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(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (CROWN SIDE)

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D's Application [2015] NIQB 78

IN THE MATTER OF AN APPLICATION BY D FOR LEAVE TO APPLY FOR JUDICIAL REVIEW OF A DECISION OF THE PSNI TO ADMINISTER AN INFORMED WARNING

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Before: Coghlin LJ, Weir LJ and Treacy J

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COGHLIN LJ (delivering the judgment of the court)

[1] In this case *D* (the "applicant") is a minor who is currently in the care of a local Trust. At the time of the impugned events he was 11 years of age. Accordingly, the identity of the applicant must remain anonymous and no material should be published by any form of media that might assist in his identification.

[2] For the purpose of conducting the application before this court the applicant was represented by Mr Frank O'Donoghue QC and Mr Sean Devine, the respondent, the Police Service for Northern Ireland ("PSNI"), was represented Mr Michael Egan, while Mr Philip Henry appeared on behalf of the Public Prosecution Service ("PPS"), one of the notice parties, and the other notice party, the relevant Trust, was represented by Ms Suzanne Simpson QC. The court wishes to acknowledge the considerable assistance that it derived from the carefully prepared and attractively delivered written and oral submissions advanced by all counsel concerned.

The background facts

[3] As a consequence of a serious deterioration in his family relationships when the applicant was 11 years of age he left his mother's house in order to reside with his father. At about 4.30 pm on 27 September 2013 officers of the PSNI were tasked to an address in Belfast following a report of an 11 year old male said to be out of control. When Constable Howells arrived at the address and entered the premises he saw the applicant's father restraining the applicant on the floor. The applicant's

father alleged that both he and the applicant's aunt had been attacked and that the applicant had attempted to stab him with a knife. The applicant was shouting and making threats against his father and other members of the family. Ensuring that the handcuffs had been checked for safety and comfort Constable Howells handcuffed and restrained the applicant. The applicant was informed repeatedly that he was under arrest and asked to calm down. Nevertheless, he began to kick out towards his father as soon as the restraint was removed from his legs. He was further restrained for some 3 to 4 minutes until he began to calm down. The applicant was then escorted to the police vehicle. Constable Howells returned to the premises where the applicant's father and another family member confirmed the threats and attacks made by the applicant. The applicant's father was noted to have sustained cuts to his hands. The applicant was then arrested upon suspicion of having committed assault occasioning actual bodily harm, possession of an offensive weapon with intent, resisting police and issuing threats to kill. The applicant made no reply after caution. He was conveyed to the custody suite at Musgrave Street police station where his detention was authorised. He was then examined by the forensic medical officer.

[4] Owing to the fact that the applicant's father and aunt were the complainants, it was necessary to arrange for the attendance of an appropriate adult from the Northern Ireland Appropriate Adult Scheme ("NIAAS") and, accordingly, arrangements were made for a Ms Mulholland to attend and speak to the applicant. Arrangements were also made for a solicitor from Messrs Kristina Murray and Company, solicitors, to attend and consult with the applicant. Social Services were contacted and advised of the circumstances but, despite efforts being made, no suitable address could be identified for the applicant and, consequently, he was detained overnight and kept under observation.

[5] On the following day, 28 September 2013, an appropriate adult from NIAAS and Ms Hughes from the applicant's solicitors attended at Musgrave Street. Arrangements were also made for the attendance of the applicant's social worker. Further investigation confirmed that neither the applicant's father nor his aunt wished to make statements of complaint and the applicant's aunt attended at the police station. After consultation with his solicitor the applicant was then interviewed under caution in the presence of the NIAAS representative and his solicitor. The interview was conducted by Constable Keegan who commenced it by making the following observations:

> "Okay, D you are to be interviewed in relation to your suspected involvement in the commission of an offence. In view of the fact you are a juvenile this matter may be dealt with in a number of ways should there be sufficient evidence to proceed. Should this be the case the potential outcomes are an informed warning, a restorative caution or being reported for prosecution. An informed warning or a restorative

> caution may only be given if you admit your involvement in this offence. However, even if you admit the offence, you may still be referred for prosecution through the courts. The method of disposal will be decided once all the facts of your case have been considered, including any previous offending history you may have, the seriousness and gravity of the offences involved. Consideration will also be given to any specific relevant information provided to police by the Probation Service, the Education and Welfare Services, Social Services or the Youth Justice Agency if you are or have recently been engaged with any of them. An informed warning and a restorative caution are recorded on the criminal record though neither are a conviction. A prosecution may result in conviction which is recorded on criminal record. All the aforementioned disposals may be disclosed in any subsequent proceedings."

Constable Keegan then confirmed with the solicitor that she had discussed the various options with the applicant and that he was happy to proceed with the interview. Before the commencement of formal questioning the solicitor indicated that it was going to be a 'no comment' interview in that she had advised the applicant to reply to each question with the words 'no comment'. The interview then proceeded on a 'no comment' basis. At the conclusion of the interview arrangements were made for the applicant to stay with another aunt and he was released unconditionally on all charges, save for that of resisting the police.

[6] On 1 November 2013 the applicant was made the subject of an emergency Protection Order. On 7 November 2013 Geraldine Hughes was appointed as the applicant's Guardian Ad Litem ("GAL") in relation to all family proceedings involving the applicant. The applicant consented to the making of a Care Order and consented to an Interim Secure Accommodation Order as a result of which he was placed in a Secure Care Centre on 13 November 2013. The applicant remained in that Centre until 14 February 2014. In pursuance of the Care Order he was subsequently placed in a Trust foster home where he has established good relations with his foster carers and the workers by whom he is being looked after.

[7] Following the police interview of the applicant, Constable Howells submitted a report to the PPS recommending no prosecution in respect of the outstanding offence of resisting police upon the ground that he did not believe it to be in the public interest to pursue that single matter. That recommendation was based on:

(*i*) The applicant's age

(*ii*) The applicant's troubled family background.

(*iii*) The applicant's lack of offending history.

(*iv*) The decision on the part of the complainants not to pursue the complaint.

[8] The recommendation from the PSNI was received and considered by Ms Karen Trainor a PPS lawyer working in the Youth Team in Belfast Chambers. Ms Trainor set herself to apply the PPS test for prosecution. That test is met if:

> (*i*) The evidence which can be adduced in court is sufficient to provide a reasonable prospect of conviction – the 'Evidential Test'; and
>
> (*ii*) Prosecution is required in the public interest – the 'Public Interest Test'. Broadly, the presumption is that the public interest requires prosecution where there has been a contravention of the criminal law. Such a presumption provides the starting point for consideration in each individual case. However, there are circumstances in which, although the evidence is sufficient to provide a reasonable prospect of conviction, prosecution is not required in the public interest. Public Prosecutors are required to positively consider the appropriateness of a diversionary option (particularly if the defendant is a youth) when considering where the public interest lies.

[9] Before making her decision Ms Trainor telephoned the PSNI Youth Diversion Officer ("YDO") in the belief that such officers often have valuable 'on the ground' knowledge about the accused and their circumstances which may not be apparent from files submitted to the PPS. She was unable to recall the exact content of her conversation but believes that she received some useful information about the background and history of the accused. Ms Trainor concluded that the evidential test had been met in respect of the charge of resisting police. In deciding whether it was in the public interest to prosecute the accused she considered a number of diversionary options including an informed warning ("IW"), a caution or a youth conference. She noted the investigating officer's recommendation that there should be no prosecution and took into account the considerations to which he had referred in his report. She also noted the recommendation against prosecution from the YDO and took her comments into account. Ultimately, Ms Trainor decided that it was in the public interest to issue an IW in relation to the offence of resisting police. She selected that option rather than a caution due to the very young age of the accused and because it is considered less serious and has a shorter currency.

[10] Arrangements were then set in train for the administration of the IW. It was decided that the IW should be administered by Ms Margaret Cunningham a trained

YDO who familiarised herself with the details of the case. Ms Cunningham had 14 years' experience as a YDO and was a trained facilitator who had undertaken the PSNI Restorative Justice Facilitation course. Following receipt of a pro forma Certificate of Informed Warning Ms Cunningham contacted the children's home at which the accused was residing and made contact with his social worker, a Ms Fiona Auld. Ms Auld informed Ms Cunningham that the applicant had been moved to an intensive support unit and was the subject of an Interim Secure Accommodation Order and an Emergency Protection Order. Ms Auld advised Constable Cunningham that a Core Group meeting had been arranged at the secure accommodation on 5 December 2013 and it was agreed that this would also be a convenient date for the administration of the IW. Ms Auld thereafter contacted the applicant's father and advised him of the intention to administer the IW. The applicant's father accepted the proposal and raised no objection. Attempts were made to contact the applicant's mother but they were unsuccessful. Ms Auld was also unable to make contact with Ms Geraldine Hughes, the applicant's GAL.

[11] On 5 December 2013 the applicant met Ms Cunningham and Ms Auld at the intensive support unit. His father was also in attendance. Ms Cunningham spoke to the applicant in a manner which he was able to understand, simplifying matters as much as possible. She referred him to the events of 27 September 2013 in his father's house and specifically asked him whether he recalled his involvement with the police including his arrest. She referred to his struggles and ignoring the police requests to behave himself. When asked, the applicant agreed that was not a way to behave and could amount to a criminal offence. He agreed that he understood that his behaviour had been wrong and that in future he would have to behave himself. Ms Cunningham explained the nature of the IW procedure, confirming that it was an alternative to going to court, and that, if accepted, an IW would appear on his police record. The applicant said that he understood and would like to have the matter disposed of in that manner. Ms Auld confirmed to Ms Cunningham that she was satisfied that the applicant understood that he was admitting the offence, that he understood the process and implications of an IW and that was the disposal that he preferred. Ms Cunningham then read the content of the pro forma Certificate of IW to the applicant and confirmed that he admitted the offence of resisting arrest and consented to the matter being dealt with by that procedure. The Certificate was signed by the applicant, Ms Auld and Ms Cunningham. In her affidavit Ms Cunningham has averred that if there had been any suggestion that the applicant was not voluntarily admitting the offence or that he did not understand or consent to the IW procedure she would have terminated the process and, *according to her own practice*, she would then have advised the applicant to seek legal advice.

The application for judicial review

[12] The applicant seeks a declaration that the decision, policy and/or practice of refusing and/or failing to provide the applicant with legal representation (or ensuring that he has had access to the same) when implementing the Youth Diversionary Scheme/Informed Warning is unlawful. It is important to note that the

application focussed solely upon the question of consent when such consent was based upon an admission of offending without the benefit of legal advice in this case. No issue was taken as to whether the measure in question, the IW, was not, in itself, rationally connected with a reduction in offending by children and young persons nor was it contended that in no circumstances would it be appropriate to administer an IW in the absence of such advice.

Delay

[13] Order 53 rule 4 provides that judicial review proceedings shall be initiated:

> "….promptly and in any event within three months from the date when grounds for the application first arose unless the court considers that there is good reason for extending the period within which the application shall be made."

The need to act promptly and the need to provide an explanation for any apparent delay have been repeatedly emphasised in this jurisdiction – Re Shearer's Application [1993] NIJB; Re McCabe's Application [1994] NIJB 27; Re Hill's Application [2007] NICA 1. Both requirements have been recently addressed by Treacy J in Re Turkington [2014] 58 at paragraphs [43] and [44].

[14] In this case the proceedings were issued:

> (i) six months after the IW was administered,
>
> (ii) five months after the applicant's solicitors wrote to the PSNI seeking relief.

No attempt to explain or justify that delay was made in the original affidavits or skeleton filed on behalf of the applicant. Somewhat belatedly, in fact on the morning of the hearing, the applicant's solicitor filed an affidavit purporting to explain/justify the delay. According to that affidavit the solicitor was not instructed to investigate the circumstances of the IW until the matter arose during the Interim Secure Accommodation proceedings in the Family Proceedings Court on 28 January 2015. There then followed further delay in seeking and obtaining legal aid. On behalf of the PSNI Mr Egan indicated that he did not intend to add to the points made in his skeleton.

[15] 'Good reason' within the meaning of Order 53 has long been accepted to be grounded upon the particular circumstances of the case and, consequently, the court arranged for this application to proceed as a 'rolled up hearing'. In the event the respondents did not press the issue of delay. We have carefully reviewed the matter taking into account, in particular, the troubled background of the applicant, the fact that the significance of the IW only emerged in the course of quite different and

stressful proceedings and the potential impact on the applicant's future. Having done so, we decided to extend the time.

The relevant Convention Article

[16] The applicant relied upon Article 8 of the European Convention on Human Rights ("the Convention") which provides as follows:

> "Article 8 Right to Respect for Private and Family Life
>
> 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 wellbeing 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."

The relevant policy/practice

[17] The IW in this case was administered by Constable Cunningham in accordance with the PSNI Service Procedure 17/2008 ("SP17"). SP 17 established the PSNI Youth Diversion Scheme ("YDS") in April 2008 and was amended and reissued in September 2009. The YDS was originally introduced in September 2003 replacing the existing Juvenile Liaison Scheme. The purpose of the YDS is to provide a framework within which the PSNI responds to all children and young people below the age of 18 years who come into contact with the police for non-offence behaviour or who have offended or are potentially at risk of offending or becoming involved in anti-social behaviour. The scheme takes account of the philosophy and principles of restorative justice.

[18] The aims of the YDS are as follows:

> "(1) To work in partnership with agencies, both statutory and voluntary, business and the community to prevent children and young people becoming involved in offending or anti-social behaviour.
>
> (2) To identify children and young people who are at risk in terms of their safety or well-being, or are at risk of becoming involved in offending or anti-social

behaviour, but initially come into contact with police for reasons which are non-offence related.

(3) To provide an effective, equitable and restorative response to all children and young people throughout Northern Ireland who have offended or are at risk of offending or becoming involved in anti-social behaviour.

(4) To divert, wherever possible, those children and young people who have offended from becoming further involved in the Criminal Justice System.

(5) To promote the needs of victims and the community throughout the process and whenever possible engage them appropriately in restorative intervention.

(6) To encourage children and young people who have offended to take responsibility for their behaviour, and the consequences, to consider the choices they made, and explore the impact on others."

The YDS was the subject of an external evaluation carried out on behalf of the Chief Constable in 2006 and, in January 2007, an Equality Impact Assessment confirmed that it met that organisation's needs in terms of being Human Rights, UNCRC, Section 75 and integrity standards compliant.

[19] SP17 set out a number of options for diversionary disposal in respect of individuals found to have committed offence behaviour. These are:

(*i*) Community Based Restorative Justice;

(*ii*) Informed Warning;

(*iii*) Restorative Caution;

(*iv*) YJA Youth Conference;

(*v*) Prosecution.

Both IWs and restorative cautions represent administrative processes for dealing with offending behaviour and must be delivered by a trained facilitator. A child/young person and his/her respective parent/guardian must be provided with the appropriate information regarding all the potential outcomes in relation to the disposal of the case for the purpose of ensuring that they have the opportunity to

make an informed decision as to how to proceed. Under no circumstances should such information be given on the potential outcomes in such a manner as to induce an admission of guilt through the offer of a diversionary disposal. When administering an IW, SP17 does not oblige the police officer concerned to draw the attention of the subject individual to the possibility of obtaining legal advice. The policy does not formally require such advice to be given even if there has been any suggestion from either the applicant or his social worker that the offence was not readily admitted or that the applicant did not understand or consent to the informed warning procedure.

[20] An IW is 'exhausted' 12 months after acceptance. From that date it is removed from the child or young person's criminal record and placed on an "Exhausted Diversion" Tab on the Northern Ireland Criminal Record Viewer. If an application is made for a Standard Disclosure Certificate (SDC) or an Enhanced Disclosure Certificate ("EDC") pursuant to the provisions of Sections 113A and 113B of the Police Act 1997, the fact that a child or young person has an exhausted informed warning for a particular offence may be revealed. SDCs and EDCs are issued by Access Northern Ireland in the event of receiving an application for either form of disclosure. In the case of an individual whose record contains an entry recording an IW Access NI would consider whether the IW was one that was eligible for "filtering" in accordance with the relevant provisions of the Police Act 1997 i.e. that it might not be disclosed. The offence of resisting an officer pursuant to Section 66 of the Police (NI) Act 1998 is one of a list of offences which is not eligible for filtering. Thus, in the case of the applicant, an SDC may and an EDC will reveal the fact that he has been the subject of an IW. When the Department of Justice proposes to issue an SDC or an EDC containing details of a spent conviction, or a diversionary disposal accepted when the person was under 18 years of age, the Department is required to refer the certificate to an independent reviewer to determine whether the information which it is proposed to disclose should be removed.

[21] In October 2012 the Youth Engagement Scheme was introduced on a pilot basis in the Belfast area sponsored by the PSNI, PPS and the Youth Justice Agency. The Youth Engagement Scheme ("YE") is also based on the consent of the child or young person and seeks to identify cases that are suitable for referral to the Youth Engagement Clinic ("YEC"). The scheme provides that a streamlined police file may be sent to the PPS together with a recommendation on disposal by the investigating officer of a supervisor. If the PPS considers that the case is suitable for a diversion and that it can be dealt with at the YEC by means of administration of an IW, a Restorative Caution or a Diversionary Youth Conference it advises the PSNI accordingly. A YEC is then arranged with the child or young person. The YEC comprises a meeting between the child or young person, his parent or guardian, the relevant PSNI Youth Diversionary Officer, the Youth Conferencing Co-Ordinator ("YCC") and any appropriate additional attendee including a family support worker, a social worker or the victim. At the meeting the YDO outlines the case which includes informing the young person and the appropriate adult that a

diversionary disposal is a non-conviction and explaining the circumstances in which it may be disclosed on a criminal records check. Step 3.3 of the YE process provides as follows:

> "3.3 Please note the young person will have been encouraged to have a legal representative present. Where the young person has not made a full admission during interview and continues with that position, they must be accompanied by a solicitor at the Clinic. Should no solicitor be present the case will be postponed and another appointment arranged. A Directory of Solicitors based on locality is provided to assist the young person in accessing legal representation and it may be possible to make telephone contact with a solicitor for advice."

The 'guidance' furnished to an individual who is to be made subject to the YE process contains the following material:

> "**Do I need to bring a solicitor with me**?
>
> You must bring a solicitor with you to the YE Clinic if you intend to say you did not commit the offence.
>
> It is strongly advised that you bring a solicitor with you to the YE Clinic even if you do not think you need one or think that you already know the decision you will make.
>
> At the YE Clinic you will have to decide if you want to admit responsibility for committing the offence you are accused of.
>
> A solicitor will be able to help you to make your decision as they can explain things like the crime you have been accused of and the evidence that can be used against you. They can ask questions on your behalf and ensure your rights are protected.
>
> You will have time to speak to your solicitor and your family in private about what you should do.
>
> **Remember the solicitor will be paid by legal-aid**.
>
> Don't worry if you only decide that you want a solicitor a short time beforehand or at the YE Clinic

> itself: the appointment can be re-arranged to give you more time to find a solicitor to provide you with advice."

According to the affidavit sworn by Inspector McGuigan of the PSNI the evaluation of the YE indicated that the majority of parents felt that the services of a solicitor were not required. That is perfectly understandable and the court accepts that PSNI could not insist upon the retention of a solicitor. However we also bear in mind that the court has no information about the specific facts of those cases and, in any event, the important principle is that the parents and guardians concerned *were advised to consider the possibility.*

The relevant authorities

[22] In R v Durham Constabulary and Another [2005] 1 WLR 1184 the claimant, who was nearly 15, was suspected of having committed indecent assaults on young girls. He was interviewed by the police in the presence of his step-father and admitted the assaults. The police decided that it was appropriate to administer a warning under Section 65 of the Crime and Disorder Act 1998 but, in accordance with guidance issued by the Secretary of State, they did not first seek or obtain the consent either of the claimant or of his step-father. The warning was administered and, as a result, the claimant became subject to the notification requirements of the Sex Offenders Act 1997, a consequence of which neither he nor his step-father had been aware when he had admitted the offences. The claimant sought judicial review of the decision to administer the warning on the ground that, inter alia, failing to inform him of the consequences and obtain his consent violated his right to a fair trial under Article 6 of the Convention. The Divisional Court of the QBD allowed the claim and quashed the decision but the appeal by the police and the Secretary of State succeeded in the House of Lords upon the ground that the criminal charge had effectively ceased to exist when a firm decision was taken not to prosecute the claimant and that, therefore, Article 6 of the Convention was not engaged. Before the Divisional Court, although not before the House of Lords, the claimant had argued that there had also been infringement of his right to respect for his private life contrary to Article 8 of the Convention. Lord Bingham, with whom the other members of the House agreed, said at paragraph [20] of his judgment:

> "[20] I mention briefly two points raised in the Divisional Court although not the subject of decision and not pursued in oral argument before the House.
>
> (1) It was said that some of the measures imposed on R interfered with R's Article 8(1) right to respect for his private life. I am willing to accept, without deciding, that they did or may have done. But for the reasons similar to those given by the Divisional Court in (R (M) v Inner London Crown Court [2003] 1 FLR

> 994 and by the House in R (S) v Chief Constable of the South Yorkshire Police [2004] 1 WLR 2196, I have no doubt that they were in accordance with the law, pursued a legitimate aim and were necessary in a democratic society in the interests of public safety, the prevention of disorder or crime, the protection of health or morals or the protection of the rights and freedoms of others."

An appeal to the Strasbourg court was subsequently rejected as manifestly unfounded in respect of Article 6(2). That court noted that the potential impact on civil rights had not been "raised or pursued" in the course of domestic proceedings but went on to observe that:

> "In any event, even assuming exhaustion of domestic remedies, (the Court) finds no indication that the warning applied to the applicant determined any of his civil rights or obligations within the meaning of Article 6(1) of the Convention."

[23] In R (T) v Chief Constable of Greater Manchester and others [2015] AC 49 the Supreme Court considered the case of an 18 year old claimant who had sought to enrol for a sports degree course at a university which involved contact with children. The university required him to obtain an enhanced criminal record certificate which revealed police warnings in respect of two stolen bicycles. The claimant sought judicial review asserting that the disclosure provisions of Part V of the Police Act 1997 in requiring the mandatory disclosure of all convictions and cautions relating to recordable offences held on the police national computer were incompatible with his right to private life guaranteed by Article 8 of the Convention. The court held that cautions or warnings, the receipt of which took place in private, represented an aspect of the recipient's private life, respect for which was guaranteed by Article 8.1 and that the disclosure by the State of the details of such caution or warning constituted an interference with that right and so had to meet the requirements in Article 8.2 of being in accordance with the law and necessary in a democratic society. The court applied the decision of MM v United Kingdom (Application No. 24029/07) noting that the jurisprudence of the ECHR imposed strict standards in relation to the use by the State of personal data and that the requirement of legality had been breached because the disclosure provisions under Part V of the 1997 Act contained no safeguards against arbitrary interference with the Convention right. There was no clear legislative framework for the collection and storage of data, no clarity as to the scope, extent and restrictions of the common law power to the police to retain and disclose caution data, and no mechanism for independent review of a decision to retain or disclose data.

Was the admission by the applicant to the offence of resisting the police a breach of Article 8 in the absence of the applicant being informed that he had a right to legal advice?

[24] We note the following in relation to this question:

(*i*) In the circumstances of this case the decision that the applicant should receive an IW was taken by the PPS but the decision as to the circumstances under which such a warning should be administered was taken by the PSNI in accordance with the then current service procedure SP17.

(*ii*) It is conceded that there is no clear domestic or European authority dealing expressly with this issue.

(*iii*) In R(R) v Durham Constabulary [2003] 1 WLR 897 the Divisional Court did not consider it necessary to come to any conclusion as to the arguments based upon Article 8 and, as noted above, the Article 8 submission was not pursued before the House of Lords. In R(T) v Chief Constable of Greater Manchester Police Lord Wilson, delivering the primary judgment of the Supreme Court, after referring to the two main judgments in R(L) v Commissioner of Police of the Metropolis [2010] 1 AC 410, said at paragraph [17]:

> "[17] Building on the comments in those 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."

Thus it would appear that cautions or warnings, the receipt of which takes place in private, do represent an aspect of the recipient's private life thereby engaging Article 8. It is of course important to bear in mind that the relevant issue in T was not the original administration of the caution/warning but disclosure consequent upon an application for an enhanced criminal record certificate required by the university in relation to the sports degree course in which the applicant was

seeking to enrol. The Supreme Court held that there was no rational connection between minor dishonesty as a child and the question whether, as an adult, that person might pose a threat to the safety of children with whom he came into contact. We bear in mind that, in the instant case, no question of disclosure has arisen as yet.

The context of the applicant's consent

[25] The relevant factual context in which the IW appears to have been administered to the applicant was as follows:

(*i*) On 29 September 2014 the applicant was interviewed by Constable Keegan and Assistant Investigator Gowan in the presence of his solicitor and an appropriate adult. He was informed that the potential outcomes were an IW, a restorative caution or being reported for prosecution. He was also told that an IW or restorative caution could only be given if he had admitted his involvement in the offence and that, even if he did so, he could still be referred for prosecution. He was also told that an IW would appear on his criminal record and that it might be disclosed in any subsequent proceedings. His solicitor confirmed that she had discussed the potential disposals with the applicant. A 'no comment' interview then took place.

(*ii*) Upon receipt of the PSNI file, the PPS decided that the evidential test for prosecution had been met but that the public interest could be sufficiently served by the administration of an IW.

(*iii*) The PSNI Youth Diversion Officer, Constable Cunningham, was charged with arranging and implementing the IW procedure. The applicant's social worker, Ms Auld also attended. According to her affidavit Ms Cunningham explained to the applicant what an IW involved, that it was an alternative to going to court and that the implications for acceptance included the fact that it would appear on his police record. She may also have told him that the IW would remain 'live' for a period of 12 months.

(*iv*) In the course of her affidavit Ms Cunningham maintains that she discussed the matter with Ms Auld and that she confirmed, inter alia, that the applicant understood the process and implications of an IW.

(*v*) Ms Auld has stated on affidavit that she was telephoned by Constable Cunningham to arrange the administration of the IW. However, she asserts that, during that conversation, there was no discussion about the detail of an IW. Ms Auld was able to recall Constable Cunningham explaining to the applicant that the IW was an alternative to proceedings in court and she stated in her affidavit that

the contents of paragraph 14, 15 and 16 of the Constable's affidavit accorded with her general recollections. Paragraph 15 included the assertion by Constable Cunningham that Ms Auld had confirmed that the applicant understood the process and implications of an informed warning. While there is no doubt that, as the applicant's social worker, Ms Auld was fully aware of and informed about his background of domestic, social and educational difficulty, as Ms Simpson reminded the court, Ms Auld was not a lawyer and her knowledge of the informed warning procedure was only as good as the information that she received from Constable Cunningham.

(*vi*) There can be no doubt but that the applicant in this case was an extremely vulnerable young person. The various social work reports prepared in relation to the application for him to be admitted to secure accommodation confirm a highly disruptive and damaging family background including domestic violence together with alcohol and substance abuse. As a consequence, his own behaviour has been disruptive, aggressive and risk-taking. He has a history of absconding, an unstable educational background and a limited attention span. Despite his young age he himself has been involved in substance and alcohol abuse. He was removed from his mother's parental care on 23 September 2013 subsequent to allegations of being physically assaulted and arrangements for him to live with his father broke down following a number of volatile and aggressive exchanges.

Was the consent of the applicant informed in the circumstances?

[26] On behalf of the PSNI Mr Egan accepted that Service Procedure SP17 was not the product of any statutory or regulatory provision but arose from the common law powers of PSNI and was grounded in the principle of consent. In the course of his helpful skeleton argument he set out three conditions to be satisfied for an IW to be lawfully administered in accordance with SP17:

(*a*) there had to be evidence judged to be sufficient to support a successful prosecution;

(*b*) the young offender had to admit the offence, and

(*c*) the parent or guardian of the young offender had to give informed consent.

[27] In R neither the Crime and Disorder Act 1998 nor the Guidance issued thereunder by the Secretary of State envisaged or required that the consent of the young offender should be sought or required prior to the administration of a warning and R was not aware of the consequent obligation to register with the police under the Sex Offenders Act 1997 until after the warning had been

administered. The Divisional Court did not consider that failure to warn of the consequences of a final warning could render the decision to administer a final warning unlawful as a matter of domestic law and that conclusion was not challenged before the House of Lords. However, in R, as Lord Bingham indicated at paragraph [12] of his judgment it was inescapable that the criminal charge ceased to exist when a firm decision was made not to prosecute.

[28] In the instant case it would appear that the PPS reserved the right to proceed with the prosecution for resisting police in the event that the applicant refused to be subjected to the IW procedure. The applicant was expressly so informed in the presence of his solicitor by constable Keegan when the IW was being administered.

Discussion

[29] We consider that this is a case which must be seen very much in the context of its own specific circumstances. In that context while the replacement of SP17 by the YE procedure is a factor, particularly bearing in mind the impressive extent of the consultation upon which the latter has been based, we also bear in mind that most systems are capable of improvement and the fact that improvement takes place does not necessarily mean that the pre-existing system was unlawful.

[30] In principle we are inclined to the view that the judgment of Lord Wilson in T, an excerpt from which we have cited above, supports the proposition that the administration and receipt of an IW in accordance with SP17 engaged Article 8(1) of the Convention. We consider that R may be distinguished upon a number of grounds:

(*i*) That case concerned a statutory scheme which the House of Lords noted did not require the consent of either the claimant or his step-father prior to the administration of a warning.

(*ii*) The House of Lords also concluded in that case that any possibility of prosecution had been brought to an end by the decision of the police officer to administer the warning.

(*iii*) The primary concern of the arguments in R was the potential application of Article 6 of the Convention and, as Lord Bingham specifically recorded, Article 8 was not pursued in oral argument before the House. However, while his remarks may have been, strictly speaking obiter, he was forthright in holding that the measures concerned were compliant with 8(2) justification as being compliant with the law, pursuant to a legitimate aim and necessary in a democratic society. In the instant case we consider that the fundamental issue is whether the particular circumstances in which the IW was administered were lawful as being compliant with procedural fairness.

[31] Even if we are not correct in holding that Article 8 is engaged in this case, we have to consider whether it was lawful at common law to subject this particular applicant to SP17. Mr Egan concedes that the scheme arose from the PSNI's common law powers and was grounded on the principle of informed consent. Unlike the statutory scheme in R, the possibility of prosecution had not been removed prior to the administration of the IW. At interview on 28 September 2013 Constable Keegan had informed the applicant that, even if he admitted the offence, he might still be referred for prosecution through the courts and, as Mr Henry made clear in his submissions to this court, the procedure adopted by the PPS was both sequential and flexible in that, if diversion had been refused, it would still have been a matter for the PPS to determine whether it was in the public interest to prosecute. Mr O'Donoghue submitted with some force that, in such circumstances, there must have been a significant prospect that a decision would be taken not to prosecute in the event of a refusal to accept an informed warning. The witnesses responsible for the most serious allegations had already withdrawn their complaints and the PSNI had indicated its view that it was not in the public interest to prosecute the applicant for resisting arrest. It seems to us self-evident that neither Constable Cunningham nor Ms Auld would have been in a position to give objective advice in relation to such a prospect. In addition, while the applicant may have been told that the IW would be 'live' for a period of 12 months there is no evidence to indicate that he received any information explaining that the offence of resisting arrest pursuant to Section 66 of the Police (Northern Ireland) Act 1998 was one of a list of offences which was not eligible for 'filtering' and therefore remained discloseable in the circumstances detailed in the memoranda compiled for the court by the PSNI.

[32] The legal requirement of procedural fairness, reflecting the principles of natural justice, has always been an entirely contextual principle with the content of the duty depending upon the circumstances of the particular case. It incorporates the basic right to be given sufficient information to enable an informed decision to be reached by the subject whose future may be adversely affected.

[33] We have referred above to the damaging and destabilising background of this applicant. One of the most difficult and depressing realities which the courts have to deal with in this jurisdiction is the number of very young individuals, failed by their families, educational and social circumstances, who find themselves having to cope with the complexities of the law generally as a consequence of negative peer influence combined with poor judgment. They are frequently at risk of acquiring a record of one kind or another which has the potential to adversely affect them long into the future. Diversionary schemes such as SP17 and its successor YE represent praiseworthy attempts on the part of the PPS and PSNI to recognise that risk and to achieve a just balance between the rights of the individual and those of the community. It is accepted that those concerned sought to conscientiously comply with SP17 in administering the IW. However, the court is obliged to subject the operation and outcome of any such scheme to the closest scrutiny so as to ensure compliance with the law. In that context, we remind ourselves of the eloquent and authoritative review of national and international law relating to the rights of children contained in the judgment of Baroness Hale in R and echoed by Gillen LJ in

the Northern Ireland Court of Appeal in M v A Health and Social Care Trust [2014] NICA 73. After careful consideration, we have reached the conclusion that, in the particular circumstances of this case, the applicant's consent could not be regarded as sufficiently or properly informed and that, consequently, the decision of the PSNI to administer the IW without referring to the possibility of seeking legal advice beforehand was not in accordance with law and should be quashed and that the IW should be removed from his record.