Judicial Communications Office

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COURT DECLARES REHABILITION OF OFFENDERS LEGISLATION INCOMPATIBLE WITH ECHR

Summary of Judgment

Mr Justice Colton, sitting in the High Court in Belfast today, made a declaration to the effect that Article 6(1) of the Rehabilitation of Offenders (NI) Order 1978 is incompatible with Article 8 of the ECHR by reason of failing to provide a mechanism by which certain categories of offenders can apply to have their conviction considered to be spent.

The applicant was convicted in 1980 of offences relating to a petrol bombing of a house and burglary and theft. He received a concurrent sentence of five years imprisonment. The attack was apparently motivated by a desire for revenge on the resident of the house for having given information to the police about an earlier burglary. The applicant denied any involvement with the gang or the previous burglary but said he was an associate of one member of the gang and felt pressurised to participate. He has had no involvement with the criminal justice system and no further convictions since being released from prison but has experienced difficulties and negative consequences of his convictions over the years and finds the process of repeatedly having to disclose them to be oppressive and shaming.

The applicant sought to challenge the legality of Article 6(1) of the Rehabilitation of Offenders (NI) Order 1978 ("the 1978 Order") which prevents his previous convictions from ever becoming "spent". As his sentence was greater than thirty months, his conviction will never become spent and he will never be treated in law as a person who has not committed a criminal offence. The applicant argued that the provision is incompatible with his right to private and family life under Article 8 of the European Convention on Human Rights ("ECHR"). He sought to have the legislation struck down or a declaration of incompatibility.

The Applicant's Article 8 Rights and Proportionality

The court held that the failure to provide for the applicant's conviction to become spent engaged his rights under Article 8. It also concluded that there has been an interference with his Article 8 rights and accepted his evidence that the interference has had a significant effect on him.

In light of these findings the court had to consider whether any such interference was in accordance with law, pursued a legitimate aim and is proportionate. The court said there was no real issue in relation to the first two limbs of the test and the real issue was therefore one of proportionality/justification. The applicant's primary submission was that the absence of a mechanism under the legislation by which he could apply to have his conviction considered to be spent, irrespective of the passage of time and his personal circumstances, was fatal to Department of Justice's ("the respondent") submission that the legislation is compatible. The respondent's primary submission was that the imposition of periods during which sentences will not be considered spent and the designation of certain offences in respect of which convictions will never be considered spent is a permissible and lawful approach which does not breach Article 8. It was argued that the

State enjoys a margin of appreciation in determining the need for interference of Article 8 rights and is entitled to draw a "bright line" in respect of the designation of certain offences.

The Legislative History

In paragraphs [31] – [52], the court outlined the legislative history to the 1978 Order and the equivalent legislation in England and Wales ("the 1974 Act"). Prior to the devolution of justice to Northern Ireland in 2010 the legislation essentially maintained parity. However, in 2012 and 2014 the rehabilitation periods set out in the 1974 Act were changed to include sentences of imprisonment of up to four years in the rehabilitation regime and to shorten rehabilitation periods for other sentences. In 2019, the Ministry of Justice announced proposals to further reform rehabilitation periods in England and Wales so that, inter alia, some sentences of over four years would no longer have to be disclosed to employers after a specified period of time was passed. A consultation paper published in 2020 contained proposals including the ability of some custodial sentences of over four years to be able to become spent as part of criminal record checks for non-sensitive roles. The Police, Crime, Sentencing and Courts Bill, which introduces these changes is currently being debated in Parliament. If such a change were introduced in NI this would have the potential to be of benefit to the applicant.

In NI, there have been calls to shorten the rehabilitation periods in line with the changes made in England and Wales in 2012 and 2014. The court heard that there was insufficient legislative time available between 2011 and 2016 to effect any changes because of what was described as "a particularly busy legislative programme". When the Assembly was re-established in January 2020 the new Minister of Justice approved a review of rehabilitation periods with the intention to bring forward an amendment to Article 6(1) of the 1978 Order to both reduce current rehabilitation periods and to increase the range of sentences capable of becoming spent. The respondent told the court that it anticipated a draft legislative instrument will be prepared for introduction and debate in the Assembly during Autumn 2021 but noted that this period is "expected to be particularly congested legislative period".

Is Article 6(1) of the 1978 Order compatible with the ECHR?

In paragraphs [53] – [79] of its judgment, the court reviewed significant relevant decisions. It focussed on the recent judgment of the Supreme Court in *R(P) v Secretary of State* [2020] AC 185. In that case, the Supreme Court was considering challenges to the disclosure of spent convictions under both a system of criminal records checks and the equivalent English provisions to the 1978 Order. Because spent convictions were in issue, disclosure was only to employers vetting candidates for sensitive occupations and others who had a pressing need for disclosure. The Supreme Court concluded that the scheme was a proportionate interference with Article 8 rights, holding that it was not disproportionate as a matter of principle to legislate by reference to pre-defined categories where appropriate, even though this might result in cases which individually would be regarded as disproportionate. The decision supported the proposition that there are occasions when the State is entitled to draw "bright lines" in respect of the point at which interference with an individual's Article 8 rights is proportionate or justified.

The court then considered the application of the Supreme Court's decision to the applicant's case. It said the applicant's case can be distinguished as he is seeking to establish that the failure to provide a mechanism whereby he can apply to have his conviction to be spent is disproportionate. The court said that the scope of the circumstances in which the 1978 Order may require disclosure is far wider

than the scope of the circumstances in which disclosure of a spent conviction can be required as it goes beyond employers in sensitive occupations and extends, for example, to a person seeking insurance, a tenancy or non-sensitive employment. The Supreme Court in *R(P)* noted that a smaller jurisdiction such as Northern Ireland has the capacity to establish mechanism to review whether a previous conviction can be treated as spent for the purposes of the 1978 Order given that the numbers seeking the review will be low (referred to as the practicality issue).

The court's approach to proportionality

In order to decide whether interference with a fundamental right is proportionate to the legitimate end sought to be achieved the court had to consider whether:

- the legislative objective is sufficiently important to justify limiting a fundamental right;
- the measures designed to meet the legislative objective are rationally connected to it; and
- the means used to impair the right or freedom are no more than is necessary to accomplish the objective.

It noted that there is an overriding requirement to balance the interests of an individual against those of society. The court said that the State's rationale for the rehabilitation of offenders is an important objective and something given weight in an Article 8 context:

> "There is a clear public interest and benefit to society in providing offenders to fully rehabilitate in society after having been convicted of criminal offences. The disclosure of prior convictions can have an adverse impact on rehabilitation and, as the court has found, is an interference with an individual's Article 8 rights. In this context it is important to recognise that the State is entitled to ensure that those who are convicted of serious offences serve their appropriate punishment. When that punishment is completed there is a continuing need to protect the public from further harm. In doing so, in the context of rehabilitation, it is entirely legitimate to impose restrictions on the circumstances in which individual convictions can be regarded as spent. The passage of time since the conviction and the severity of the offence for which a person has been convicted are legitimate factors to be taken into account in this context. Thus, the legislative objective behind the restrictions under challenge are sufficiently important to justify limiting a fundamental right and the measures designed to meet the legislative object have a rational connection to the objective."

The court said the next question for it to consider was whether the means used to impair the Article 8 rights in this case are proportionate or no more than are necessary to accomplish the objective. This question has to be considered in the context of the overriding requirement to balance the interests of the individual against those of society. The court noted that it was clear from the history of the policy and legislative background that the thinking behind the 1974 Act and the 1978 Order in respect of the necessity for "*bright lines*" which ensured that there are some offences which can never be considered spent was the "fear that such a proposal would be too radical to command general support."

The court commented that whilst confidence in the justice system is an important consideration it seemed that the idea that a conviction can never be spent, irrespective of individual circumstances, pays insufficient weight to the interests protected by Article 8. In considering the appropriate balance the actual and potential interference with the applicant's Article 8 rights and those in a

similar position is significant. The court said there must be a question mark about the relationship between the length of sentence and the risk of reoffending so as to justify the operation of the impugned legislation where this subjects the applicant to a life-long disclosure requirement and where his convictions can never become spent. The system by definition does not distinguish between those who are known to be at high risk resulting in a sentence designed to address risk, such as a life sentence, and those who are not:

> "It seems to the court that that it would be both practicable and proportionate to devise a system of administrative review which would enable persons such as the applicant to apply to have their conviction deemed to be spent. The court considers that there must be some circumstances in which an appropriate Tribunal could reliably conclude that an individual's conviction should be deemed to be spent. That system of review would involve consideration of such matters as the circumstances of the conviction, the length of sentence, the period of time since the conviction was imposed, the conduct of the individual since the conviction and his current personal circumstances."

The court considered that Article 6(1) of the 1978 Order is arbitrary both in substance and effect. It held that the ongoing interference with the applicant's Article 8 rights is not proportionate and said that the objectives of protecting the public and ensuring confidence in the justice system can be achieved by the imposition of lesser restrictions which would facilitate the opportunity for the applicant to apply to have his conviction deemed to be spent. The court recognised that the whole question of rehabilitation of offenders in this jurisdiction is under review but said there was no guarantee that the review will result in new legislation. It noted, however, that it was argued on behalf of the respondent that the current system is compatible with the ECHR, irrespective of any review:

> "In those circumstances the court does not consider it appropriate to await the outcome of a review. This was not suggested by any of the parties in any event. Accordingly, the court is persuaded that it is appropriate to make a declaration to the effect that Article 6(1) of the Rehabilitation of Offenders Order 1978 is incompatible with Article 8 of the ECHR pursuant to section 4(4) of the Human Rights Act 1998 by reason of a failure to provide a mechanism by which the applicant can apply to have his conviction considered to be spent, irrespective of the passage of time and his personal circumstances."

NOTES TO EDITORS

1. This summary should be read together with the judgment and should not be read in isolation. Nothing said in this summary adds to or amends the judgment. The full judgment will be available on the Judiciary NI website (https://judiciaryni.uk).

ENDS

If you have any further enquiries about this or other court related matters please contact:

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