**Article 8 ECHR and the Disclosure of Criminal Records: Time to reconsider.**

**R (on the application of P and A v (1) Secretary of State for Justice (2) Secretary of State for the Home Department and Chief Constable of Thames Valley Police (Interested Party) [2016] EWHC 89 (Admin)**

**R (on the application of G v (1) Chief Constable of Surrey Police (2) Secretary of State for the Home Department (3) Secretary of State for Justice [2016] EWHC 295 (Admin)**

**Keywords:** Criminal Records; Disclosure; Spent Cautions; Spent Convictions; Article 8 ECHR

**Case 1**

P is a 47-year-old former teacher who has two convictions, both for offences committed 16 years previously at a time when she was suffering from undiagnosed, and therefore untreated, schizophrenia. The first conviction was for a minor shoplifting offence and the second was for failing to surrender to the court in relation to the shoplifting charge. Both convictions were sentenced on the same date by way of conditional discharge. A is a 51-year-old finance director who has 3 convictions dating back to when he was 17 and 18. The first conviction was for theft from a market stall, for which he was fined £30. The second and third relate to the theft of a motorcycle and driving without insurance, for which he was fined £50 and required to attend at an attendance centre for 24 hours.

Both P and A were caught by the scheme concerning the disclosure of convictions and cautions contained in Part V of the Police Act 1997 (“The 1997 Act”), as amended by the Police Act 1997 (Criminal Record Certificates: Relevant Matters) (Amendment) (England and Wales) Order 2013 (SI 2013/1200) as they had been convicted of more than one offence.

Both Claimants brought applications for judicial review seeking declarations that (1) the scheme under Part V Police Act 1997 as amended remains incompatible with Article 8 ECHR in that it requires the disclosure of all convictions where there is more than one conviction on a person’s record and (2) the Rehabilitation of Offenders Act (Exceptions) Order 1975 is ultra vires as being incompatible with Article 8 ECHR

**Held, both claims for judicial review should succeed.** In addressing whether the disclosure scheme’s interference with Article 8 rights was “in accordance with the law”, the question is whether the statute in its present form provides the individual with adequate protectionagainst arbitrariness and that there are adequate safeguards which enable the proportionality of the interference to be examined. Those safeguards, such a review mechanism, do not exist. The present rules produce results, including those in the instant cases, which are arbitrary. The scheme represented in the 1997 Act, as amended, is not “in accordance with the law”.

In relation to the 1975 Order the question of whether it is justified “in accordance with the law” was not specifically considered. However, turning to the question of whether the 1975 Order is “necessary in a democratic society”, there cannot be a rational connection between the interference with the Article 8 rights of the Claimants and the aim of ensuring suitability for their entire lives in respect of all of the activities specified in the order.

**Case 2**

At the age of 13 G had been issued with 2 reprimands for offences of sexual activity with a child (contrary to Section 13 of the Sexual Offences Act 2003) for behaviour which had begun when he was 11 and ended 3 weeks after his 13th birthday. The incidents appeared to have been sexual experimentation which was consensual and non-exploitative and which involved 2 other boys who were 2 to 3 years younger than G (and who were therefore under the age of criminal responsibility).

In September 2006, at the time of the reprimands, the Claimant’s mother was provided with a leaflet which incorrectly stated that the record of the reprimands would not be retained after 5 years, or beyond his 18th birthday if there was no further offending during that period. After his 18th birthday the Claimant applied for employment which involved some contact with children. He was therefore required to apply to the (then) Criminal Records Bureau for an Enhanced Criminal Record Certificate (“ECRC”).

In response to his application the Claimant was advised that the 2 reprimands (which by this time were treated as cautions) were to be disclosed and he was invited to make representations upon a proposed explanatory comment about the circumstances in which they arose. G discovered that in March 2006 there had been a change in the data retention policy set out in the leaflet provided to his mother which was recommended by the Association of Chief Police Officers (ACPO). This amended the practice of ‘weeding out’ reprimands where there was no subsequent offending by ‘stepping down’ such information, which in this case would have been after 10 years. However, as the practice of ‘stepping down’ was abandoned in 2009 the reprimands would remain indefinitely or until the Claimant reached the age of 100.

The Chief Constable of Surrey Police was invited to exercise her very limited discretion (under ACPO guidelines 4.3 of the Retention Guidelines for Nominal Record on the Police National Computer) to delete the reprimands on the basis that the circumstances in which they arose and the relevant CPS Rape and Sexual Offence Guidance: Chapter 11, reprimands should never have been issued. The Chief Constable declined on the basis that the reprimands were lawfully administered and therefore there was no basis on which to exercise the discretion to delete them.

The effect of the provisions of the Police Act 1997 (as discussed below) for G is that as an offence under Section 13 of the Sexual Offences Act 2003 is an offence which falls to be mandatorily included in an ECRC whatever the circumstances or age of offender and offence and regardless of good behaviour since.

The Claimant sought judicial review seeking (1) an order quashing the decision of the Chief Constable of Surrey Police refusing to delete the reprimands on the basis that the exercise of discretion was flawed because the reprimands should not have been issued (2) If (1) was not successful, declaratory relief against the Secretary of State for the Home Department with responsibility for the exemption regulations made under the Police Act 1997 and the Secretary of State for Justice with responsibility for the exemption regulations made under the Rehabilitation of Offenders Act 1974 on the basis that the scheme is incompatible with Article 8 ECHR.

**Held: (1) The reprimands were lawfully issued and therefore the challenge to them and the contention that the Chief Constable erred in not deleting them, failed. (2) Declaratory relief was granted on the basis that the statutory regime under the 1997 and 1974 Acts is, in the absence of procedural safeguards, such as a review mechanism, incompatible with Article 8 rights.**

**Commentary**

The Rehabilitation of Offenders Act 1974 introduced provisions to allow ‘spent’ convictions and cautions for criminal offences not to be disclosable in certain situation such as in response to questions from employers or potential employers. The Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 (SI 1975/1023) provided for certain exceptions to this exemption in relation to those intending to work with children or vulnerable adults. The effect of this was that a person was not exempted from disclosing any unspent conviction or caution where the Order applied no matter how old that conviction or caution was. In 2013 the scheme was amended and thereafter provided that where an individual had registered against them two or more convictions these would always be disclosable. Also, if a conviction was for an offence specified in The 1997 Act section 113A(6D) (which includes most serious violent offences and all sexual offences) or resulted in a custodial sentence or was ‘current’ (for an adult, within the last 11 years and for a minor within the last 5 years and 6 months) then it would always be disclosable. These amendments were supposed to create a more “nuanced” scheme which meant that not all cautions and convictions were now to be disclosed for life. However, both P and A were caught by the provisions of The 1997 Act as they had more than one conviction and G was caught by the list of offence which would always fall to be disclosed.

The 2013 amendments to the disclosure scheme were made partly as a result of a string of cases which found that the previous scheme was incompatible with article 8 ECHR. In MM v the United Kingdom [2012] ECHR 24029/12 the ECtHR determined that "...indiscriminate and open-ended collection of criminal record data is unlikely to comply with the requirements of Article 8 in the absence of clear and detailed statutory regulations clarifying the safeguards applicable” (at [199]). The United Kingdom Supreme Court adopted a similar approach in R (on the application of T and another) v Secretary of State for the Home Department and another [2014] UKSC 35 holding that “legislation which requires the indiscriminate disclosure by the state of personal data which it has collected and stored does not contain adequate safeguards against arbitrary interferences with Article 8 rights” (at[113]).

In both of the cases it was accepted that the present scheme, like its predecessor, constitutes an interference with the Claimant’s Article 8 rights and the only question is whether the interference can be justified under the two limbs of Article 8.2 called “legality” and “necessity”. In both cases the court came to the conclusion that the amended scheme failed to pass the first part of 8.2 in that it was “not in accordance with the law”. The importance of such a finding is that if an interference is found not to be “in accordance with the law” then “there is no margin of appreciation afforded to the national authorities in the measures enacted by them which constitute the interference with rights under Article 8.1” (at [34]). However, in both of the cases the courts followed the line of jurisprudence found in the case of T that in order for the interference to be “in accordance with the law” there must be safeguards which have the effect of enabling the proportionality of the interference to be adequately examined” (T at [114]). Lord Justice McCombe in the case of P and A held that the Supreme Court had moved our domestic understand of “in accordance with the law” significantly. The question now is “whether the present statute affords the individual adequate protection against arbitrariness, but also in order for an interference with Article 8 rights to be “in accordance with the law” there must be adequate safeguards which have the effect of enabling the proportionality of the interference to be adequately examined” (at [85]). The cases of P and A and G highlighted that the rules were capable of producing questionable results which could be described as arbitrary. The potential for arbitrariness could be highlighted in the contrasting positions of “a person with one conviction for stealing a significant sum of money from an employer and that of a person who steals a sandwich and a cheap article of clothing from two shops: the former has one conviction and in due course, is exempted from disclosure of it when spent: the latter has two convictions which remain disclosable for life” (at [30]). The consequence of such a finding is that questions of administrative convenience argued by the Defendants do not have to be considered. Lord Justice McCombe ultimately concluded in the case of P and A that he was “far from convinced that a review scheme would be unworkable” (at [88]).

In the case of G the considerations were slightly different as the Claimant had been reprimanded for an offence which would always fall to be disclosed. The Claimant was not arguing that section 13 of the Sexual Offences Act 2013 should not have been included in subsection 6D of the 1997 Act but rather that the scheme as a whole was not in accordance with law because there was no mechanism available that enabled the Claimant to submit to the public authority that the “data to be disclosed has no rational connection with the risk assessment for which it is sought” (at [42]). Consequently if there are “insufficient safeguards to ensure that the data retained is relevant to and necessary for the purpose for which it is disclosed to the third party, then, despite the existence of the filtering process under the more recent national measures that have the status of law domestically, the overall regime for disclosure cannot be said to have the characteristics that the ECHR requires in order for the interference with private life caused by the transmission to be in accordance with the law” (at [43]).

The fact that G was so young when the offences were committed was given specific consideration by the court. The court noted that England and Wales have one of the youngest ages of criminal responsibility in Europe that it is “necessary to temper the long arm of the criminal law with other measures designed to ensure that children do not become stigmatised as criminals for engaging in activity that might be seen as an ordinary part of the process of growing up” (at [37]). The potential unfairness caused by disclosing cautions given when a person is very young are particularly highlighted in the case of G. In that case it was the Police who identified the fact that disclosure of the reprimand would have a disproportionate effect on the Claimant and sought to mitigate this in the only way that was available to them by adding additional explanatory information. The court in G came to the same conclusion as in P and A that there are insufficient safeguards in the scheme and consequently the interference with the Claimant’s Article 8 rights was not in accordance with the law. Ultimately it would appear that by making the 2013 changes the Government has simply replaced one blanket scheme with another, As the court identified in R(G) there now appears to be a “compelling case that a review mechanism is both needed and is practicable” [para 48].

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