



Press Summary

THE NORTHERN IRELAND COURT OF APPEAL ORDERED that the appellant is granted anonymity. That order continues to apply. No one shall publish or reveal the name or address of the appellant or reveal any information which would be likely to lead to his identification in connection with these proceedings.

6 March 2025

In the matter of an application for Judicial Review by JR123 (Appellant) (Northern Ireland)

[2025] UKSC 8

On appeal from [2023] NICA 30

Justices: Lord Lloyd-Jones, Lord Sales, Lord Burrows, Lord Stephens, Sir Declan Morgan

Background to the Appeal

This appeal concerns whether the regime in Northern Ireland for convictions becoming ‘spent’ under the Rehabilitation of Offenders (Northern Ireland) Order 1978 (“**the Order**”) is compatible with the appellant’s right to respect for private and family life under article 8 of the European Convention on Human Rights (“**article 8**” and “**the Convention**”, respectively).

The appellant is now aged 66. In 1980, when he was aged 21, he was convicted of arson and of possessing a petrol bomb in suspicious circumstances. He was sentenced to concurrent terms of imprisonment of five years and four years respectively. He was released from prison in 1982. The appellant says he is now a fully rehabilitated member of society and expresses shame and regret for his offences. The respondent (“**the Department**”) does not seek to dispute this.

However, as the appellant was sentenced to a term of imprisonment of more than 30 months, the effect of article 6 of the Order is that his convictions are incapable of becoming “spent” for the purposes of the rehabilitation regime (i.e. to allow him not to mention them to third parties and forbidding state officials to take them into account). This has had the consequence that the appellant has been required to disclose his convictions in certain circumstances, such as when applying for jobs or for insurance for his business. The appellant says that this has negative consequences for him, such as making it difficult to find employment and insurance, and causing him distress and humiliation when he has had to disclose his convictions.

The appellant argues that, to comply with his rights under article 8, the state must afford him an opportunity to show that, upon consideration of his individual circumstances, his convictions should be treated as spent. Since the Order does not allow this, the appellant brought a judicial review claim seeking a declaration that article 6 of the Order was incompatible with his article 8 rights. The appellant also sought damages for the breach of his article 8 rights.

The High Court upheld the appellant's claim and made a declaration that article 6 of the Order breached the appellant's article 8 rights. However, the High Court declined to award the appellant any damages, holding that the declaration was sufficient to acknowledge the breach of his rights. The Department appealed in relation to the declaration, and the appellant cross-appealed in relation to the damages decision. The Court of Appeal allowed the Department's appeal and dismissed the appellant's cross-appeal. The appellant now appeals to the Supreme Court.

Judgment

The Supreme Court unanimously dismisses the appeal. It holds that the Order strikes a fair balance between the rights of the appellant, the rights and freedoms of others and the interest of the general community. The rehabilitation regime under the Order falls within the wide margin of appreciation that is given to the legislator in this context and does not breach the appellant's article 8 rights. Lord Sales and Sir Declan Morgan give the judgment, with which the other members of the Court agree.

Reasons for the Judgment

The issues on appeal

On appeal, the appellant argues that the Order is incompatible with article 8 as it imposes, without exception, a lifetime obligation on offenders like him to disclose their convictions, where there is no reason to believe that many of those offenders will pose any greater risk of re-offending than the general population, which is disproportionate [15]. He argues that to comply with article 8, the state is obliged to provide a system which allows individuals to apply for review on a case-by-case basis of whether, in light of the current absence of risk posed by them, their conviction should be treated as spent [15].

The Court sets out the development of the offender rehabilitation legislation across the UK [17]-[34]. For every part of the United Kingdom except Northern Ireland, a rehabilitation scheme was introduced by the Rehabilitation of Offenders Act 1974 ("**the 1974 Act**"). The 1974 Act implemented recommendations made in 1972 in a report entitled *Living it Down: The Problem of Old Convictions* ("**the 1972 report**") [2].

The 1972 report did not recommend an individualised system such as that which the appellant argues is required; instead, the Committee recommended a category-based approach to identifying convictions which could be treated as spent and those which could not, with the categories defined in terms of seriousness by reference to the length of the sentence imposed [20].

Parliament broadly accepted the 1972 report's recommendations and passed the 1974 Act to give effect to them. Parliament provided that only convictions carrying sentences of thirty months or less could be treated as spent [22]. The Order was made in 1978 to provide for an equivalent rehabilitation scheme in Northern Ireland [23]-[26]. Article 5 of the Order states that when a conviction is spent the offender will not be obliged to disclose it (except in very limited circumstances) [23]. Article 6(1) of the Order provides that certain convictions are

excluded from becoming spent under the Order, including convictions carrying sentences exceeding thirty months, which covers the appellant's offences [24].

Although in Northern Ireland the Order remains unchanged, the legislation in England & Wales and Scotland has been amended [27]. In England & Wales, the 1974 Act was amended in 2022 to allow for any conviction to become spent after a certain period, except certain serious offences [28]. One of those offences is arson (one of the appellant's offences) [29]. In Scotland, the Scottish Ministers were given a power in 2019 to extend the rehabilitation scheme under the 1974 Act to cover offences carrying long fixed term sentences, but not those offences carrying a sentence of imprisonment for life [30]. The Scottish Ministers have not so far exercised this power [31]. At the hearing, the Court was told that Ministers in Northern Ireland are considering changing the regime in the Order, but these proposals are still at the consultation stage [33]. This means that the appellant would not currently be entitled to have his conviction treated as spent under the regime in any part of the UK.

Analysis under article 8

The Court reviews the proper approach to an appeal on the issue of proportionality of a general measure like the Order and concludes that in a case like this an appellate court should conduct a fresh assessment of that issue, rather than merely reviewing the judgment of the first instance court to see whether it had applied the right test and whether it had made any error [36].

To determine whether the Order is compatible with the appellant's article 8 rights, the Court must assess whether the Order is a proportionate means of achieving a legitimate aim. The Court explains that the approach to a proportionality assessment under article 8 depends on whether the state is subject to a positive obligation requiring it to act, or a negative obligation prohibiting it from taking certain steps [43].

The appellant argued that the case should be analysed in terms of a negative obligation on the state to stop it interfering with his article 8 rights, on the basis that the Order represented such an interference by imposing an obligation on him to disclose his convictions [38]. The Court disagrees with this description of the Order: it is the general law, and not the Order, which requires the appellant to disclose his convictions, as if he misleads others when contracting with them he may face civil and criminal liability according to ordinary general principles [39]. On proper analysis, the appellant must argue that the state is subject to a positive obligation to intervene in relations between private persons to give him a right to mislead others, by extending the provision allowing an offence to be treated as spent so as to cover his case [40].

For a negative obligation, the proportionality assessment involves applying a four-stage test: (i) is the aim sufficiently important to justify interference with a fundamental right? (ii) is there a rational connection between the means chosen and the aim in view? (iii) was there a less intrusive measure which could have been used without compromising the achievement of that aim? (iv) has a fair balance been struck between the rights of the individual and the general interest of the community, including the rights of others [41]? For both negative and positive obligations, the ultimate question is whether a fair balance has been struck between the relevant competing interests in issue [42]. However, as positive obligations involve imposing a burden on the state the four-stage test cannot be applied in the same way and with the same rigour [62].

There are two legitimate aims: (i) to protect the rights and freedoms of others, including potential employers of the appellant, insurers dealing with him and the rights of other offenders to be treated equitably; and (ii) the prevention of disorder or crime, as a more restricted rehabilitation regime will be a deterrent to potential offenders [45]. These are important aims [46]-[47].

Before applying the third and fourth stage of the test, the Court analyses the margin of appreciation in this context regarding the respect a court should give to the judgment of the

legislator as to the proper scope and structure of the rehabilitation regime [48]-[60]. The Court holds that there is a wide margin of appreciation in this case. First, it involves difficult questions of moral and political judgment [49]. Second, there is no consensus on this issue amongst other countries who are parties to the Convention, nor in the different parts of the UK [51]-[53]. Third, the Order strikes a balance between competing private interests [54]. Fourth, the type of individualised assessment regime for which the appellant contends would be burdensome and costly; it would also be less equitable and potentially lead to inconsistent treatment of offenders in similar positions [55]-[57]. Fifth, the Order is the result of careful policy consideration in the 1972 report and in Parliament [58]-[59]. Sixth, in terms of striking a fair balance, the appellant is responsible for the situation he finds himself in, having committed a serious offence [60].

The appellant submitted that the Order must be found disproportionate as the proposed alternative regime of individualised review would involve a less restrictive interference with his article 8 rights [61]. The Court disagrees: (i) the four-stage test is applied in a more general and less formalised way for positive obligations [62]; (ii) even if this case involved a negative obligation, the submission could not succeed in light of the European Court of Human Rights decision in *Animal Defenders International v United Kingdom* (2013) 57 EHRR 31. That case held that for general rules in legislation the ultimate question is not whether there is a less restrictive alternative, but whether the rules fall within the margin of appreciation to be afforded to the legislator [64]-[72]. The Court holds that this analysis is supported by the judgment of the Supreme Court in *Re P* [2019] UKSC 3 and is not undermined by the decision of the Supreme Court in *Re F* [2010] UKSC 17 [73]-[79].

At the fourth stage (fair balance), the Court concludes that the regime in the Order strikes a fair balance between the rights of the appellant, the rights and freedoms of others and the interest of the general community. The Order falls within the margin of appreciation which is applicable in this context and is compatible with article 8 [85].

The test for grant of a declaration of incompatibility

Although the Court agrees with the overall conclusion of the Court of Appeal, the Court corrects the approach adopted by the Court of Appeal for deciding whether to grant a declaration of incompatibility. The Court of Appeal applied a test whether the appellant could show that application of the Order would violate the article 8 rights of offenders outside the rehabilitation regime in all or almost all cases, which is wrong. The correct test applicable for the grant of a declaration of incompatibility in this case is whether the Order breaches the appellant's own article 8 rights; he does not need to show that it would breach anyone else's article 8 rights [87]-[92].

The availability of a common law declaration of incompatibility and the devolution context

Normally, a declaration of incompatibility (which declares legislation as incompatible with a Convention right) is made under section 4 of the Human Rights Act 1998 (“HRA”). However, a declaration under section 4 of the HRA can only be made in respect of ‘primary legislation’, as that term is defined in the HRA. The Order is not primary legislation under the HRA and so the High Court had instead made a declaration using its common law powers [11]. The Court holds that, even if the High Court was right that there had been a breach of the appellant's article 8 rights, it would have been wrong to issue a common law declaration [97]. Declarations of incompatibility under section 4 of the HRA serve a useful purpose because they trigger a power for Ministers to make a remedial order under the HRA to address the incompatibility [94], [97]. In contrast, the High Court's declaration does not trigger these powers and had no other purpose which could justify it being made [97].

The challenge to the damages decision

Since the Court holds that the Order does not violate the appellant's article 8 rights, it does not consider it necessary to consider what damages (if any) should be awarded [102].

Conclusion

For these reasons, which differ from those given by the Court of Appeal, the Court dismisses this appeal [103].

References in square brackets are to paragraphs in the judgment.

NOTE:

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at: [Decided cases - The Supreme Court](#)