relation to the 1975 Order is necessary. I respectfully agree with the reasons which he gives for that conclusion.

LORD REED

67. If a person applies for a job, the employer is entitled under the common law to ask whatever questions of the applicant he considers relevant, and the applicant is obliged, if he chooses to answer them, to do so truthfully. If therefore he is asked about his criminal record, he can decline to answer the question, in which event he may of course not be considered further for the position. If he chooses to answer the question, however, he is under an obligation to do so truthfully. If he lies about his past, a resultant contract of employment will be regarded as having been induced by a fraudulent misrepresentation. If the deceit is discovered, the employer is in principle entitled to have the contract set aside. A person who obtained employment by means of deceit is also in principle liable to prosecution.

68. The position of a person applying for appointment to certain offices, such as judicial office, or for admission to certain professions, such as accountancy or the legal profession, or for permission to carry on certain other regulated activities, such as providing financial services or operating a casino, is broadly analogous. At common law, the applicant may again be asked about his criminal record. If he chooses to answer the question, he is again under a duty to do so truthfully, and his failure to do so will expose him to the risk of adverse consequences under both the civil and the criminal law.

The Rehabilitation of Offenders Act 1974

69. The common law position was altered significantly by the Rehabilitation of Offenders Act 1974 ("the 1974 Act"). This landmark measure, enacted following the report of a committee chaired by Lord Gardiner, *Living it Down – the Problem of Old Convictions* (1972), was designed to facilitate the rehabilitation of offenders who have not been reconvicted of any serious offence for a period of years, and to penalise the unauthorised disclosure of their previous convictions. The provisions of the Act are complex, and have undergone repeated amendment.

70. The central provision is section 4. Subsection (1) provides:

> "Subject to sections 7 and 8 below, a person who has become a rehabilitated person for the purposes of this Act in respect of a conviction shall be treated for all purposes in law as a person who has not committed or been charged with or prosecuted for or convicted of or sentenced for the offence or offences which were the subject of that conviction; and, notwithstanding the provisions of any other enactment or rule of law to the contrary, but subject as aforesaid -

> (a) no evidence shall be admissible in any proceedings before a judicial authority exercising its jurisdiction or functions in Great Britain to prove that any such person has committed or been charged with or prosecuted for or convicted of or sentenced for any offence which was the subject of a spent conviction; and
>
> (b) a person shall not, in any such proceedings, be asked, and, if asked, shall not be required to answer, any question relating to his past which cannot be answered without acknowledging or referring to a spent conviction or spent convictions or any circumstances ancillary thereto."

71. Section 7 imposes limitations upon the effect of section 4(1) in a number of circumstances, so as to ensure for example that evidence of a person's criminal convictions continues to be admissible in criminal proceedings, and in subsection (4) provides the Secretary of State with the power to add to those circumstances:

> "The Secretary of State may by order exclude the application of section 4(1) above in relation to any proceedings specified in the order (other than proceedings to which section 8 below applies) to such extent and for such purposes as may be so specified."

72. Section 4(2) provides:

> "Subject to the provisions of any order made under subsection (4) below, where a question seeking information with respect to a person's previous convictions, 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 convictions or to any circumstances ancillary to spent convictions, and the answer thereto 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 conviction or

> any circumstances ancillary to a spent conviction in his answer to the question."

Section 4(2) does not affect the rights of employers or others to ask questions about criminal convictions, but it alters the obligations and liabilities of persons to whom the questions are addressed, by requiring such questions to be treated as not relating to spent convictions, and by exempting such persons from any liability by reason of their failure to disclose such convictions. A person with a spent conviction is therefore entitled to treat a question about his criminal record as not relating to spent convictions; and he cannot incur any civil or criminal liability if he answers the question on that basis.

73. Section 4(3) provides:

> "Subject to the provisions of any order made under subsection (4) below, -
>
> > (a) 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 conviction or any circumstances ancillary to a spent conviction (whether the conviction is his own or another's); and
> >
> > (b) a conviction which has become spent or any circumstances ancillary thereto, or any failure to disclose a spent conviction 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."

Section 4(3) deals with the situation where no question is asked, but where an obligation to disclose criminal convictions arises for some other reason. In that situation too, such an obligation is not to extend to spent convictions, and neither the spent conviction nor the failure to disclose it is to be a proper ground for dismissing or excluding the person from (read short) any occupation or employment.

74. Section 4(4) enables exceptions to be made to the general principles set out in section 4(2) and (3):

"The Secretary of State may by order -

> (*a*) make such provision as seems to him appropriate for excluding or modifying the application of either or both of paragraphs (*a*) and (*b*) of subsection (2) above in relation to questions put in such circumstances as may be specified in the order;
>
> (*b*) provide for such exceptions from the provisions of subsection (3) above as seem to him appropriate, in such cases or classes of case, and in relation to convictions of such a description, as may be specified in the order."

75. The operation of section 4(2) and (3) is therefore subject to any order made under section 4(4), and it also depends of course upon the provisions defining the circumstances in which convictions become spent.

76. As originally enacted, the 1974 Act was silent on the subject of cautions, and the equivalent warnings and reprimands given to offenders under the age of 18. The Act was however amended with effect from 19 December 2008 by the Criminal Justice and Immigration Act 2008, so as to enable cautions, warnings, and reprimands to become spent. In what follows, I shall refer generally to "cautions" as including each of these disposals, unless I wish to refer specifically to warnings. The relevant provisions are set out in Schedule 2 to the Act, as added by paragraph 6 of Schedule 10 to the 2008 Act, and in subordinate legislation. They are broadly analogous in structure to those applicable to convictions, subject to the qualification that a caution (other than a conditional caution) becomes spent at the time it is given. In particular, paragraphs 3(1), 3(3), 3(4) and 3(5) of Schedule 2 correspond to sections 4(1), 4(2), 4(3)(a) and 4(3)(b) respectively; paragraph 4 of Schedule 2 corresponds to section 4(4); and paragraph 6(4) of Schedule 2 corresponds to section 7(4).

The Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975

77. As I have explained, sections 4(4) and 7(4) of the 1974 Act confer a power upon the Secretary of State to make exceptions to the general principles laid down in section 4(1), (2) and (3). That power was exercised when the Secretary of State made the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 (SI 1975/1023) ("the 1975 Order"), which came into force on the same day as the Act. The Order has undergone repeated amendment, but the general scheme has remained the same. For present purposes, the relevant version of the Order is as it stood prior

to amendment by the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 (Amendment) (England and Wales) Order 2013 (SI 2013/1198) ("the 2013 Order").

78. The substantive provisions of the Order begin with article 3, which excludes the application of section 4(2) of the Act, and paragraph 3(3) of Schedule 2 to the Act, to questions asked in a number of specified circumstances. These include admission to a number of specified professions, appointment to certain offices and employments, and working with children or in circumstances raising issues of national security.

79. Article 3A of the 1975 Order, added by article 3 of the Rehabilitation of Offenders Act 1974 (Exceptions) (Amendment) (England and Wales) Order 2010 (SI 2010/1153), excludes the application of section 4(2) of the Act, and paragraph 3(3) of Schedule 2 to the Act, in two particular situations. Put shortly, the first is where it is necessary to assess the suitability of a person for work with children, and that person is barred from regulated activity relating to children, or is included in the list kept under the Protection of Children Act 1999, or is subject to a direction made under section 142 of the Education Act 2002. The second situation is the analogous situation relating to work with vulnerable adults, where the person is barred from regulated activity relating to vulnerable adults or is included in the list kept under the Care Standards Act 2000.

80. Article 4 of the 1975 Order excludes the application of section 4(3)(b) of the 1974 Act, and paragraph 3(5) of Schedule 2 to the Act, to professions, offices and employments falling within the scope of article 3. Article 4A of the Order, added by article 3 of the Rehabilitation of Offenders Act 1974 (Exceptions) (Amendment) (England and Wales) Order 2012 (SI 2012/1957), excludes the application of sections 4(2) and (3) specifically in relation to the election of police and crime commissioners. Article 5 of the Order excludes the application of section 4(1) of the Act, and paragraph 3(1) of Schedule 2 to the Act, in relation to particular proceedings, such as disciplinary proceedings in respect of members of the professions falling within the scope of article 3. Finally, article 6 of the Order deals specifically with offices and employments in the Channel Islands and the Isle of Man.

The Police Act 1997

81. Part V of the Police Act 1997 ("the 1997 Act") created a statutory scheme for the disclosure of criminal records and, in limited circumstances, other information held by the police relating to individuals, where required in order to assess the suitability of a person for employment in particular types of position of trust or

sensitivity, such as those involving contact with children, or suitability for the grant of particular types of licence or permit, such as gaming, betting and lottery licences.

82. In particular, sections 113A and 113B (inserted by section 163(2) of the Serious Organised Crime and Police Act 2005) have the practical effect of enabling employers and regulatory bodies to obtain access to such records and information when considering applications falling within the scope of the 1975 Order. The application for a criminal record certificate (or, under section 113B, for an enhanced criminal record certificate) must be made to the Disclosure and Barring Service ("DBS") by the individual to whom the certificate relates. It must be accompanied by a statement by the prospective employer or regulatory body that the certificate is required for the purposes of an "exempted question": that is to say, a question in relation to which section 4(2) of the 1974 Act, or paragraph 3(3) or (4) of Schedule 2 to the Act, has been excluded by an order made under section 4(4) of the Act. In consequence, the circumstances must fall within the scope of articles 3, 3A or 4A of the 1975 Order.

83. In such a situation, disclosure is made under section 113A of every "relevant matter" recorded on the Police National Computer. Under section 113A as it stood at the relevant time, prior to its amendment by the Police Act 1997 (Criminal Record Certificates: Relevant Matters) (Amendment) (England and Wales) Order 2013 (SI 2013/1200), a relevant matter was any conviction or caution, whether spent or not, other than a "disregarded caution" within the meaning of Chapter 4 of Part 5 of the Protection of Freedoms Act 2012 (which is concerned with sexual offences committed upon a consenting adult).

84. Section 113B provides for the disclosure of additional information where it is required for the purpose of an exempted question which is asked for a prescribed purpose. Such purposes include considering the suitability of a person to engage in a regulated activity relating to children or vulnerable adults, as defined in legislation. In that situation, in addition to the information which would be disclosed under section 113A, disclosure is also made under section 113B(4) of any information held on local police records which the chief officer of the relevant police force reasonably believes to be relevant, and which in his opinion ought to be included in the certificate. In exercising these functions, the chief officer is required to have regard to guidance published by the Secretary of State.

85. The process of obtaining a criminal record certificate is thus initiated by the person to whom it relates. He applies for the certificate because he wishes to obtain an employment, or some form of permit or licence to carry on an activity, which involves such a degree of trust, or is of such sensitivity, as to have been excluded from the general regime for the rehabilitation of offenders laid down in the 1974 Act. In practice, without the certificate he will not be able to obtain the employment

or licence in question, since the employer or regulatory authority is likely to insist upon it. The certificate will only be seen by the applicant and by the employer or authority to which he produces it: it is an offence for the latter to make further disclosure of the certificate, under section 124. Provision is made in section 117 for the applicant to be able to challenge the inclusion of information in an enhanced criminal record certificate. Provision is made in section 119B, inserted by section 28 of the Safeguarding Vulnerable Groups Act 2006, for the independent monitoring of the operation of section 113B(4), so as to ensure compliance with article 8 of the Convention.

86. It follows that the relevant provisions of the 1997 Act are different in nature from the 1974 Act and the 1975 Order. The 1974 Act innovates upon the common law in relation to the rights and obligations of employers and persons seeking employment (and, in an analogous manner, in relation to those of persons seeking to be admitted to some office or to be permitted to carry on some activity, and the persons responsible for controlling admission to such offices or the right to carry on such activities). The 1975 Order limits the effect of the 1974 Act, and in consequence preserves the common law position in relation to the employments, offices and activities falling within its scope. Part V of the 1997 Act as amended, and in particular sections 113A and 113B, are on the other hand concerned with the disclosure by the DBS of the criminal records of individuals which are held on the Police National Computer and, where section 113B applies, of additional information held in local police records.

87. There are however both legal and practical connections between the provisions of the 1997 Act and the 1975 Order. Sections 113A and 113B of the 1997 Act are legally dependent upon the 1975 Order, in that the information disclosed under those sections must be required for the purposes of a question falling within the ambit of the 1975 Order. But the converse is not true: the amendment or repeal of sections 113A and 113B would have no effect upon the legal status of the 1975 Order, which was in force for more than 20 years before the 1997 Act was enacted. The amendment or repeal of those sections would nevertheless affect the practical working of the 1975 Order, to the extent that, in circumstances falling within their scope, disclosure under those sections provides a means of obtaining information which might otherwise be obtained from the individual by virtue of the 1975 Order. Since it provides a means of obtaining information which is independent of the individual and potentially more reliable, the effect of the 1997 Act is to improve the effectiveness of the vetting of potential employees by employers and others who come within its scope.

Personal data and the Convention

88. The United Kingdom has never had a secret police or internal intelligence agency comparable to those that have existed in some other European countries, the East German Stasi being a well-known example. There has however been growing concern in recent times about surveillance and the collection and use of personal data by the state. Some might argue that the grounds for such concern are illustrated in the present case by the information that about four million criminal record certificates are provided annually under Part V of the 1997 Act. But such concern on this side of the Channel might be said to have arisen later, and to be less acutely felt, than in many other European countries, where for reasons of history there has been a more vigilant attitude towards state surveillance. That concern and vigilance are reflected in the jurisprudence of the European Court of Human Rights in relation to the collection, storage and use by the state of personal data. The protection offered by the common law in this area has, by comparison, been of a limited nature. The contrast is exemplified by the judgments in *Malone v Metropolitan Police Commissioner* [1979] Ch 344 and *Malone v United Kingdom* (1984) 7 EHRR 14.

89. The higher level of concern elsewhere in Europe is reflected in the repeated condemnation by the European court of the law of this country in this area, often on the basis that the law contains no adequate safeguards, in such cases as *Malone v United Kingdom* (1984) 7 EHRR 14, *Halford v United Kingdom* (1997) 24 EHRR 523, *Khan v United Kingdom* (2000) 31 EHRR 1016, *Peck v United Kingdom* (2003) 36 EHRR 719, *Copland v United Kingdom* (2007) 45 EHRR 858, *S v United Kingdom* (2008) 48 EHRR 1169 and *Kennedy v United Kingdom* (2010) 52 EHRR 207.

90. Although there is a relationship between the disclosure of criminal records and the rehabilitation of offenders, the retention and use by the state of data relating to individuals, including data relating to their criminal records, therefore raise different issues under the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") from the question whether employers and regulatory authorities are entitled to ask applicants for employment or a licence about their past histories. Part V of the 1997 Act is accordingly best considered separately from the 1975 Order. I shall consider the aspect of the present appeals relating to the 1997 Act before turning to the aspect concerning the 1975 Order.

Domestic case law and the judgments of the European Court of Human Rights

91. Under article 1 of the Convention, the member states undertake to secure to everyone within their jurisdiction the rights and freedoms defined in Section I. Those include the right set out in article 8, which provides:

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

92. There is a substantial body of judgments of the European court concerned with the effect of article 8 in relation to the retention and use by the state of personal data. As I have indicated, many of the judgments concern the United Kingdom. The issue has also been considered by the courts of this country, but none of the domestic judgments cited to us fully reflects the Strasbourg court's approach to the application of article 8 in this context, or appears to me to provide an answer to the present appeals.

93. In particular, although the judgments of Lord Hope and Lord Neuberger in *R (L) v Comr of Police for the Metropolis (Secretary of State for the Home Department intervening)* [2009] UKSC 3; [2010] 1 AC 410 contain much that is valuable in relation to the applicability of article 8 in the present context – and, as I shall explain, passages from the judgments were subsequently incorporated by the Strasbourg court into its own reasoning on that point – they are of less assistance in relation to the application of article 8(2) in the circumstances of the present appeals. In the first place, the court was concerned in that case only with the disclosure of information under the then equivalent of section 113B(4) of the 1997 Act: that is to say, the additional information contained in an enhanced criminal record certificate. That issue does not arise on the facts of the present appeals. Secondly, and more importantly, the court did not approach the question of justification under article 8(2) in the way in which it would be addressed by the European court. As Lord Hope explained at para 41, there was no suggestion in that case that the relevant legislation contravened article 8: the argument focused upon whether it had been interpreted and applied in a way that was proportionate. Following the common law conception of the judicial function, the court dealt with the appeal on the basis of the arguments presented to it.

94. As I shall explain, the European court's consideration of article 8(2) in this context begins by addressing the question whether the interference with the right protected by article 8 is in accordance with the law; and it often ends there. It ended there, in particular, in a carefully considered judgment of the Strasbourg court, which I shall discuss shortly, that addressed the very point in issue in these appeals in relation to the 1997 Act.

Rotaru v Romania

95. Although the Strasbourg jurisprudence in this area goes back more than 30 years, a suitable starting point is the judgment of the Grand Chamber in *Rotaru v Romania* (2000) 8 BHRC 449, in which the court considered the storage and disclosure of a criminal record. The applicant in the case complained about the disclosure by the security services of the contents of a file containing information about him, and his inability to have inaccuracies in the information corrected. It was argued by the government that article 8 was not applicable, since the information in question, which included information about the applicant's political activities and his criminal record, related not to his private life but to his public life.

96. That contention was rejected. As in its earlier case law, the court began by emphasising the correspondence between its broad interpretation of private life and that adopted in the Council of Europe's Convention of 28 January 1981 for the Protection of Individuals with regard to Automatic Processing of Personal Data, which came into force on 1 October 1985, and of which the UK is a signatory ("the 1981 Convention"). The purpose of the 1981 Convention is "to secure … for every individual … respect for his rights and fundamental freedoms, and in particular his right to privacy, with regard to automatic processing of personal data relating to him" (article 1), such personal data being defined in article 2 as "any information relating to an identified or identifiable individual". Article 5 requires that personal data undergoing automatic processing shall be, inter alia, "stored for specified and legitimate purposes and not used in a way incompatible with those purposes", "adequate, relevant and not excessive in relation to the purposes for which they are stored", and "preserved in a form which permits identification of the data subjects for no longer than is required for the purpose for which those data are stored". Article 6 provides that special categories of data, including "personal data relating to criminal convictions", "may not be processed automatically unless domestic law provides appropriate safeguards".

97. In relation to this aspect of the case, the court stated at paras 43-44:

> "43. … public information can fall within the scope of private life where it is systematically collected and stored in files held by the

> authorities. That is all the truer where such information concerns a person's distant past.
>
> 44. In the instant case the court notes that the [letter containing the disclosure] contained various pieces of information about the applicant's life, in particular his studies, his political activities and his criminal record, some of which had been gathered more than 50 years earlier. In the court's opinion, such information, when systematically collected and stored in a file held by agents of the state, falls within the scope of 'private life' for the purposes of article 8(1) of the Convention."

98. As to whether there had been an interference with the right protected by article 8, the court stated at para 46 that "both the storing by a public authority of information relating to an individual's private life and the use of it and the refusal to allow for an opportunity for it to be refuted amount to interference with the right to respect for private life secured in article 8(1) of the Convention".

99. In considering whether the interference was justifiable under article 8(2), the court stated at para 47 that "that paragraph, since it provides for an exception to a right guaranteed by the Convention, is to be interpreted narrowly". As in many of its earlier judgments in this area, including the Grand Chamber judgment given earlier that year in the case of *Amman v Switzerland* (2000) 30 EHRR 843, the court held that the holding and use of the information in question had not been "in accordance with the law", as required by article 8(2), because of the absence from the relevant national legislation of adequate protection against arbitrary interference. In that regard, the court based its decision upon a number of aspects of the legislation, including the absence of a definition of the kind of information that might be recorded, and the absence of limits as to the age of the information held or the length of time for which it might be kept.

MM v United Kingdom

100. This approach was followed in the case of *MM v United Kingdom* (Application No 24029/07) (unreported) given 13 November 2012, which concerned the disclosure of a caution which the applicant had received for child abduction. Disclosures had been made by the police to organisations to which the applicant had applied for employment as a family support worker. The disclosures occurred in Northern Ireland, prior to the entry into force there of the relevant provisions of the 1997 Act, and were made under common law powers. The European court however treated the complaint as encompassing the continuing threat of future disclosure under sections 113A and 113B of the 1997 Act as amended, the terms of which were

for all material purposes indistinguishable from the version with which the present appeals are concerned. As the court observed, the data in question would be retained for life, and would be disclosed under the 1997 Act whenever the applicant applied for employment falling within its scope. It was therefore clear that "for as long as her data are retained and capable of being disclosed, she remains a victim of any potential violation of article 8 arising from retention or disclosure" (para 159). The judgment is therefore directly relevant to the present appeals.

101. As in *Rotaru*, the court referred to the 1981 Convention, citing articles 5 and 6. It also referred to a number of other relevant Council of Europe and EU instruments. In particular, it considered in detail Recommendation No R (87) 15 regulating the use of personal data in the police sector, adopted by the Committee of Ministers on 17 September 1987 in the context of an approach to data protection intended to adapt the principles of the 1981 Convention to the requirements of particular sectors. The Recommendation does not have the same status as the 1981 Convention, but sets out principles to serve as guidance to the governments of the member states in their domestic law and practice.

102. Principle 2 concerns the collection of data and states:

> "2.1 The collection of personal data for police purposes should be limited to such as is necessary for the prevention of a real danger or the suppression of a specific criminal offence. Any exception to this provision should be the subject of specific national legislation."

The Explanatory Memorandum setting out the background to the Recommendation's adoption states that Principle 2.1 excludes an "open-ended, indiscriminate" collection of data by the police (paragraph 43).

103. Principle 5 of the Recommendation deals with communication of police data. Principle 5.2 states:

> "5.2.i Communication of data to other public bodies should only be permissible if, in a particular case:
>
> > a. there exists a clear legal obligation or authorisation, or with the authorisation of the supervisory authority, or if

> b. these data are indispensable to the recipient to enable him to fulfil his own lawful task and provided that the aim of the collection or processing to be carried out by the recipient is not incompatible with the original processing, and the legal obligations of the communicating body are not contrary to this.
>
> 5.2.ii Furthermore, communication to other public bodies is exceptionally permissible if, in a particular case:
>
> …
>
> b. the communication is necessary so as to prevent a serious and imminent danger."

Principle 5.3 makes analogous provision in relation to communication to private parties. The Explanatory Memorandum stresses that Principles 5.2 and 5.3 allow communication only in circumstances of an exceptional nature (paragraph 58).

104. Principle 7 deals with length of storage and updating of data. Principle 7.1 requires measures to be taken to delete personal data kept for police purposes if they are no longer necessary for the purposes for which they are stored. In that regard, it requires consideration to be given to a number of criteria, including rehabilitation, spent convictions and the age of the data subject. The Explanatory Memorandum states that it is essential that periodic reviews of police files are undertaken to ensure that they are purged of superfluous data (paragraph 96).

105. In its assessment of the merits of the application, the court reiterated that "both the storing of information relating to an individual's private life and the release of such information come within the scope of article 8(1)", that "even public information can fall within the scope of private life where it is systematically collected and stored in files held by the authorities", and that "this is all the more true where the information concerns a person's distant past" (para 187). In particular, data relating to the applicant's caution related to her private life, and their disclosure constituted an interference with her private life.

106. In reaching that conclusion, the court noted that the data constituted both "personal data" and "sensitive personal data" within the meaning of the Data Protection Act 1998, and also fell within a special category of data under the 1981 Convention. Further, the data formed part of the applicant's criminal record:

> "In this regard the court, like Lord Hope in *R (L) v Comr of Police for the Metropolis (Secretary of State for the Home Department intervening)* [2009] UKSC 3; [2010] 1 AC 410 [at para 27], emphasises that although data contained in the criminal record are, in one sense, public information, their systematic storing in central records means that they are available for disclosure long after the event when everyone other than the person concerned is likely to have forgotten about it, and all the more so where, as in the present case, the caution has occurred in private. Thus as the conviction or caution itself recedes into the past, it becomes a part of the person's private life which must be respected." (para 188)

107. The court rejected the Government's contention that it was material that disclosure was made to the applicant herself, on her own application:

> "The court notes and agrees with the comments of Lords Hope and Neuberger in *R (L)* [at paras 43 and 73], to the effect that the fact that disclosure follows upon a request by the data subject or with her consent is no answer to concerns regarding the compatibility of disclosure with article 8 of the Convention. Individuals have no real choice if an employer in their chosen profession insists, and is entitled to do so, on disclosure." (para 189)

108. In considering whether the interference was justified under article 8(2), the court focused initially upon the question whether the interference was "in accordance with the law". In order to satisfy that test, the domestic law had to be compatible with the rule of law, and therefore "must afford adequate legal protection against arbitrariness" (para 193). In particular, following the approach adopted by the Grand Chamber in such cases as *Amman v Switzerland*, *Rotaru v Romania* and *Bykov v Russia* (Application No 4378/02) (unreported) given 10 March 2009, the court considered it essential in the context of the recording and communication of criminal record data, as in relation to telephone tapping, secret surveillance and covert intelligence-gathering, to have clear, detailed rules governing the scope and application of measures, as well as minimum safeguards concerning, inter alia, duration, storage, usage, access of third parties, procedures for preserving the integrity and confidentiality of data and procedures for their destruction, thus providing sufficient guarantees against the risk of abuse and arbitrariness (para 195). In that regard, the court drew attention to Principles 2.1, 5 and 7 of Recommendation No R (87) 15.

109. The court acknowledged that there might be a need for a comprehensive record of all cautions, convictions and other information of the nature disclosed under section 113B of the 1997 Act. But it observed that the indiscriminate and

open-ended collection of criminal record data was unlikely to comply with the requirements of article 8 in the absence of clear and detailed statutory regulations clarifying the safeguards applicable and setting out the rules governing, inter alia, the circumstances in which data could be collected, the duration of their storage, the use to which they could be put and the circumstances in which they might be destroyed (para 199). The court referred in that connection to passages in the judgments of Lord Hope and Lord Neuberger in *R (L)* as demonstrating the wide reach of the legislation requiring disclosure and the impact of an adverse certificate upon the hopes of a person who aspires to any post which falls within the scope of disclosure requirements.

110. In relation to the possibility of future disclosure of the applicant's caution, the court stated:

> "Pursuant to the legislation now in place, caution data contained in central records, including where applicable information on spent cautions, must be disclosed in the context of a standard or enhanced criminal record check. 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." (para 204)

111. The court concluded:

> "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."

112. In the present case, counsel for the Secretaries of State were critical of the reasoning of this judgment. Lord Wilson adopts some of their criticisms. I take a different view. The approach adopted by the court in *MM* appears to me to have been based on its settled case law.

113. As long ago as 1984, the court said in *Malone v United Kingdom* (1984) 7 EHRR 14, in the context of surveillance measures, that the phrase "in accordance with the law" implies that "the law must … give the individual adequate protection against arbitrary interference" (para 68). In *Kopp v Switzerland* (1998) 27 EHRR 91, para 72, it stated that since the surveillance constituted a serious interference with private life and correspondence, it must be based on a "law" that was particularly precise:

> "It is essential to have clear, detailed rules on the subject, especially as the technology available for use is continually becoming more sophisticated."

These statements were reiterated in *Amman v Switzerland* 30 EHRR 843. As I have explained, that approach to the question whether the measure provides sufficient protection against arbitrary interference was applied, in the context of criminal records and other intelligence, in *Rotaru v Romania,* where the finding that the interference was not "in accordance with the law" was based upon the absence from the national law of adequate safeguards. The condemnation of Part V of the 1997 Act in *MM v United Kingdom* is based on an application of the same approach. Put shortly, legislation which requires the indiscriminate disclosure by the state of

personal data which it has collected and stored does not contain adequate safeguards against arbitrary interferences with article 8 rights.

114. This issue may appear to overlap with the question whether the interference is "necessary in a democratic society": a question which requires an assessment of the proportionality of the interference. These two issues are indeed inter-linked, as I shall explain, but their focus is different. Determination of whether the collection and use by the state of personal data was necessary in a particular case involves an assessment of the relevancy and sufficiency of the reasons given by the national authorities. In making that assessment, in a context where the aim pursued is likely to be the protection of national security or public safety, or the prevention of disorder or crime, the court allows a margin of appreciation to the national authorities, recognising that they are often in the best position to determine the necessity for the interference. As I have explained, the court's focus tends to be upon whether there were adequate safeguards against abuse, since the existence of such safeguards should ensure that the national authorities have addressed the issue of the necessity for the interference in a manner which is capable of satisfying the requirements of the Convention. In other words, in order for the interference to be "in accordance with the law", there must be safeguards which have the effect of enabling the proportionality of the interference to be adequately examined. Whether the interference in a given case was in fact proportionate is a separate question.

115. The criticism that the court in *MM* did not allow for any margin of appreciation is therefore misplaced. Whether a system provides adequate safeguards against arbitrary treatment, and is therefore "in accordance with the law" within the meaning of the Convention, is not a question of proportionality, and is therefore not a matter in relation to which the court allows national authorities a margin of appreciation.

116. The criticism that the court reached its conclusion in *MM* on a basis that had not been argued by the applicant reflects assumptions about the judicial role that do not hold good across the English Channel. In Strasbourg, the civilian principle jura novit curia applies: the court indeed referred to the principle in its judgment. This was by no means the first occasion on which the court had found a violation on a basis which the applicant had not raised: the court gave some other examples at para 150 of the judgment.

The present case – the 1997 Act

117. The respondent T received two warnings from the police in 2002, when he was 11 years old, in respect of the theft of two bicycles. He has no other criminal record. The warnings were disclosed under Part V of the 1997 Act in 2008, when he

applied for a part-time job with a football club which might involve contact with children. They were disclosed again in 2010, when he applied for a place on a sports studies course, which again might involve contact with children. Under the legislation as it then stood, they were bound to be disclosed throughout the rest of his life, whenever he made an application falling within the ambit of Part V of the 1997 Act.

118. The respondent JB received a caution from the police in 2001, when she was 41years old, in respect of the theft from a shop of a packet of false fingernails. She has no other criminal record. The caution was disclosed under Part V of the 1997 Act in 2009, when she completed a training course for employment in the care sector and was required by the training organsiation to obtain a criminal record certificate. The organisation told her that it felt unable to put her forward for employment in the care sector.

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.

120. I would therefore dismiss the appeals of the Secretaries of State against the grant of declarations of incompatibility in respect of sections 113A and 113B of the 1997 Act.

121. Although I have reached that conclusion on the basis that Part V of the 1997 Act (as it stood at the material time) fails to meet Convention requirements as to the quality of the law, I agree with Lord Wilson that the disclosure of the respondents' cautions could not in any event be regarded as necessary in a democratic society. In the case of the respondent T, the disclosure of the warnings for dishonesty which had been given to him when he was a young child bore no rational relationship to the aim of protecting the safety of children with whom, as an adult, he might come into contact. In the case of the respondent JB, the impact upon her private life of the disclosure of her caution for minor dishonesty, many years earlier, was disproportionate to its likely benefit in achieving the objective of protecting people receiving care.

The 1975 Order and the Convention: introduction

122. The challenge made to the 1975 Order in these proceedings raises different issues from the challenge to the 1997 Act. Part V of the 1997 Act is concerned with the use by the state of data which it collects and stores, relating to the criminal records of individuals. The 1975 Order is on the other hand concerned largely with relationships between employers and potential employees, and has the effect, broadly speaking, that those relationships, in circumstances falling within the scope of the Order, remain governed by the common law of contract and tort. It is less immediately obvious why this should be regarded as an interference by the state with the right to respect for private life.

Positive and negative obligations

123. The primary argument advanced on behalf of the respondent T is that the effect of the 1975 Order, taken together with the common law, is to require applicants for employment of a kind falling within its scope, or for a licence to carry on a regulated activity falling within its scope, to make a full disclosure of their criminal records when asked about them by prospective employers or regulatory bodies, however old, trivial or irrelevant a conviction or caution may be. The 1975 Order is therefore, it is argued, an unjustifiable interference by the state with the applicant's right to respect for his private life under article 8.

124. Counsel for the Secretaries of State submit that the respondent's argument amounts to an assertion that article 8 imposes a positive obligation upon contracting states to enact legislation establishing a scheme which excuses applicants for employment from any obligation to provide information to employers about their criminal records, except to the extent that an obligation to provide specific information may be proportionate in the particular circumstances.

125. This question of classification should not inhibit the court from considering the challenge to the 1975 Order and, if it is valid, granting an appropriate remedy. Even if the respondent's argument is correctly characterised as involving the assertion of a positive obligation on the part of the state, that does not mean that it is necessarily ill-founded. The European court has said repeatedly that, although the purpose of article 8 is essentially to protect the individual against arbitrary interference by public authorities, it does not merely compel the state to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of relations between individuals: see, amongst many other authorities, the court's recent judgment in *Węgrzynowski and Smolczewski v*

Poland (Application No 33846/07) (unreported) given 16 July 2013, para 54. The court developed the concept of the positive obligation precisely to express the principle that the state cannot fulfil its duty under article 1 of the Convention to "secure" the rights guaranteed by simply remaining passive: it must, for example, ensure through its legal system the protection of those whose lives are at risk, the recognition of novel forms of family relationship, and the prevention of undue media intrusion into the private lives of individuals.

126. Furthermore, as the European court has often said, the boundary between the state's positive and negative obligations under article 8 does not lend itself to precise definition. There are many situations which could be analysed on either basis, particularly where the complaint concerns a defect in a state's existing law. In such a situation (as, for example, in the series of cases concerning the failure of the United Kingdom to amend its law so as to recognise the change of gender of transsexual people), a negative/positive dichotomy is unhelpful, since the situation can be analysed either on the basis that the existing law results in a breach of a negative obligation not to interfere with the relevant Convention right, or on the basis that the state is in breach of a positive obligation to adapt its law so as to comply with the Convention right. The mode of analysis selected can hardly determine the outcome of the complaint.

127. I doubt therefore whether there is much value in debating whether the argument advanced on behalf of T is more aptly regarded as involving a positive or a negative obligation. The complaint about the 1975 Order can be analysed either as concerning a violation resulting from the existing law (ie the common law, to the extent that it is excluded from the ambit of the 1974 Act by the 1975 Order), and therefore as involving the breach of a negative obligation, or as concerning a violation resulting from the state's failure to extend more widely the scope of the 1974 Act, and therefore as involving the breach of a positive obligation. The real issue, however it is presented, is whether the obligation imposed upon T by the law of the United Kingdom to disclose to any potential employer in his chosen career, for the remainder of his life, the fact that he had received two warnings for stealing a bicycle when he was a child of 11, or otherwise lose the opportunity of being employed, involves an interference with his right to private life which is unjustifiable under article 8(2).

Relevant international instruments

128. The search for common standards, whether evidenced by international instruments or by national laws and practices, is a constant thread running through the case law of the European court. By anchoring developments in its jurisprudence to developments at the national or international level, the court seeks to ensure that

it keeps pace with societal developments. I shall therefore begin by considering relevant developments at the international level.

129. There is no doubt that the importance attached to the rehabilitation of offenders in a variety of international instruments can be a relevant consideration in the application of the Convention. For example, in its judgment in *MM v United Kingdom* the court referred at para 142 to Recommendation No R (84) 10 on the criminal record and rehabilitation of convicted persons, adopted by the Committee of Ministers on 21 June 1984. The document sets out measures which the governments of the member states are recommended to introduce where necessary. In particular, recommendation 1 is "to provide that the information mentioned on the criminal record will be communicated only in the form of extracts whose content will be strictly limited to the legitimate interest of the recipients". That recommendation reflects the view, expressed in the preamble to the document, that the disclosure of criminal records outside the context of criminal proceedings may jeopardise the convicted person's chances of social reintegration, and should therefore be restricted to the utmost. Other recommendations include "to provide for an automatic rehabilitation after a reasonably short period of time" (recommendation 10) and "to provide that rehabilitation implies prohibition of any reference to the convictions of a rehabilitated person except on compelling grounds provided for in national law" (recommendation 13).

130. In its judgment in *V v United Kingdom* (1999) 30 EHRR 121 the court also referred to Recommendation R (87) 20 on social reactions to juvenile delinquency, adopted by the Committee of Ministers on 17 September 1987. The document recommends the governments of member states to review, if necessary, their legislation and practice with a view:

> "10. to ensuring that the entries of decisions relating to minors in the police records are treated as confidential and only communicated to the judicial authorities or equivalent authorities and that these entries are not used after the persons concerned come of age, except on compelling grounds provided for in national law."

131. There are a number of other international instruments which are also relevant to the rehabilitation of juvenile offenders, and which the court has referred to in its case law. First, the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules), adopted by the United Nations General Assembly on 29 November 1985, contain a number of relevant provisions. Rule 21, concerned with records, provides:

> "21.1 Records of juvenile offenders shall be kept strictly confidential and closed to third parties. Access to such records shall be limited to persons directly concerned with the disposition of the case at hand or other duly authorized persons.
>
> 21.2 Records of juvenile offenders shall not be used in adult proceedings in subsequent cases involving the same offender."

These Rules are not binding in international law: in the Preamble, states are invited, but not required, to adopt them.

132. The United Nations Convention on the Rights of the Child, adopted by the General Assembly of the United Nations on 20 November 1989, has binding force under international law on the contracting states, including all of the member states of the Council of Europe. Article 40 provides:

> "1. States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society."

133. Finally, in this connection, the International Covenant on Civil and Political Rights 1966 provides in article 14(4), which broadly corresponds to article 6 of the European Convention, that:

> "In the case of juvenile persons, the procedure shall be such as will take account of their age, and the desirability of promoting their rehabilitation."

134. Some of these instruments are of greater significance than others in the present context, but they are consistent in their emphasis upon the importance attached to the rehabilitation of minor and juvenile offenders, and to the confidentiality of their criminal records as an aid to promoting their rehabilitation. In particular, recommendations 10 and 13 of Recommendation No R (84) 10, recommendation 10 of Recommendation R (87) 20, and rule 21 of the Beijing Rules, are directly relevant to the present context. That a person should in practice be required throughout his adult life to disclose the fact that he committed a minor offence as a juvenile, if he wishes to pursue a wide range of careers, is difficult to

reconcile with these provisions, in the absence of what recommendation 10 of Recommendation R (87) 20 describes as "compelling grounds".

The laws of the member states

135. When considering what the position might be under the Convention, it is also relevant to consider whether there is or is not a consensus across the member states: as the European court has often said, where no consensus exists, the margin of appreciation afforded to states is generally a wide one. No comparative analysis was however presented by any of the parties to the appeals. Although a certain amount of information is readily available, notably in the Home Office report, "Breaking the Circle – a Report of the Review of the Rehabilitation of Offenders Act" (2002), the Report of the Irish Law Reform Commission on Spent Convictions, LRC 84-2007 (2007), and the report published by KPMG, *Disclosure of Records in Overseas Jurisdictions* (2009), it would not be appropriate to draw firm conclusions from it in the absence of submissions.

136. The reports that I have mentioned indicate that a survey would probably be of limited assistance in any event, since almost all the other member states do not have legislation equivalent to the 1974 Act, but address the issue of rehabilitation in other ways, such as provisions in their constitution or civil code which prohibit unjustified discrimination against ex-offenders. The reports focus upon the vetting of potential employees on the basis of criminal record certificates. In that context, there appears to be a widely held view that the disclosure of information about a minor conviction of a juvenile offender, after he has become an adult, is not appropriate. That is consistent with the international instruments to which I have referred. It is relevant to note that a child of 11 would not be regarded as criminally responsible in most of the member states.

The present case – the 1975 Order

137. No judgment or decision of the European Court of Human Rights, or of the European Commission on Human Rights, has been cited to this court relating to legislation (or the absence of legislation) analogous to the 1974 Act, or the exceptions made to it by the 1975 Order: that is to say, legislation relating to the right of employers to require information from applicants for employment about their criminal records, or the obligation of such applicants to provide the information requested. That does not however prevent this court from reaching its own view on the compatibility of the 1975 Order with the Convention rights protected by the Human Rights Act 1998, if the relevant principles are sufficiently clear.

138. It seems to me to be reasonably clear that laws requiring a person to disclose his previous convictions or cautions to a potential employer constitute an interference with the right to respect for private life, protected by article 8. Whereas the European court laid particular emphasis, when considering Part V of the 1997 Act in *MM v United Kingdom*, upon the interference constituted by the state's disclosure of personal data which it had collected and stored, that issue does not arise directly in relation to the disclosure by a person of information retained in his own memory. On the other hand, the same issue arises out of the private aspect of a person's personal history, especially as it fades into the past and becomes forgotten by the world at large. It is also important to remember that article 8 protects the right to personal development, and the right to establish and develop relationships with other human beings, including relationships at work. As the court has said, "it is, after all, in the course of their working lives that the majority of people have a significant, if not the greatest, opportunity of developing relationships with the outside world" (*Niemitz v Germany* (1992) 16 EHRR 97, para 29). Viewed in that way, laws which have the effect of jeopardising a person's ability to pursue his chosen career, or which in practice close off to him a wide range of potential employments, must be regarded as interfering with his private life: see, for example, *Sidabras v Lithuania* (2004) 42 EHRR 104.

139. The fact that the relevant laws do not, strictly speaking, require an ex-offender to disclose his criminal record, since he can avoid doing so by refraining from applying for jobs in the relevant sectors or by abandoning such an application when the inevitable question is asked, is no answer to these points.

140. The question then arises whether the interference with the right to respect for private life resulting from the 1975 Order is justifiable under article 8(2). This question can in my view be addressed most conveniently by considering in the first place whether the interference resulting from the Order, in a case such as that of the respondent T, has a legitimate aim and is "necessary in a democratic society". As I shall explain, that question admits of a clear answer. The question whether the interference is "in accordance with the law" appears to me to be less straightforward, and it is unnecessary to answer it. The conclusion reached in relation to the 1997 Act cannot automatically be extended to the 1975 Order, since the question whether the domestic law affords adequate safeguards against abuse must be judged by reference to the degree of intrusiveness of the interference being considered. As I have explained, particularly strict standards apply in relation to the collection, storage and use by the state of personal data, as under Part V of the 1997 Act. It may be arguable that the requirements in the context of the 1975 Order are somewhat less stringent, as the particularly sensitive element of the use by the state of personal data is absent.

141. Focusing then on the questions of "legitimate aim" and "necessity in a democratic society", there is undoubtedly a public interest in ensuring the suitability

of applicants for certain positions, including those involving the supervision or care of children or vulnerable adults, and those which are of particular sensitivity, such as positions connected with the administration of justice. In principle, measures designed to facilitate the vetting of applicants for such positions fall within the scope of one or more of the legitimate aims listed in article 8(2), namely "in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others".

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.

143. It can only be concluded that the interference in issue in this case was not necessary in a democratic society to attain the aim of protecting the safety of children.

Remedy

144. I have already explained that the Court of Appeal was correct to make the declaration of incompatibility which it made in relation to the 1997 Act. The position in relation to the 1975 Order appears to me to be less straightforward.

145. The Human Rights Act 1998 makes express provision for two distinct types of remedy to be given. Under section 4, the court can grant a declaration of incompatibility in circumstances falling within the scope of that section. Under section 8, the court can grant a remedy in relation to an act of a public authority which it finds is unlawful under section 6(1).

146. Considering first the possibility of a remedy under section 8, the application of the 1975 Order to a particular person is not an act of the Secretary of State. The Order forms part of the law of the land governing the obligations inter se of (amongst others) employers and applicants for employment. Its operation, and in particular the resultant obligation of an applicant for employment to answer questions about his past history, does not depend upon any action on the part of the Secretary of State.

147. The question then arises whether the making of the 1975 Order was an unlawful act of the Secretary of State within the meaning of section 6(1). The answer would appear to be that it was not. Subject to an exception created by section 22(4), which has no application in these proceedings, none of the operative provisions of the Act is retroactive: *Wilson v First County Trust (No 2)* [2003] UKHL 40; [2004] 1 AC 816, para 212.

148. Could it however be said that the Secretary of State acted unlawfully by failing to amend the 1975 Order, following the entry into force of the Human Rights Act, so as to establish a proportionate scheme in relation to the disclosure of convictions and cautions (at least until 29 May 2013, when the 2013 Order came into force: whether that Order succeeded in rendering the scheme compatible with Convention rights is not a question raised in these appeals)? By virtue of section 6(6), "an act" includes a failure to act but does not include "a failure to (a) introduce in, or lay before, Parliament a proposal for legislation, or (b) make any primary legislation or remedial order". The term "legislation", as used in section 6(6)(a), must include subordinate legislation, given the express reference in section 6(6)(b) to primary legislation. Was the Secretary of State's failure in relation to the amendment of the 1975 Order a failure to lay before Parliament "a proposal for legislation"?

149. I am inclined to think that it was. The power to make orders under the 1974 Act is exercisable in accordance with section 10(2), which requires that a draft of the proposed order must be laid before Parliament and approved by an affirmative resolution. The draft order would appear to me to be properly described as a "proposal for legislation". That approach leads to the somewhat unattractive conclusion that whether a failure to make subordinate legislation falls within the scope of section 6 of the Human Rights Act depends upon the particular way in which the legislation must be made: an order made by the Secretary of State subject to annulment by a resolution of either House, for example, would not on any view involve the laying before Parliament of a "proposal for legislation". On the other hand, it is consistent with the respect for Parliamentary sovereignty found throughout the Human Rights Act that the decision of a member of either House whether to lay a legislative proposal before Parliament, whether in the form of a Bill or a draft order, should not be the subject of judicial remedies. As I shall explain, however, I find it unnecessary to reach a concluded view upon the point, which was not the subject of submissions.

150. If no remedy can be granted under section 8 of the Human Rights Act, can a declaration of incompatibility be made under section 4? Where primary legislation cannot be interpreted compatibly with Convention rights, the court can make a declaration of incompatibility under section 4(2). The position in relation to subordinate legislation is governed by section 4(3) and (4):

> "(3) Subsection (4) applies in any proceedings in which a court determines whether a provision of subordinate legislation, made in the exercise of a power conferred by primary legislation, is compatible with a Convention right.
>
> (4) If the court is satisfied -
>
> > (a) that the provision is incompatible with a Convention right, and
> >
> > (b) that (disregarding any possibility of revocation) the primary legislation concerned prevents removal of the incompatibility,
>
> it may make a declaration of that incompatibility."

151. By virtue of subsection (3), subsection (4) applies in the present proceedings. Subsection (4)(a) is satisfied: even applying the rule of interpretation set out in section 3(1) of the Act, the 1975 Order cannot be interpreted compatibly with Convention rights. In relation to subsection (4)(b), however, there is no suggestion that the 1974 Act prevents removal of the incompatibility of the 1975 Order with article 8 of the Convention. The condition laid down by section 4(4)(b) of the Human Rights Act is therefore not satisfied. It follows that the court cannot make a declaration of incompatibility under section 4.

152. If, then, there is no remedy that can be granted under either section 4 or section 8 of the Human Rights Act, is there any other basis upon which a remedy might be granted? This question was not addressed in the parties' submissions, and I do not consider it necessary to reach a concluded view. A number of potential answers present themselves.

153. An approach that has been adopted in some cases, such as *Francis v Secretary of State for Work and Pensions* [2005] EWCA Civ 1303; [2006] 1 WLR 3202 and *In re G (Adoption: Unmarried Couple)* [2008] UKHL 38; [2009] AC 173 has been to make a declaration that it was unlawful for a public authority to act in the manner required by subordinate legislation which could not be interpreted or given effect in a way which was compatible with Convention rights. That solution does not however appear to be apt in the present case, for the reason I have explained at para 146.

154. A more attractive possibility in the present circumstances is that a declaration might be granted to the effect that the 1975 Order cannot be read or given effect in a way which is compatible with Convention rights, or at least with the Convention rights of the respondent T. Although it appears that a declaration of incompatibility could not be granted under section 4 of the Human Rights Act, for the reasons I have explained at para 151, and the powers conferred by section 10 would therefore not be available, it is arguable that a declaration along the lines I have suggested, reflecting the result of applying section 3(1) of the Act to the 1975 Order, might nevertheless be granted.

155. A further possibility is that the Order might be declared to be ultra vires, on the basis that the entry into force of section 3(1) of the Human Rights Act had the effect that the order-making powers conferred by sections 4(4) and 7(4) of the 1974 Act must, as from 2 October 2000, be read and given effect in a way which is compatible with Convention rights, and therefore could not be read as authorising the making of an order which was incompatible with Convention rights. It might perhaps be argued that it follows that the making of the 1975 Order could not after 2 October 2000 be regarded as being authorised by the 1974 Act. On the other hand, the idea that subordinate legislation which was intra vires when made could subsequently become ultra vires would give rise to numerous counter-arguments and questions.

156. One such question concerns the effect which a declaration that the Order was to be treated as ultra vires with effect from 2 October 2000 might have upon actions taken since that date by persons affected by the Order. Lord Wilson comments, in relation to the Court of Appeal's declaration that the 1975 Order was ultra vires, that its effect was that all actions taken by questioners in reliance on disclosures made pursuant to it had been unlawful. Its effect in his view was indeed still more astonishing, since if the Order was ultra vires, it would follow that no valid application for a criminal records certificate could have been made. These are serious concerns, but I would wish to reserve my opinion as to whether they are well-founded. In a suitable case, consideration would have to be given to the protection of legal certainty in our administrative law, under reference to such authorities as *R v Wicks* [1998] AC 92, *Boddington v British Transport Police* [1999] 2 AC 143 and *Mossell (Jamaica) Ltd v Office of Utilities Regulations* [2010] UKPC 1, to the Convention principle of legal certainty (discussed, for example, in *Cadder v HM Advocate (HM Advocate General for Scotland intervening)* [2010] UKSC 43; [2010] 1 WLR 2601, para 58), and to the possibility, if necessary to protect legal certainty, of either exercising the court's discretion to refuse to provide a remedy, or alternatively granting a remedy with only prospective effect.

157. In the circumstances of the present case, however, it does not appear to me to be necessary for the court to insist upon further discussion of these questions, or of the other possible remedies that I have discussed. The respondent T does not

complain of any adverse consequences which he has suffered as a result of the 1975 Order: on the contrary, he failed to disclose his cautions when asked questions about his record, as he mistakenly believed that they no longer formed part of his record, and no adverse consequences are said to have resulted from that failure. The harm of which he complains resulted rather from the operation of the 1997 Act. As a result of these proceedings, the 1975 Order has been amended with the intention of rectifying the problem identified. There is therefore no possibility of T being affected in future by the 1975 Order in the form in which it has been considered in these proceedings. He can be regarded for the purposes of the Convention as having obtained just satisfaction by reason of the courts' acceptance that his complaint was well-founded, and the resultant amendment of the Order. In these circumstances, it appears to me that the court can properly conclude that, even if a remedy might in principle be granted, this is not a case in which, in relation to the 1975 Order, any judicial remedy is necessary.

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158. We agree with Lord Reed and Lord Wilson that the appeal of the Secretaries of State against the grant of a declaration of incompatibility in respect of sections 113A and 113B of the Police Act 1997 should be dismissed; but that their appeal against the declaration that the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 is ultra vires should be allowed; and that there is no need for a judicial remedy in respect of that Order. They disagree on only one matter: whether those sections of the 1997 Act are incompatible because they fail to meet the requirement that the interference with the Convention right be "in accordance with the law". As to that, we agree with Lord Reed that those sections of the 1997 Act are incompatible for that reason, although we also agree with both Lord Reed and Lord Wilson that the interferences in these cases failed to meet the requirement that they be "necessary in a democratic society". In all other respects, we agree with both judgments.