18 June 2014

PRESS SUMMARY

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

On appeal from the Court of Appeal [2013] EWCA Civ 25
[2014] UKSC 35

JUSTICES: Lord Neuberger (President), Lady Hale (Deputy President), Lord Clarke, Lord Wilson, Lord Reed

BACKGROUND TO THE APPEAL

Under the Rehabilitation of Offenders Act 1974, where a person is asked about his criminal record the question will be treated as not extending to 'spent' convictions. Consequently, he is entitled not to disclose these and cannot be liable for a failure to do so. Equally, a prospective employer is not entitled to make any decision prejudicial to the individual by reference to spent convictions or to any failure to disclose them **[6]**. This applies to cautions, warnings or reprimands, which are spent as soon as they are given **[76]**.

These appeals concern the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 and sections 113A and 113B in Part V of the Police Act 1997. The 1975 Order makes certain questions exempt from the above provisions of the 1974 Act, including where they relate to specified professions and employments, and to working with children and vulnerable adults **[78-79]**. Part V of the 1997 Act deals with enhanced criminal record certificates (ECRCs). These are issued where an "exempted question" within the meaning of the 1975 Order is asked, including by a prospective employer. Disclosure is then made of every "relevant matter" recorded on the Police National Computer, including, at the relevant time, any spent conviction or caution **[83-84]**.

In *T*, the police issued warnings in 2002 to an 11 year-old boy in respect of the theft of two bicycles. The warnings were disclosed in 2008 under Part V of the 1997 Act when T applied for a part-time job with a football club possibly involving contact with children. They were disclosed again in 2010 when he applied for a place on a sports studies course which again might have involved contact with children **[117]**.

In *JB*, the police issued a caution to a 41 year-old woman in 2001 in respect of the theft from a shop of a packet of false fingernails. In 2009 she completed a training course for employment in the care sector. She was required to obtain an ECRC, which disclosed the caution. The training organisation told JB that it felt unable to put her forward for employment in the care sector **[118]**.

The respondents have no other criminal records. Both claim that the references in the ECRCs to their cautions violated their right to respect for private life under article 8 of the European Convention on Human Rights. T also asserts that his obligation to disclose the warnings violated the same right. T and JB were successful in the Court of Appeal, which made declarations that the relevant provisions of the 1997 Act were incompatible with article 8. The Court of Appeal in *T* held that the 1975 Order was also incompatible with article 8 and *ultra vires* (that is, that it went beyond the powers set out in) the 1974 Act.

The Secretaries of State now appeal to this Court. While they have made amendment orders designed to eliminate the problems identified by the Court of Appeal, their appeals concern the 1975 Order and 1997 Act as they stood at the time **[3]**.

JUDGMENT

The Court unanimously (1) dismisses the appeals against the declarations of incompatibility in respect of the 1997 Act; and (2) allows the appeal against the declaration that the 1975 Order was *ultra vires* **[158]**.

REASONS FOR THE JUDGMENT

The respondents' cautions represent an aspect of their private lives, respect for which is guaranteed by article 8 **[16]**. Laws requiring a person to disclose his previous convictions or cautions to a potential employer constitute an interference with that right **[138]**. The disclosures in the ECRCs also constituted article 8 interferences, significantly jeopardising the respondents' entry into their chosen fields of endeavour **[20]**.

Lord Reed – in line with 2012 decision of the European Court of Human Rights in *MM v UK* – considers that sections 113A and 113B of the 1997 Act are incompatible with article 8 because they fail to meet the requirement of legality, that is, that the interference with the Convention right be "*in accordance with law*". Legality requires safeguards which enable the proportionality of the interference to be adequately examined **[108-119; 158]**. Legislation like the present 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 **[113-119]**. Lord Neuberger, Lord Clarke and Lady Hale agree with Lord Reed's conclusion on legality **[158]**, while Lord Wilson disagrees **[28-38]**, emphasising the importance of the distinction between the tests of legality and necessity in a democratic society. On this point he is critical of the European Court's approach in *MM*.

The Court unanimously holds that the article 8 interferences under both the 1997 Act and the 1975 Order could not, in any event, be said to meet the requirement of being "necessary in a democratic society" **[50; 121; 158]**. Lord Wilson notes that it was the Home Secretary who identified a need to scale back the criminal records system "to common sense levels" **[48]**. Lord Reed points to a lack of a rational connection between dishonesty as a child and the question of whether, as an adult, the person might pose a threat to the safety of children with whom he comes into contact **[142]**.

The Court upholds the declarations of incompatibility in relation to the 1997 Act. It is impossible to read and give effect to its provisions in a way which was compatible with the respondents' Convention rights **[53; 120]**.

The Court, however, allows the appeal in *T* against the decision that the 1975 Order was *ultra vires*. This was inconsistent with the declaration of incompatibility, which stated that it did not affect the validity or continuing operation of the 1997 Act, Part V of which in fact relied upon the validity of the terms of the Order **[61-62]**. No judicial remedy in relation to the Order is necessary. Lord Reed explains that it had no adverse consequences for T and he can be regarded for the purposes of the Convention as having obtained just satisfaction given the courts' acceptance that his complaint is well-founded and the resultant amendment of the Order **[66;157-158]**.

References in square brackets are to paragraphs in the judgment