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Judgment: approved by the Court for handing down | *Delivered:* **10/07/2015**

*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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Gallagher's (Lorraine) Application [2015] NIQB 63

IN THE MATTER OF AN APPLICATION BY LORRAINE GALLAGHER FOR JUDICIAL REVIEW

and

IN THE MATTER OF DECISIONS OF THE DEPARTMENT OF JUSTICE IN NORTHERN IRELAND MADE IN APRIL 2014 AND ON 24TH JULY 2014

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TREACY J

Introduction

[1] This application challenges the statutory framework whereby, for certain exempted areas of employment, an applicant's conviction(s) can be disclosed to potential employers on a criminal record disclosure certificate in a manner which, it is alleged, does not allow for any real consideration of the relevance of this information and whether the convictions in question are 'spent' and as such is a breach of her Article 8 rights.

Background

[2] The Applicant is a care worker. These proceedings concern her application for a post as a care worker with the Western Health and Social Care Trust (WHSCT). The Applicant was initially offered the post but, after the events described below, said offer was withdrawn.

[3] Under the applicable statutory framework for certain exempted areas of employment an applicant's conviction(s) can be disclosed to potential employers on a criminal record disclosure certificate allegedly without any real consideration of the relevance of this criminal record information and whether the convictions in question are 'spent'.

[4] If an applicant for such a certificate has more than 1 conviction they will all be disclosed automatically, irrespective of whether they are considered 'spent' and irrespective of their relevance to the employment sought.

[5] Furthermore, irrespective of whether a criminal record disclosure is sought, if an applicant has more than 1 conviction she must disclose all of her convictions by way of a personal declaration to a potential employer for certain exempted areas of employment irrespective of whether they are now 'spent', the nature of the convictions, and other pertinent factors.

[6] As a result of information being disclosed on a criminal record disclosure certificate and the requirement to disclose criminal record information to employers in certain exempted areas of employment the Applicant had an employment opportunity with the Western Health and Social Care Trust withdrawn.

[7] The Applicant claims that automatic disclosure of such information has compromised her employment opportunities and caused disruption to her employment in her chosen field of expertise and financial loss.

Chronology

- 1996 – the Applicant receives 4 convictions – one of driving without a seatbelt and three of carrying a child under 14 years old in the back of the car without a seatbelt. These four convictions arose out of the same incident.

- 1998 – the Applicant receives 2 further convictions, both for the same offence as in 1996. Both convictions arose out of the same incident and the Applicant deposes that her sons *'had only put the seat belt on but put the shoulder strap under their arm so that they were not wearing or using the seat belts correctly. I did not know that they were not wearing them in the proper manner.'*

- 1st April 2008 – current statutory scheme for disclosure of criminal record information entered into force in Northern Ireland.

- April 2010 – Policing and Justice functions devolved to Northern Ireland Assembly.

- Pre-February 2014 – The Applicant worked for the Western Health and Social Care Trust as an agency-worker.

- 11th February 2014 – the Applicant applies for a post employed by the Trust at the Oak Tree Centre in Derry (a day facility for adults with learning difficulties).

- April 2014 – Statutory scheme for disclosure of criminal record information was amended by the DoJNI to reflect the position in England & Wales.

- 29th May 2014 – Applicant called for interview.

- 11th June 2014 – the Applicant was informed she was successful and placed on WHSCT waiting list for vacancies.

- 17th June 2014 – the Trust offered the Applicant temporary part-time employment as a Care Assistant in the Benbradagh Resource Centre, Limavady, subject to (inter alia) an AccessNI check. As part of the initial application form and as an updating exercise the Trust required the Applicant to set out any convictions. The Applicant disclosed one conviction describing it as 'carrying child without seatbelt 1996' and also (in relation to the same conviction) as '4 May 1996 carrying child without seatbelt fined £25'. The Applicant in fact has 6 convictions.

- 20th June 2014 – Personal Declaration and AccessNI consent signed and returned to WHSCT by the Applicant. The Personal Declaration disclosed only one of the convictions.

- 24th June 2014 – EDC issued in respect of the Applicant disclosing 'spent' convictions.

- 13th August 2014 – the Applicant was interviewed by WHSCT for 1st time about disclosures on EDC. The Applicant deposes that she was led to believe in this interview that the interview was nothing to worry about as it was a minor conviction and that the interview process was standard procedure.

- 18th August 2014 – the Applicant was interviewed by WHSCT for 2nd time about disclosures on EDC as the interviewees had failed to notice the further convictions listed on the disclosure certificate. The Applicant deposes that she was again led to believe that the interview was nothing to worry about.

- 29th September 2014 – the Trust withdraws the offer of employment.

- 2nd October 2014 – the Applicant sends a letter requesting reasons for the decision.

- 23rd October 2014 – the Trust gives a full explanation of its reasoning. This explanation concluded with the following:

> "The fact remains that on two separate occasions you were asked if you had any convictions / cautions and you did not fully disclose your convictions at either opportunity. The Western Trust considers failure by an

applicant to declare complete and accurate information about convictions to be a serious breach of trust and this is why the posts were withdrawn."

- 10th December 2014 – Letters before application sent.
- 17th December 2014 – Application for Legal Aid lodged.
- 19th December 2014 – Legal Aid Certificate granted.
- 23rd December 2014 – Response to letter before application from WHSCT.
- 2nd January 2015 – Legal Aid Certificate granted.

Relief Sought

[8] The Applicant sought the following relief:

> (a) A declaration that the automatic disclosure, and potential future disclosure, of the Applicant's criminal record information, and information pertaining to her 'spent' convictions in particular, on a criminal record disclosure certificate breaches her rights under Article 8 of the European Convention on Human Rights 1950;
>
> (b) A further declaration that the requirement upon the Applicant to disclose all of her convictions, and her 'spent' convictions in particular, in applying for certain exempted areas of employment breaches her rights under Article 8 of the European Convention on Human Rights;
>
> (c) A further declaration under Section 4 of the Human Rights Act 1998 that the regime for the disclosure of criminal record information under Part V of the Police Act 1997 and the Rehabilitation of Offenders (Exceptions) (Northern Ireland) Order 1979 is incompatible with Article 8 of the European Convention on Human rights 1950; and
>
> (d) An order for damages in respect of the violation of the Applicant's rights under the European Convention on Human Rights 1950 and the loss occasioned to the Applicant by reason of the aforesaid decisions.

Grounds for Relief

[9] The grounds on which this relief was sought are:

- That the Applicant's rights under Article 8 of the European Convention on Human Rights 1950 ('the Convention') have been breached, in particular:

  i. The retention and disclosure of criminal record information, particularly where it has receded into the past, engages a person's rights under Article 8(1) of the Convention;

  ii. Disclosure of a person's criminal record information must therefore comply with Article 8(2) of the Convention by being in accordance with the law and necessary in a democratic society in pursuance of a legitimate aim;

  iii. Under the statutory regime disclosure of criminal record information occurs both;

    1. By preventing certain convictions from being regarded as 'spent' in certain circumstances and thereby requiring an applicant to reveal them to potential employers, and

    2. By the provision of Criminal Record Disclosure Certificates to those employers;

  iv. If a job/role applied for by the Applicant falls within one of the exempted categories and the requirements of the legislation are met she must disclose her criminal record information to an employer and such information will be included within a criminal record disclosure certificate automatically, even if the convictions in question are otherwise 'spent';

  v. There is no provision for consideration of the relevance of this information or other pertinent factors prior to its disclosure. Account cannot be taken of pertinent factors such as the age or

nature of any conviction, nor whether it is 'spent', nor does it permit consideration of the relevance of the convictions to the employment applied for prior to their disclosure;

vi. As a result of this legislative regime the Applicant was required to disclose her criminal record information and it was automatically disclosed to an employer on a criminal record disclosure certificate without any consideration of its relevance to the position applied for, the age of the convictions, their nature, or the penalty imposed;

vii. This resulted in the withdrawal of the Applicant's offer of employment and her removal from the Western Health and Social Care Trust's vacancy waiting list;

viii. If the Applicant applies for any other jobs in this exempted area of employment this legislative regime will once again require her to disclose her criminal record information irrespective of its age, nature and relevance, and her criminal record information will be disclosed on a criminal record disclosure certificate despite having receded so far into her past;

ix. These infringements of the Applicant's rights under Article 8(1) cannot be regarded as necessary in a democratic society under Article 8(2).

Relevant Law

Section 113A of the Police Act 1997

"113A Criminal record certificates
(1) The [Department of Justice in Northern Ireland] must issue a criminal record certificate to any individual who-

(a) makes an application, and

(b) pays in the prescribed manner any prescribed fee.

(2) The application must-

(a) be countersigned by a registered person, and
(b) be accompanied by a statement by the registered person that the certificate is required for the purposes of an exempted question.

(3) A criminal record certificate is a certificate which-
(a) gives the prescribed details of every relevant matter relating to the applicant which is recorded in central records, or
(b) states that there is no such matter.

(4) The [Department of Justice in Northern Ireland] must send a copy of a criminal record certificate to the registered person who countersigned the application.

(5) The [Department of Justice in Northern Ireland] may treat an application under this section as an application under section 113B if-
(a) in his opinion the certificate is required for a purpose prescribed under subsection (2) of that section,
(b) the registered person provides him with the statement required by that subsection, and
(c) the applicant consents and pays to the [Department of Justice in Northern Ireland] the amount (if any) by which the fee payable in relation to an application under that section exceeds the fee paid in relation to the application under this section.

(6) In this section-
"central records" means such records of convictions and cautions held for the use of police forces generally as may be prescribed;
"exempted question" means a question in relation to which section 4(2)(a) or (b) of the Rehabilitation of Offenders Act 1974 (effect of rehabilitation) has been excluded by an order of the [Department of Justice in Northern Ireland] under section 4(4) of that Act;
"relevant matter" means –
(a) a conviction within the meaning of the Rehabilitation of Offenders Act 1974, including a spent conviction, and
(b) a caution.

….

(7) The [Department of Justice in Northern Ireland] may by order amend the definitions of "central records" and "relevant matter" in subsection (6)."

Section 3 of the Police Act 1997 (Criminal Record Certificates: Relevant Matters) (Amendment) Order (Northern Ireland) 2014

"In section 113A(6), for the definition of "relevant matter" substitute:
""relevant matter", in this section as it has effect in Northern Ireland, means-
(a) in relation to a person who has one conviction only –
(i) a conviction of an offence within subsection (6D);
(ii) a conviction in respect of which a sentence of imprisonment, a sentence of service detention or custodial order was imposed; or
(iii) a current conviction;
(b) In relation to any other person, any conviction;
….."

Section 4 of the Police Act 1997 (Criminal Record Certificates: Relevant Matters) (Amendment) Order (Northern Ireland) 2014

"…
(6E) for the purposes of the definition of "relevant matter" as it has effect in Northern Ireland –
(a) "conviction" has the same meaning as in the Rehabilitation of Offenders (Northern Ireland) Order 1978 and includes a spent conviction within the meaning of that order;
(b) a person's conviction is a current conviction if –
(i) the person was aged 18 or over on the date of the conviction and that date fell within the 11 year period ending with the day on which the certificate is issued, or
(ii) the person was aged 18 or under on the date of conviction and that date fell within the period of 5 years and 6 months ending with the day on which the certificate is issued;
…"

Section 9 of the Police Act 1997 (Criminal Records) (Disclosure) Regulations (Northern Ireland) 2008

"**Enhanced criminal record certificates: prescribed purposes**

9(1) The purposes for which an enhanced criminal record certificate may be required in accordance with a statement made by a registered person under section 11B (2)(b) of the Act, are prescribed as follows; namely for the purposes of –

…
(e) considering the applicant's suitability for a position which involves regularly caring for, training, supervising or being in the sole charge of a person aged 18 or over who is a vulnerable adult within the meaning given by paragraph (2) below;"

Section 113B of the Police Act 1997

"(1) The [Department of Justice in Northern Ireland (AccessNI)] must issue an enhanced criminal record certificate to any individual who –

(a) makes an application, and

(b) pays in the prescribed manner any prescribed fee.

(2) The application must –

(a) be countersigned by a registered person, and

(b) be 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.

(3) An enhanced criminal record certificate is a certificate which –

(a) gives the prescribed details of every relevant matter relating to the applicant which is recorded in central records and any information provided in accordance with subsection (4), or

(b) states that there is no such information.

(4) Before issuing an enhanced criminal record certificate the [Department of Justice in Northern Ireland] must request the chief officer of every relevant police force to provide any information which, in the chief officer's opinion –

(a) might be relevant for the purpose described in the statement under subsection (2), and
(b) ought to be included in the certificate.

(5) The [Department of Justice in Northern Ireland] must also request the chief officer of every relevant police force to provide any information which, in the chief officer's opinion-

(a) might be relevant for the purpose described in the statement under subsection (2),
(b) ought not to be included in the certificate, in the interests of the prevention or detection of crime, and
(c) can, without harming those interests, be disclosed to the registered person.

(6) The [Department of Justice in Northern Ireland] must send to the registered person who countersigned the application –

(a) a copy of the enhanced criminal record certificate, and
(b) any information provided in accordance with subsection (5).

(7) The [Department of Justice in Northern Ireland] may treat an application under this section as an application under section 113A if in his opinion the certificate is not required for a purpose prescribed under subsection (2).
…"

Article 5(2) of the Rehabilitation of Offenders (Northern Ireland) Order 1978

"*Effect of rehabilitation*
5(1) Subject to Articles 8 and 9, a person who has become a rehabilitated person for the purposes of this Order 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 or sentenced for the offence or offences which were the subject of that conviction; and, notwithstanding the provisions of any other statutory provisions or rule of law to the contrary…

(2) Subject to the provisions of any order made under paragraph (4), where a question seeking information with respect to a person's previous convictions,

offences, conduct or circumstances is put to him or to any 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…"

Rehabilitation of Offenders (Exceptions) Order (Northern Ireland) 1979

"**Exclusion of article 5(2) of the Order in relation to certain questions**

2(1) …. none of the provisions of article 5(2) of the Order shall apply in relation to –

(a) any question asked by or on behalf of any person, in the course of the duties of his office or employment, in order to assess the suitability –

…

(ii) of the person to whom the question relates for any office or employment specified in Part II of Schedule 1 or for any work specified in paragraph … 12 …"

"**Part II of Schedule 1**

…

(12) Any employment or other kind of work which is concerned with the provision of [health care] and which is of such a kind as to enable the holder to have access to persons in receipt of such services in the course of normal duties."

The Rehabilitation of Offenders (Exceptions) (Amendment) Order (Northern Ireland) 2014

4 Insertion of new Article 1A

1A – (1) For the purposes of this Order, a person's conviction is a protected conviction if the conditions at paragraph (2) are satisfied and

(a) Where the person was under 18 years at the time of the conviction, five years and six months or more have passed since the date of the conviction; or

(b) Where the person was 18 years or over at the time of the conviction, 11 years or more have passed since the date of the conviction

> (2) The conditions referred to in paragraph (1) are that –
> a. The offence of which the person was convicted was not a listed offence;
> b. No sentence mentioned in paragraph (3) was imposed in respect of the conviction; and
> c. The person has not been convicted of any other offence at any time.

Article 8 ECHR

> "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 in accordance with the law and is necessary in a democratic society in the interests of national security, public safety of 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."

Applicant's Submissions

[10] Under the new S113A(6)(c), a person who has more than one conviction will have all of their convictions disclosed automatically, irrespective of their relevance to the job applied for, their age, and whether the convictions have become 'spent' under the Rehabilitations of Offenders framework. The Applicant argues that this situation remains unchanged from that which the UKSC found to be unlawful in *R (on the application of T & another) v Secretary of State for the Home Department & another* [2014] UKSC 35.

[11] Due to the action of s113A(6)(a)(iii) and (6E)(b), even if a person only has one conviction on their record which they received as an adult it will automatically be disclosed on an EDC if that EDC is requested within 11 years of the conviction. The Applicant argues that while this allows for a token consideration of the age of the conviction, it takes no account of any other pertinent factors such as its nature, relevance to the form of employment sought, or whether it may otherwise be considered spent.

Response to Developments since the Grant of Leave

[12] The Respondent has stated that due to a new IT system from the 1st April 2015, AccessNI will routinely search for information for Criminal Record Disclosure Certificates (CRDC'S) only on the Police National Computer (PNC) rather than on both the PNC and the Causeway system (as had previously been the case). Furthermore the Respondent has stated that as the Applicant's offences are

considered non-recordable they should not appear on the PNC. However, these convictions remain on the Causeway System and may still be included on an Enhanced Disclosure Certificate (EDC) as 'other relevant information'.

[13] In response to this the Applicant makes the following points:

a) the Respondent has not accepted any fault arising from its previous automatic disclosure of the Applicant's conviction information, nor the remaining obligation upon her under the Rehabilitation of Offenders scheme to disclose the existence of her convictions to any future prospective employer irrespective of pertinent considerations such as their relatively minor nature, arguable irrelevance and that they have been 'spent' for many years.

b) It is unclear whether any future alterations to AccessNI's IT system could result in the fresh revelation of the Applicant's conviction information which would then trigger their automatic inclusion on a CDRC under the current legislative framework.

c) This change in IT system does not resolve the issue for any other persons who are in the same position as the Applicant albeit that their convictions are 'recordable' and therefore remain visible to AccessNI after the 1st April 2015.

[14] The Applicant argues that the storage of information pertaining to the cautioning of an individual and 'spent' convictions falls within the scope of Article 8(1) and therefore must be justified. The Applicant also notes that being excluded from employment in one's chosen field may engage Article 8(1). Based on this, the Applicant submits that due to the potential impact of the disclosure of criminal record information, proper consideration must be given to the likely impact on an individual's private life and whether its disclosure would be justified. In other words, disclosure of criminal record information in each case must therefore be in accordance with the law, and a proportionate response in all the circumstances in pursuance of a legitimate aim.

[15] The Applicant argues that, in fact, once an applicant meets the requirements to obtain an EDC if they have more than 1 conviction, the regime does not provide, nor permit, consideration of what information is relevant in each case. The Applicant further submits that it should be possible to consider factors such as:

- the species of the offence(s),
- the circumstances of the offence(s)
- the age of the perpetrator at the time,
- the sentence imposed,
- whether there has been any further offending
- the passage of time since the offence occurred, and
- the relevance of the offence/information to the application for disclosure

[16] The Applicant submits that although *R(T)* concerned the pre-April 2014 version of the regime, the amendments have not changed the position where an applicant has more than 1 conviction on their criminal record. In this regard the Applicant notes that the UKSC held (in *R(T)*) that it was impossible to read the Police Act 1997 in such a way as to give effect to its provisions in compliance with Article 8 under s.3 of the Human Rights Act 1998, and thereby affirmed the Court of Appeal's declaration of incompatibility under s4 of the Human Rights Act 1998 in respect of the 1997 Act. Furthermore, the UKSC held that the 1979 Order element of the regime cannot be interpreted compatibly with Convention rights.

[17] The Applicant therefore submits that the current iteration of the 1997 Act and the 1997 Order regime cannot be regarded as being compliant with Article 8 of the ECHR.

[18] The Applicant notes that while in *R(T)* it was acknowledged by the UKSC that the facts of the cases before it did not concern the disclosure of 'spent' convictions, the UKSC has stated twice that the automatic disclosure of 'spent' convictions *'would be impossible to justify…*[as]*… there would simply be insufficient, indeed effectively no real, countervailing protection for the article 8 rights of applicants for such posts'.* (*R(L)* at [77]-[78], see also [27]; *R(T)* at [18])

[19] The Applicant notes that it has been acknowledged by the UK Supreme Court that the Police Act's stance of providing for disclosure of criminal record information and then leaving it to each employer to assess the relevance of the information and whether it should negate an offer of employment *'… in the majority of cases… 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'* (*R(L)* at [75]; *R(T)* at [20]). Based on this the Applicant argues that leaving the determination of relevance of this information to its recipients, particularly where there is a dearth of guidance as to its interpretation etc available to them, compounds the failings of the regime.

[20] In sum, the Applicant argues that the aforementioned infringements are accordingly in breach of obligations under Section 6 of the Human Rights Act 1998 and this regime has caused significant economic loss, upheaval and distress to the Applicant.

Respondent's Submissions

[21] The Respondent submits that the Applicant did not lose the offer of employment because of the disclosure on the EDC but on the basis that she was deemed to have engaged in a breach of trust by the Trust.

[22] The Respondent submits that notwithstanding her full convictions being displayed on EDCs on no less than 9 occasions (not including the instant application) since July 2010, there is no evidence that the disclosures had a detrimental effect on

her securing the employment/placement in question on each occasion. In fact, the Applicant is currently employed by a Housing Association providing personal care to adults.

[23] The Respondent's preliminary submission is that based on the above factual matrix in this case there has been no breach of Article 8 and/or that the Applicant in any event has not been the victim of any breach/unjustified breach of Article 8 as per Section 7 of the Human Rights Act 1998. The Applicant has not been excluded from her chosen field of employment, and certainly not as a result of the disclosure of her convictions per se.

[24] In response to the Applicant's contention that where there is disclosure because of the existence of more than one conviction it must inevitably follow that the regime falls foul of the *T* dicta, the Respondent argues that this is too simplistic an approach. This is because the courts in *T* were not considering the context of the filtering regime now in place.

[25] The Respondent argues that there will be no violation of Article 8 if it is shown that the disclosure of all convictions in all circumstances where there is more than one conviction is in accordance with the law and necessary in a democratic society for one of the reasons identified in Article 8(2). Drawing on the decisions in *Gaughran v Chief Constable of the Police Service of Northern Ireland [2015] UKSC 29* and the *T* case, the Respondent identifies the following test for whether or not an interference is lawful:

- Is the objective behind the interference sufficiently important to justify limiting the right in question?
- Were the measures rationally connected to the objective?
- Did the measures go any further than was necessary to achieve it?
- Did the measures strike a fair balance between the rights of the individual and the interests of the community?

[26] The Respondent refers to the reasons that interferences were considered to fall foul of Article 8 in the *T* case and the *Gaughram* case.

[27] In the *T* Case the judge commented as follows:

> ".. the nature of …[the]… attack on the regime is obvious. It is that it operated indiscriminately. The exception… from the eradication for practical purposes of certain entries form 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 on 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 judgment to be made by the person making the request."

[28] In the *Gaughran* case the interference (retention of DNA) was found to be disproportionate because

- The retention was indiscriminate in terms of the nature and gravity of the offence and the age of the suspected offender.

- The duration of retention was indeterminate.

- That there were limited possibilities for an acquitted individual to have the data removed or destroyed and that there was no provision for independent review of the justification for the retention.

[29] For these reasons the interference was found to fail to strike a fair balance and was thus a disproportionate interference with the applicant's right. The Court in *Gaughran* also held that:

> "… interference will be considered necessary in a democratic society for a legitimate aim if it answers a pressing social need and, in particular, if it is proportionate to the legitimate aim pursued and if the reasons given by the national authorities to justify it are relevant and sufficient. … A margin of appreciation must be left to the competent national authorities, which varies and depends upon a number of factors. They include the nature of the right in issue, its importance for the individual the nature of the interference and the object pursued by the interference."

[30] The Respondent submits that the following factors militate towards justification of any infringement by the disclosure regime having been made out:

- The post 2014 regime introduces a strong degree of filtering out of convictions and cautions.

- The new system is recognised by the Supreme Court in *T* as 'a more calibrated system for identifying material which should be the subject of disclosure'.

- The new system is plainly not a blanket, indiscriminate one. The fact that within it the fact of multiple convictions will result in disclosure of all the convictions does not alter that status of the overall scheme.

- The Supreme Court was critical of the old regime for not separating out the convictions for disclosure 'by reference to any or all of the following '… (e) his perpetration or otherwise of further offences…' The new system does now include discrimination on that basis. It is a nuanced scheme in a manner that the old *T* scheme was not.

- The new system has been reached by the Respondent as a result of extensive expert consideration and consultation. Furthermore, it is not simply a matter of adopted policy but moreover is the reflection of the will of the legislature.

- The existence of more than one conviction is a matter of some significance as it may point towards a propensity/recklessness for criminal law breaking that should properly be a matter for assessment by the employer in the protected fields of work the regime is aimed at.

- In the instant case, had the Applicant only one of her actual convictions it would not have been disclosable under the new regime.

- That it strikes a fair balance between her rights and those of the wider community is illustrated by the fact that there is nothing to suggest the disclosure of her offending has operated to negative the various employers' view of her suitability – as assessed by them.

- The parameters of the balance struck is a matter that falls within the Respondent's margin of appreciation. In the Animal Defenders case at paras 109 and 110 it was held:

> "109. It follows that the more convincing the general justifications for the general measure are, the less importance the court will attach to its impact in the particular case…

> 110. The central question as regards such measures is not, as the applicant suggested, whether less restrictive rules should have been adopted or, indeed, whether the State could prove that, without the prohibition, the legitimate aim would not be achieved. Rather the core issue is whether, in adopting the general measure and striking the balance it did, the legislature acted within the margin of appreciation afforded to it."

[31] The Respondent notes that in *Gaughran* the retention of biometric data was deemed lawful and that the key distinction between the situation pertaining there and that in *S & Marper* was that the retention was nuanced – it applied to a category of persons. The Respondent argues that this categorisation marks a move away from blanket, indiscriminate retention.

[32] In Gaughran it was found:

> "The current policy in fact does distinguish between (a) un-convicted persons and those convicted of offences which are not recordable and (b) those convicted of offences which are recordable. This represents a policy and legislative intent which is not blanket or indiscriminate as such but one which distinguishes between cases. The choice of that differentiation is one involving the exercise of judgment by the state authorities which seeks to balance, on the one hand, the very limited impact of retention and use of such material on a person's real private life and its minimal impact on the intimate side of his life and, on the other hand, the benefit to society flowing from the creation of as effective a database as legitimately possible to help in combatting crime. The choice to retain the data of those convicted of recordable offences represents the exercise of a balanced and rational judgment by the authorities."

[33] In this regard the Respondent argues that the disclosure regime deemed unlawful under *T* has been subject to extensive recasting with the result that it cannot be tenably argued that there remains a *blanket* approach whereby every conviction/caution will always be disclosed.

[34] The Respondent argues that it is not an answer to this for the Applicant to say that there is a *blanket* disclosure of convictions in the case of multiple convictions. Rather this marks a setting of *bright line* rules, within the wider context of a nuanced filtering system. The Respondent points to the words of Lord Neuberger in *R (Nicklinson) v Ministry of Justice [2014] 3 WLR 2000 at 63:*

> "The expression 'blanket ban' is not helpful, as everything depends on how one defines the width of the blanket. Thus a blanket ban on voting for all those serving life sentences would appear to be acceptable to the Strasbourg Court – and certainly should be in my view".

Discussion

[35] It is accepted that the retention, storage and disclosure of criminal information engages the Applicant's article 8 rights. It is clear then that the task of the court is to decide whether the interference is justified by considering the following questions:

- Is the objective behind the interference sufficiently important to justify limiting the right in question?
- Were the measures rationally connected to the objective?
- Did the measures go any further than was necessary to achieve it?
- Did the measures strike a fair balance between the rights of the individual and the interests of the community?

[36] It seems that questions one and two are uncontroversial.

[37] In the *T* case the regime that then existed was found to be unlawful because it *'operated indiscriminately'* and because there were no *'rules which identify the entries which should then be disclosed'*. The Respondent argues that there *are* now rules which filter the entries to be disclosed and that therefore the new regime represents a justified interference. The Respondent argues that the new system *'is plainly not a blanket, indiscriminate one'* and further states *'The fact that within [the system] the fact of multiple convictions will result in disclosure of all the convictions does not alter that status of the overall scheme'*.

[38] I cannot agree with the Respondent's reasoning. While the issues identified in *T* have been partially resolved by the introduction of *some* filtering for age of conviction, for an individual like the instant Applicant, it is correct that the current scheme does not permit consideration of the relevance of the information to be disclosed or proportionality of that disclosure. It is this complete lack of consideration that makes the scheme indiscriminate and thus unlawful. The measure goes further than necessary to achieve the legitimate end - the objective of protecting vulnerable persons can be achieved with a less invasive disclosure regime. The measure fails to strike a fair balance between the rights of the individual and the interests of the community.

[39] Under the new S113A(6)(c), a person who has more than one conviction will have all of their convictions disclosed automatically, irrespective of their relevance to the job applied for, their age, and whether the convictions have become 'spent' under the Rehabilitations of Offenders framework. Due to the action of s113A(6)(a)(iii) and (6E)(b), even if a person only has one conviction on their record which they received as an adult it will automatically be disclosed on an EDC if that EDC is requested within 11 years of the conviction. While this allows for limited consideration of the age of the conviction, it takes no account of any other pertinent factors such as its nature, relevance to the form of employment sought, or whether it may otherwise be considered spent.

[40] While it is the case that the state is entitled to implement bright line rules, those rules cannot be at the expense of the core of the fundamental rights which the convention seeks to protect. In relation to the level of disclosure of criminal record information in this context it seems that any bright line that must be drawn must be drawn as close to the point at which criminal record information ceases to be relevant as is possible. The disclosure of irrelevant criminal information – whether irrelevant because of the age or nature of the crime goes further than is necessary to achieve the objective of protecting vulnerable people and thus breaches article 8. This scheme is unlawful because in the case of any person with more than one minor conviction the scheme *mandates* in the first instance all minor convictions, but also mandates that those minor convictions be available for disclosure forever, where a person with a single minor conviction will have that expunged from the records to be disclosed after 11 years. This gives rise to the following irrational situations:

(i) a person is stopped for driving with a minor without a seatbelt and is convicted. This conviction (assuming there are no further convictions) will not be required to be disclosed after 11 years have passed. Another person convicted for driving with 2 minors receives two convictions. These convictions will always be disclosed and there is no mechanism by which they can be prevented from appearing in an EDC; and

(ii) a person receives a minor conviction which will not be disclosed after 11 years. Another person receives a minor conviction. Ten years and 364 days pass and she receives a minor conviction on that date. This second person will then have them both disclosed forever without any mechanism to expunge them and prevent them from appearing in an EDC. It is not rational to draw a bright line between a person with one minor conviction and a person with two minor convictions when the effect of that is that the latter person will have their criminal record disclosed forever. Neither is it an effective way to achieve the legitimate aim sought.

[41] This is to be contrasted with the facts in the recently handed down decision of *R (W) v The Secretary of State For Justice [2015] EWHC 1952* wherein the complaint concerned a scheme whereby the offence of assault occasioning actual bodily harm (ABH) (and other specified violent offences as defined in the Criminal Justice Act

2003) is always 'filtered-in' regardless of the age of the offence, the age of the offender at the time of the offence, and so on. In contrast, simple assault was filtered out after a certain period. This bright line represents a rational distinction based on the potential relevance of the two offences to the purpose the disclosure is intended to serve.

[42] The Applicant in this case is thus a victim of a breach of her article 8 rights. There is evidence in the instant case that the disclosure of her previous convictions was not the reason that she was ultimately unsuccessful in the relevant job application. Accordingly, it has not been established that the reason why the job offer was withdrawn was because of the disclosure of the convictions.

Conclusion

[43] For the above reasons the court concludes that the automatic disclosure of this Applicant's convictions violates art 8 of the ECHR and that the finding to this effect constitutes just satisfaction.