Neutral Citation Number: **[2024] EWHC 1668 (KB)**

Case Nos: KB-2023-BHM-000160 & 000235

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Monday 1st July

Before :

THE HONOURABLE MR JUSTICE LINDEN

- -

Between :

(1) WAYNE TRUTER
(2) ISAAC AMPONSAH

Claimants

- and -

MINISTRY OF JUSTICE

Defendant

- -
- -

The Claimants represented themselves
Christopher Knight (instructed by Government Legal Department) for the Defendant

Hearing dates: 12 and 13 June 2024

- -

Mr Justice Linden:

Introduction

1. These are two of five claims which were issued between mid and late 2023 in the Birmingham District Registry by serving prisoners at HMP Littlehey. The claims raise an issue as to the reliance by His Majesty's Prison and Probation Service ("HMPPS"), in the OASys Sexual Reoffending Predictor ("OSP"), on convictions which are *"spent"* for the purposes of the Rehabilitation of Offenders Act 1974. The OSP, as the name suggests, is an actuarial risk assessment tool which is designed to assist HMPPS in determining the likely risk of further sexual offending by adult male prisoners who have been convicted of sexual or sexually motivated offences. An offender's OSP risk level is therefore part of the information which will affect, amongst other things, decisions about their management within the prison system and about release and recall to prison.

2. On 12 January 2024, in the context of an application by the Defendant to strike out the claims, District Judge Rich ordered that there be a preliminary issue of law in Mr Amponsah's case. That issue is fundamentally whether it is contrary to section 4(2) of the 1974 Act for an offender's OSP score to take into account spent convictions, but it was framed by reference to the guidance given by the Defendant to HMPPS staff as to how the OSP should be operated, and therefore as follows:

> *"Whether it is lawful for the Defendant Ministry of Justice's policy framework document, 'OASys Sexual reoffending Predictor (OSP) Guidance for Practitioners, Version 3.0, July 2023', to provide at section 4, p.8 thereof, that 'it is irrelevant whether the conviction is considered spent under the Rehabilitation of Offenders Act 1974'?"*

3. Version 3.0 of the Guidance has since been updated, so that the current version is version 4.0, dated March 2024. But the position in relation to spent convictions remains as stated in version 3.0.

4. The four other claims were stayed. However, on 4 June 2024 I granted Mr Truter's application to lift the stay on his claim. My reasons for doing so were essentially that he was the driving force behind the claims and he had been intended by the other Claimants to be the lead Claimant. I was also under the impression that Mr Amponsah had not attended the hearing on 4 June, which had been conducted by CVP with me in open court, and I was concerned that he may not attend the hearing of the preliminary issue given that he had been released from custody (in fact, he had been linked into the hearing by CVP but this was not drawn to my attention). Mr Truter and Mr St Omer, who is the claimant in case number KB-2023-BHM-000292 and had also applied for the stay to be lifted in his case, said that a resolution of their claims was urgent from their point of view and I did not want to run the risk of the hearing of the preliminary issue being ineffective. I also directed that the other Claimants should be produced so that they could attend the hearing by CVP if they wished to.

5. In the event all five Claimants attended the hearing of the preliminary issues by CVP, as did Mr Knight for the Defendant, pursuant to permission which had been given before I became involved in the proceedings. I sat in open court at Birmingham. Mr

Truter and Mr Amponsah confirmed that they did not wish to cross-examine the witnesses for the Defendant but Mr Truter submitted that I should exclude their evidence as being irrelevant to the preliminary issue. I did not agree that their evidence was irrelevant and therefore declined to do so.

6. In addition to his written submissions, Mr Truter then made helpful, clear and brief oral submissions which were adopted by Mr Amponsah who said that he did not wish to add to them. Mr Knight's submissions were longer, partly because his arguments were tested by the court, but they were also helpful. He upheld the finest traditions of the Bar by making concessions where appropriate and seeking to ensure that any points which might have been taken on behalf of the Claimants, had they been professionally represented, were drawn to my attention.

7. At the beginning and the conclusion of the hearing I asked the parties for their submissions on whether Mr Truter and Mr Amponsah should be anonymised, or steps should be taken to restrict publication of information about their spent convictions. Mr Truter and Mr Amponsah did not ask for any formal order which restricted reporting of these proceedings or otherwise derogated from the principle of open justice, but they suggested that I need not include details of their offending in this judgment. I have respected their wishes to the extent that this information is not relevant to the issue which I have to decide.

The facts

The Claimants/claims

8. Mr Truter is currently serving an extended determinate sentence which was imposed in 2014 for various sexual offences. He was released on licence in September 2019 but subsequently recalled to prison on 19 May 2020. He has one other conviction, in the Magistrates' Court in March 2008, for a non-sexual offence. It is common ground that that conviction is *"spent"* for the purposes of the 1974 Act.

9. Mr Amponsah was sentenced for a sexual offence in May 2022. He was released on licence on 2 May 2024 and his sentence end date is 5 May 2026. He has 7 other convictions in the Magistrates' Court for non-sexual offences. The Defendant accepts that, by the time of his claim, all of his other convictions were spent for the purposes of the 1974 Act, save for a conviction on 17 October 2022 for two motoring offences.

10. On 3 June 2023, Mr Truter issued a claim under CPR Part 8 raising what he characterised as a question of law. In effect, this question was whether the Defendant was acting contrary to the Rehabilitation of Offenders Act 1974 in taking into account spent convictions as part of the OSP calculation. In a "Substituted Particulars of Claim" dated 10 August 2023, which was provided pursuant orders of court that he clarify his cause of action, he stated that his claim is "a private law action for misfeasance in public office".

11. Mr Amponsah's claim was brought under CPR Part 7 and was issued on 9 October 2023. The amended version of his Claim Form, dated 17 October 2023, also states that the claim is a private law action for misfeasance in public office and his

Particulars of Claim, dated 20 September 2023, are in very similar terms to Mr Truter's.

12. The preliminary issue which I have to decide will therefore be determinative of the question whether the practice of HMPPS is unlawful for the purposes of the claims of misfeasance in public office. If it is not, the claims fall to be dismissed as targeted malice is not, and could not realistically be, alleged. If it is unlawful, the Claimants will need to satisfy the other elements of the tort including knowledge that there is no power to do the act complained of and that the act will probably injure the claimant: see e.g. Halsbury's Laws Volume 97A at [394].

The OSP

13. The OSP is a validated actuarial risk assessment tool which applies to male offenders. It predicts the likelihood that a man who has been convicted and/or received a caution or similar out of court disposal for a sexual or sexually- motivated offence will go on to commit a further offence of this nature. With effect from 1 March 2021 the OSP replaced a previous actuarial tool known as Risk Matrix 2000 ("RM 2000"). The introduction of the OSP was accompanied by an OSP Policy Framework and the "OASys Sexual Reoffending Guidance for Practitioners" ("the Guidance") which, amongst other things, set out how the OSP is to be operated.

14. Actuarial tools such as the OSP are the first step in the four-step risk assessment process used by HMPPS to determine an offender's overall "risk of serious harm". In her witness statement dated 1 May 2024, Ms Helen Walton (Head of the Assessment and Management of Sex Offending Policy Team at HMPPS) describes the four steps as follows:

"a. Step one – Actuarial assessment: Risk predictors should be used as a starting point to aid judgement in determining the risk of serious harm level an individual poses. (emphasis in the original)

b. Step two – Risk and protective factors: Step two supports us to identify the factors that impact likelihood of offending and harm.

c. Step three – Immediacy: Explores opportunities to offend and current situations to identify how soon and under what circumstances further offending is most likely.

d. Step four – Assign the level of risk: This step encourages staff to draw together the former 3 steps to assign a level of risk of harm Low, Medium, High or Very High. This will support staff to determine the amount of contact and intervention that may be required to address the factors raised that will reduce harmful offending."

15. The OSP has two risk scales, which were updated in March 2024. One predicts the likelihood of commission of further contact sexual offences ("OSP/C" – "OSP/DC" since March 2024) and the other the likelihood of an offence related to the possession or downloading of indecent images or, since March 2024, an indirect child contact offence ("OSP/I" – "OSP/IIC" since March 2024).

16. In his statement dated 1 May 2024 Mr Philip Howard (Head of Risk Assessment Data Science at the Ministry of Justice) explains that a substantial international evidence base demonstrates that actuarial methods have superior predictive accuracy compared with structured and unstructured professional judgement. Criminal history – convictions, cautions or equivalent disposals – is the single most important element of each of the risk assessment tools used by HMPPS. When OSP/C was constructed, it was seen that there was a strong distinction, in terms of the risk of contact sexual reoffending with adult victims, between offenders with no prior criminal history whatsoever and those with some criminal history. It was also noted, however, that the number of prior sanctions for non-sexual offences did not further improve the accuracy of the prediction. The first study to revalidate OSP/C found that the fact that an offender has any criminal history is associated with a doubling of the risk of contact sexual reoffending. The most recent study, in 2021, found that the existence of any criminal history is associated with a four to five-fold increase in the risk of contact adult sexual reoffending, and a probable small increase in direct contact child sexual reoffending risk.

17. Mr Howard goes on to explain that other features of an offender's history of offending including the nature of the offences, the age at which they were committed, and how recently they were committed, have different levels of predictive value and are therefore weighted accordingly in the OSP. He sets out the OSP questions, the explanation for each question and the points system in the following table:

Question	Explanation	Points scored in OSP/DC algorithm
Have they ever committed a sexual/sexually motivated offence?	This acts as a filter to ensure that OSP is completed for males with such offending.	(Not applicable)
Does the current offence involve actual/attempted direct contact against a victim who was a stranger?	Direct contact reoffending risk is higher for those with such current offences	No (0 points); yes (4).
Date of most recent sanction involving a sexual/sexually motivated offence	Direct contact reoffending risk is lower for those last sanctioned for sexual offending at age 16 or 17, and much lower below age 16	Aged 10 to 15 (0 points); 16 or 17 (5), 18 and over (10).
Number of previous/current sanctions involving contact adult sexual/sexually motivated offences.	Each contact adult sanction raises direct contact offending risk strongly	Zero (0 points); one (5); two (10); three or more (15).
Number of previous/current sanctions involving direct contact child sexual/sexually motivated offences	Each direct contact child sanction raises direct contact reoffending risk moderately	Zero (0 points); one (3); two (6); three or more (9).
Number of previous/current sanctions involving indecent child image sexual/sexually motivated offences or indirect contact child	Each image or indirect contact child sanction raises image / indirect contact child reoffending risk (but not direct contact) reoffending risk strongly	(Not scored in OSP/DC)
Number of previous/current sanctions involving other non-contact sexual/sexually motivated offences	Each other noncontact (i.e. not image) sanction raises direct contact reoffending risk, to a lesser degree than contact adult or direct contact child sanctions	Zero (0 points); one (2); two (4); three or more (6).
Total number of sanctions for all offences	Having one sanction – i.e., no known criminal history prior to the current offence(s) – lowers direct contact reoffending risk strongly	One sanction (0 points); two or more sanctions (6).
Date of commencement of community sentence or actual release from custody (if	Age at commencement of risk in the community is very strongly associated with	18 to 20 (14 points); 21 to 23 (13); 24 to 26 (12), and so on, to 57

18. In relation to the question what counts as a "sanction" for the purposes of the OSP, page 8 of the Guidance states that:

> *"A 'sanction' includes a formal caution, reprimand or final warning, or a court appearance resulting in conviction: if it is on the individual's list of previous convictions, then it should be counted for OSP purposes. Additionally, military offences should be counted in the same way, where they are known. For these purposes, it is irrelevant whether the conviction is considered spent under the Rehabilitation of Offenders Act 1974. That Act provides that "for all purposes in law", a person with spent convictions shall be treated as if those convictions did not exist. However the words "for all purposes in law" are words of limitation and do not apply to the factual determination of OSP risk scores by HMPPS."* (emphasis added)

19. The question from Mr Howard's Table which is complained of by Mr Truter and Mr Amponsah is "Total number of sanctions for all offences". However, the principle that spent convictions should be included applies equally to the questions about convictions for sexual offences, and the logic of the Claimants' argument is therefore that the 1974 Act also prevents such convictions from being taken into account if they are spent.

20. Consistently with the evidence that any additional offending is an indicator of increased risk but the number of additional offences is of less significance, any other convictions, spent or otherwise and regardless of the number of them, will generate six points. However, Mr Howard accepts that the six point score for the existence of other sanctions means that this factor will cause a one-level increase in the OSP/DC risk level for many individuals.

21. As for the method of completing the OSP assessment, personnel at HMPPS use information drawn from an offender's Police National Computer ("PNC") record to answer the questions in the OASys risk assessment tool. They do not generally have direct access to the PNC and therefore rely on the information in the hard copy record which is included in a bundle of information provided to HMPPS by the sentencing court. If it is not available by this route, they can request a copy from the police. HMPPS staff do not ask the offender about their criminal record.

22. The OSP/DC score is created by the OSP adding up the points accrued for the seven scored items. The range of possible scores is 0 to 64 but in practice scores below 10 or much above 40 are rare. The outcome is reported by the OSP as one of four risk levels: Low (0 to 21 points), Medium (22 to 29 points), High (30 to 35 points) and Very High (36 to 64 points). Mr Howard says that the proven direct contact sexual reoffending rates associated with these bands approximately triple at each level.

23. An offender's OSP risk level will directly affect his eligibility for certain accredited rehabilitation programmes and for polygraph testing. The overall assessment of his risk of serious harm to which the OSP risk level contributes will also inform the management of the offender in custody and his management when released on licence into the community. The offender's OSP risk level is also shared with other parts of the criminal justice system on a need-to-know basis, including in reports to courts and the Parole Board, with the police where they are managing the offender's compliance with sexual offending notification requirements, and other relevant service providers.

The workings which lead to the overall risk level, including information about any spent convictions, are not shared, however.

24. Mr Amponsah was assessed against the OSP on 10 October 2023, and was graded as a medium risk of reoffending by committing a direct contact sexual offence, having scored 27 points. Six of those points were attributable to his having other non-sexual convictions, including spent convictions, although the fact that he has two convictions for offences committed in 2022 means that he would have scored six points for this question anyway. The preliminary issue is therefore academic in his particular case but Mr Knight said that no point was taken on this given that the preliminary issue is raised in the other claims.

25. Mr Truter's OSP scores were not in evidence given that the stay in his case had only been lifted shortly before the hearing. However, there is a copy of his OSP assessment in the bundle, which was that he has a medium level risk of contact reoffending.

The relevant provisions of the Rehabilitation of Offenders Act 1974

Overview

26. The preamble to the 1974 Act states that it is:

> *"An Act to rehabilitate offenders who have not been reconvicted of any serious offence for periods of years, to penalise the unauthorised disclosure of their previous convictions, to amend the law of defamation, and for purposes connected therewith."*

27. As Hickinbottom LJ explained in *Hussain v London Borough of Waltham Forest* [2021] 1 WLR 922 at [10]:

> *"...Prior to [the 1974 Act], there was no process by which a person could be relieved of the consequences and stigma of a conviction (including, e.g., difficulties faced in obtaining employment, insurance or a fair hearing in later proceedings), irrespective of the nature and circumstances of, and time elapsed since, the offending. Previous convictions remained disclosable, and those who had committed crimes remained disadvantaged by them, indefinitely. The Act sought to address that mischief."*

28. The drafting of the 1974 Act is dense in parts, and is not particularly user friendly. But, in broad overview, the structure is that section 1 provides that convictions to which the Act applies in principle (i.e. convictions which did not result in an *"excluded sentence"* listed in section 5) will be treated as spent, and the person rehabilitated in respect of the spent conviction, after the period of time ("*the rehabilitation period"*) applicable to the conviction which is identified in section 5, read with section 6.

29. Section 4 then deals with the *"Effect of rehabilitation"*. It sets out general rules:

    i) Under section 4(1)(a), rendering evidence to prove that a person has committed or been the subject of proceedings in relation to any offence which

was the subject of a spent conviction, inadmissible in *"proceedings before a judicial authority"*; and, under section 4(1)(b), prohibiting the asking of questions relating to spent convictions or the circumstances ancillary to that conviction (as defined in section 4(5)) in such proceedings, and providing that there is no obligation to answer such questions.

ii) Under section 4(2), which is relied on by the claimants, providing that *"otherwise than in proceedings before a judicial authority"* questions about a person's convictions shall be treated as not relating to convictions which are spent, or the ancillary circumstances of such convictions, and may be answered on that basis (section 4(2)(a)); and the person questioned will not be subject to any liability or otherwise prejudiced in law by reason of any failure to disclose such information (section 4(2)(b)); and

iii) Under section 4(3), providing that any obligation imposed by a legal rule or an agreement or arrangement, to disclose any matters to any other person, shall not extend to disclosure of spent convictions or the ancillary circumstances of such convictions (section 4(3)(a)); and nor is it permissible for a spent conviction or the ancillary circumstances of that conviction to prejudice a person's position in the context of any office which they hold, the pursuit of a profession, occupation or employment (section 4(3)(b)).

30. There are then qualifications or exceptions to these general rules, or provision is made for such qualifications or exceptions:

i) In the case of section 4(1), these are contained in sections 7 and 8. Section 7 imposes limitations which are broadly concerned with various types of legal process or proceedings. Section 8 deals specifically with the position in defamation actions where the claim is founded on the publication of an imputation that the claimant has committed, or been the subject of criminal proceedings, or convicted or sentenced, for an offence which is the subject of a spent conviction.

ii) In the case of sections 4(2) and (3), section 4(4) provides for modifications, exclusions and exceptions to be made by way of secondary legislation.

31. Having set out the rules which protect the person from disclosure of, or being obliged to disclose, spent convictions, section 9(2) then creates an offence of unauthorised disclosure of spent convictions. The gist of this offence is that, subject to various qualifications, a person who has access in the course of official duties to information about a spent conviction which is contained in any official record (as defined) commits an offence if they disclose that information to another person otherwise than in the course of those duties.

Section 4(1) and the qualifications to section 4(1)

32. Turning to the detail of the provisions, so far as relevant to the issues in the present case, section 4(1) provides:

"(1) Subject to sections 7 and 8 below, a person who has become a rehabilitated person for the purposes of this Act 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 of or sentenced for the offence or offences which were the subject of that conviction; and, notwithstanding the provisions of any other enactment or rule of law to the contrary, but subject as aforesaid—

(a) no evidence shall be admissible in any proceedings before a judicial authority exercising its jurisdiction or functions in England and Wales to prove that any such person has committed or been charged with or prosecuted for or convicted of or sentenced for any offence which was the subject of a spent conviction; and

(b) a person shall not, in any such proceedings, be asked, and, if asked, shall not be required to answer, any question relating to his past which cannot be answered without acknowledging or referring to a spent conviction or spent convictions or any circumstances ancillary thereto" (emphasis added)

33. *"Proceedings before a judicial authority"* are defined by section 4(6) as follows:

"For the purposes of this section and section 7 below "proceedings before a judicial authority" includes, in addition to proceedings before any of the ordinary courts of law, proceedings before any tribunal, body or person having power-

(a) by virtue of any enactment, law, custom or practice;

(b) under the rules governing any association, institution, profession, occupation, or employment; or

(c) under any provision of an agreement providing for arbitration with respect to questions arising thereunder;

to determine any question affecting the rights, privileges, obligations or liabilities of any person, or to receive evidence affecting the determination of any such question."

34. The qualifications to the broad statements in section 4(1) also give an indication of its area of application. Thus, section 7(1) provides:

"(1) Nothing in section 4(1) above shall affect-

(a) any right of Her Majesty, by virtue of Her Royal prerogative or otherwise, to grant a free pardon, to quash any conviction or sentence, or to commute any sentence;

(b) the enforcement by any process or proceedings of any fine or other sum adjudged to be paid by or imposed on a spent conviction;

(c) the issue of any process for the purpose of proceedings in respect of any breach of a condition or requirement applicable to a sentence

imposed in respect of a spent conviction; or

(d) the operation of any enactment by virtue of which, in consequence of any conviction, a person is subject, otherwise than by way of sentence, to any disqualification, disability, prohibition, penalty, requirement, restriction or other regulation of the person's behaviour the period of which extends beyond the rehabilitation period applicable in accordance with section 6 above to the conviction."

35. Section 7(2) provides that:

"(2) Nothing in section 4(1) above shall affect the determination of any issue, or prevent the admission or requirement of any evidence, relating to a person's previous convictions or to circumstances ancillary thereto-

(a) in any criminal proceedings before a court in England and Wales (including any appeal or reference in a criminal matter)…;

(b) in any service disciplinary proceedings or in any proceedings on appeal from any service disciplinary proceedings;

(bb) in any proceedings under Part 2 of the Sexual Offences Act 2003, or on appeal from any such proceedings;

(c) in any proceedings relating to adoption, the marriage of any minor, or the formation of a civil partnership by any minor, the exercise of the inherent jurisdiction of the High Court with respect to minors or the provision by any person of accommodation, care or schooling for minors;

(cc) in any proceedings brought under the Children Act 1989;

(d) in any proceedings relating to the variation or discharge of a youth rehabilitation order under Chapter 1 of Part 9 of the Sentencing Code, or on appeal from any such proceedings;

(e) in any proceedings before a children's hearing under the Social Work (Scotland) Act 1968 or on appeal from any such hearing; or

(f) in any proceedings in which he is a party or a witness, provided that, on the occasion when the issue or the admission or requirement of the evidence falls to be determined, he consents to the determination of the issue or, as the case may be, the admission or requirement of the evidence notwithstanding the provisions of section 4(1) …or

(h) in any proceedings brought under Part 7 of the Coroners and Justice act 2009 (criminal memoirs etc)."

36. Section 7(3) provides a "safety valve" in the following terms, so far as material:

"(3) If at any stage in any proceedings before a judicial authority… (not being proceedings to which, section 4(1) …has no application, or proceedings to which section 8 ..applies) the authority is satisfied, in the light of any considerations which appear to it to be relevant (including any evidence which has been or may thereafter be put before it), that justice cannot be done in the case except by admitting or requiring evidence relating to a person's spent convictions or to circumstances ancillary thereto, that authority may admit or, as the case may be, require the evidence in question…and may determine any issue to which the evidence relates in disregard, so far as necessary, of those provisions." (emphasis added)

37. There is also a power conferred on the Secretary of State under section 7(4) to exclude, by order, the application of section 4(1) *"in any proceedings specified in the order"* other than defamation proceedings *"to such extent and for such purposes as may be so specified"*.

38. Section 8 concerns a particular type of legal proceedings before a judicial authority, namely "*Defamation Actions"*, as I have said.

Sections 4(2) and (3)

39. Section 4(2) of the 1974 Act provides as follows:

"Subject to the provisions of any order made under subsection (4) below, where a question seeking information with respect to a person's previous convictions, offences, conduct or circumstances is put to him or to any other 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; and

(b) the person questioned shall not be subjected to any liability or otherwise prejudiced in law by reason of any failure to acknowledge or disclose a spent conviction or any circumstances ancillary to a spent conviction in his answer to the question." (emphasis added)

40. Section 4(3) provides:

"Subject to the provisions of any order made under subsection (4) below—

(a) any obligation imposed on any person by any rule of law or by the provisions of any agreement or arrangement to disclose any matters to any other person shall not extend to requiring him to disclose a spent conviction or any circumstances ancillary to a spent conviction (whether the conviction is his own or another's); and

(b) a conviction which has become spent or any circumstances ancillary thereto, or any failure to disclose a spent conviction or any such circumstances, shall not be a proper ground for dismissing or excluding a

person from any office, profession, occupation or employment, or for prejudicing him in any way in any occupation or employment."

41. Subsection 4(4)(a) provides that the Secretary of State may by order:

"make such provision as seems to him appropriate for excluding or modifying the application of either or both of paragraphs (a) and (b) of subsection (2) ...in relation to questions put in such circumstances as may be specified in the order"

42. Subsection 4(4)(b) then provides for exceptions from the rule in section 4(3).

43. The provisions made pursuant to section 4(4) are the Rehabilitation of Offenders Act (Exceptions) Order 1975/1023, as amended. In very broad terms, the effect of this Orders is that a person's right not to disclose a conviction or caution does not apply if the question is asked in order to assess their suitability for any of a number of specified purposes. These include suitability for admission to certain professions or types of employment, for any assignment to work with children or vulnerable adults in specified circumstances, or for the provision of day care or for the adoption of a child.

44. It is common ground that there is no exception in the 1975 Order which applies to the present case.

The Claimants' argument

45. The Claimants' argument is that the use of spent convictions in the OSP is contrary to section 4(2) of the 1974 Act. Section 4(2)(a) requires a person who is questioned about their or another person's convictions to treat that question as not relating to spent convictions or to any circumstances ancillary to such convictions. Although the language of the section is permissive in relation to the person who responds to the question – they *"may"* frame their answer accordingly – this should be read as a requirement rather than a choice or power. In this connection they cite *Julius v Lord Bishop of Oxford* [1880] 5 App Cases 214, 225 where Earl Cairns LC said that:

"where a power is deposited with a public officer for the purpose of being used for the benefit of persons who are specifically pointed out, and with regard to whom a definition is supplied by the Legislature of the conditions upon which they are entitled to call for its exercise, that power ought to be exercised, and the Court will require it to be exercised."

46. They also rely on statements which Lord Blackburn made to similar effect in the *Julius* case. Mr Truter also referred in his Particulars of Claim to *Padfield v Minister for Agriculture, Fisheries and Food* [1968] AC 997, in which *Julius* was considered.

47. Applying the words of section 4(2) of the 1974 Act, the Claimants argue that the nature of the OSP is that the person who carries out the assessment answers questions about the person who is being assessed. Section 4(2) requires these questions to be treated as questions about convictions which are not spent. It also requires the questions to be answered accordingly. The relevant passage from the Guidance, which

is to contrary effect, therefore requires HMPPS staff to act contrary to the 1974 Act and is unlawful.

Mr Knight's arguments

48. Mr Knight began with the principles of statutory interpretation which are set out in the decision of the Supreme Court in *R (O) v Secretary of State for the Home Department* [2023] AC 255 at [29]-[31]. He drew particular attention to [29] where Lord Hodge JSC noted that task of statutory interpretation involves *"seeking the meaning of the words which Parliament used"*:

> *"…. Words and passages in a statute derive their meaning from their context. A phrase or passage must be read in the context of the section as a whole and in the wider context of a relevant group of sections. Other provisions in a statute and the statute as a whole may provide the relevant context. They are the words which Parliament has chosen to enact as an expression of the purpose of the legislation and are therefore the primary source by which meaning is ascertained. There is an important constitutional reason for having regard primarily to the statutory context as Lord Nicholls explained in Spath Holme, p 397: "Citizens, with the assistance of their advisers, are intended to be able to understand parliamentary enactments, so that they can regulate their conduct accordingly. They should be able to rely upon what they read in an Act of Parliament.""*

49. And Mr Knight reminded me of [30] in which Lord Hodge said that none of the external aids to construction to which he had referred *"displace the meaning conveyed by the words of a statute that, after consideration of that context, are clear and unambiguous and which do not produce absurdity"*.

50. Mr Knight then referred to R *v McCool* [2018] 1 WLR 2431 at [24] and [25] where Lord Kerr JSC cited the following passage from Bennion on Statutory Interpretation (6th Edition, as it then was) with approval:

> *"(1) The court seeks to avoid a construction that produces an absurd result, since this is unlikely to have been intended by Parliament. Here the courts give a very wide meaning to the concept of 'absurdity', using it to include virtually any result which is unworkable or impracticable, inconvenient, anomalous or illogical, futile or pointless, artificial, or productive of a disproportionate counter-mischief...."*

51. Lord Kerr went on to say this at [25]:

> *"Bennion suggests that the courts have been prepared to give the concept of absurdity an expansive reach. In support of that view, he cites Lord Millett in R (Edison First Power Ltd) v Central Valuation Officer [2003] 4 ALL ER 209, paras 116-117, where he said:*
>
> > *"116. The courts will presume that Parliament did not intend a statute to have consequences which are objectionable or undesirable; or*

absurd; or unworkable or impracticable; or merely inconvenient; or anomalous or illogical; or futile or pointless.

117. But the strength of these presumptions depends on the degree to which a particular construction produces an unreasonable result. The more unreasonable a result, the less likely it is that Parliament intended it…""

52. Mr Knight submitted that it would be absurd if the 1974 Act prevented HMPPS from assessing the risk of further offending by reference to the totality of the relevant information about the offender. He also drew attention to certain authorities which confirm or illustrate that there are limits to the protections afforded by the 1974 Act. These were:

i) *L v The Law Society* [2008] EWCA Civ 811 at [15], [21] and [24]-[25] in which the Court of Appeal rejected a submission that the 1974 Act renders the fact of a spent conviction, and information ancillary to that conviction, confidential information: see [25].

ii) *KJO v XIM* [2011] EWHC 1768 (Admin) at [7], [9]-[10] and [14] in which Eady J said, albeit in the context of rejecting an application for summary judgment rather than finally determining an argument that the 1974 Act created a reasonable expectation of privacy in relation to information about spent convictions for the purpose of a claim in misuse of private information, that the 1974 Act afforded *"limited protection"* which *"consisted of certain carefully defined rights or privileges"* [9] .

iii) *NT1 & 2 v Google llc (Information Commissioner intervening)* [2018] EWHC 799 (QB), [2019] QB 344 at [166] which illustrated that the 1974 Act did not, of itself, provide a basis for requiring Google to remove search results which featured links to reports about the spent convictions and sentences of the claimants.

53. Mr Knight argued that the scheme of section 4 of the 1974 Act is that the words *"for all purposes in law"* are in effect a gateway into section 4 as a whole. These words limit the purposes for which reference to, or reliance on, spent convictions is prohibited. In this connection he relied in *Hussain* at [16] where Hickinbottom LJ said:

"*16. Although it clearly extends the protection given to a rehabilitated person beyond the simple fact of conviction, in line with section 1 the primary focus of section 4 is upon the relevant conviction(s). In its opening lines, section 4(1) provides a general statement (that* ***"a person who has become a rehabilitated person for the purposes of this Act 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 of or sentenced for the offence or offences which were the subject of that conviction"****); which is followed by particular ways in which that is to be effected in proceedings before a judicial authority (sections 4(1)(a) and (b), and 4(3)(a)) and otherwise than before such an authority (sections 4(2) and 4(3)(a) and (b)).*" (emphasis added)

54. By way of shorthand, I will refer to the emboldened passage above as "the general statement". Mr Knight submitted that [16] was consistent with his proposed analysis of section 4: Hickinbottom LJ was confirming that the "general statement" in section 4(1) is itself the governing rule for section 4 as a whole and a condition of it being satisfied is that the spent conviction is being used *"for [a] purpose in law"*. If it is not being used for such a purpose, a claimant does not "get into" section 4 and sections 4(1)(a) and (b), (2) and (3) are irrelevant and do not "bite".

55. Mr Knight accepted that this was not the ratio of the *Hussain* case. Nor had there even been an issue in that case as to whether the "general statement" was a gateway provision or precondition to the application of the subsequent provisions in sections 4(1)-(3), nor as to the meaning of the words *"for all purposes in law"*. He submitted, however, that [16] deserves the highest respect and is in accordance with the words and structure of section 4 read in the context of the 1974 Act as a whole.

56. As to the meaning of the words of the putative gateway condition, Mr Knight's submission was that *"for all purposes in law"* means "any purpose where reliance on, or reference to, or knowledge of, the spent conviction has or is intended to have a direct legal consequence". He relied on the decision in *N v Governor of HMP Dartmoor* [2001] EWHC (Admin) 93 at [17], [18] and [26] in particular, as being consistent with this interpretation. In *N*, Turner J held, in the context of a claim for judicial review, that there was no breach of section 4(1) of the 1974 Act when the Governor of HMP Dartmoor decided that the applicant would be subject to the provisions of IG 54/1994 notwithstanding that this would result in the disclosure of the applicant's spent convictions to probation and social services with a view to minimising the risk which prisoners convicted of sexual offences may pose to children.

57. Counsel for the applicant in *N* submitted, amongst other things, that section 4(1) prohibited such disclosure and he relied on the words of the "general statement" in section 4(1). It was argued that the words *"for all purposes in law"* mean "for all purposes" and these words were not to be restricted to proceedings before a judicial authority [7]. Turner J rejected this argument saying, at [17]:

> *"**a). The proper construction of s.4(1)***
>
> *It is axiomatic that, in general terms, meaning should be attributed to words where they appear in a statute. On the applicant's construction of s.4(1) the words "for all purposes in law" are devoid of content or meaning. For the Governor it was submitted that those words are properly words of limitation and mean "for all legal purposes" or purposes required by the law. Examples of this are to be found in s.4(1) (a) and (b) which both contain references to proceedings before a judicial authority. Support for this approach is also to be found in s.4(3) which excludes from contractual obligations the duty to disclose spent convictions. Furthermore s.7(1) and (2) in their entirety are concerned with legal purposes which are expressly exempted from the effect of rehabilitation under S.4(1)…."* (emphasis added)

58. Mr Knight also relied on [18] of *N*, where Turner J said that it would be absurd if social services were denied access to the information necessary for the proper exercise of their statutory functions and pointed out other absurd consequences if section 4(1)

is read as the applicant proposed. And he relied on [26] where Turner J noted, in the context of the issue of proportionality under Article 8 of the European Convention on Human Rights, that the Governor's decision *"would not necessarily lead to any adverse effect on the prisoner's rights"*. This, said Mr Knight, was consistent with his argument that *"for all purposes in law"* means "for all purposes which have a direct legal consequence".

59. Mr Knight also drew attention to the decision of Eyre J to refuse permission on the papers in *R (Bradshaw) v Secretary of State for Justice* (AC-2023-BHM-00219), applying *N* to the issue which is before me. I note that Eyre J read Turner J's judgment as accepting that the words *"'for all purposes in law' limited the words 'shall be treated' and confined their effect to circumstances in which disclosure of the convictions would otherwise be required as a matter of law"*.

60. Mr Knight's primary contention was therefore that this is not a case in which section 4 applies at all because the spent convictions in the present case were not being used for a purpose in law. This was the conclusion in *N* on analogous facts. However, in the alternative, he submitted that if section 4(1) does not apply to prevent the Claimants from relying on section 4(2), the terms of section 4(2) itself have this effect in that this subsection expressly only applies *"otherwise than in proceedings before a judicial authority"*, whereas the carrying out of the OSP calculation amounts to such proceedings within the meaning of section 4(6) of the 1974 Act. On this footing, submitted Mr Knight, section 7(3) applies to permit the inclusion of spent convictions because "*justice cannot be done in the case except by"* permitting spent convictions to be taken into account.

61. As to the argument that the carrying out of the OSP calculation amounts to *"proceedings before a judicial authority"*, Mr Knight relied on the breadth of the definition in section 4(6) which, on its face, includes proceedings before any person who has power *"to determine any question affecting the rights, privileges, obligations or liabilities or any person, or to receive evidence affecting the determination of any such question"*. He also relied on the holding in *Hussain* that consideration and determination by a housing authority of the grant or revocation of a licence to manage multiple occupation housing under Part 2 or 3 of the Housing Act 2004 falls within section 4(6) of the 1974 Act. The Court of Appeal rejected the view that a housing authority is not a judicial authority for these purposes because it is not adjudicating on rights as between third parties, or rights conferring any kind of status on third parties. Referring to section 4(6), at [53] the Hickinbottom LJ said:

> *"in my view it is clear that this wide definition extends beyond those who exercise the function of adjudicating between third parties. It extends to those persons and bodies who have the power under any enactment to "determine any question affecting the rights, privileges, obligations or liabilities of any person, or to receive evidence affecting the determination of any such question"; which I consider unambiguously to include an authority empowered by statute to determine the grant, refusal and revocation of licenses which give the holder the right to control and manage property which is subject to the 2004 Act licensing regime. Such a licence gives the holder a right of real value: without it, individuals are unable to manage or control relevant properties, and commit a criminal offence if they do so…."*

62. As to the argument that justice cannot be done without the spent convictions being admitted or required, Mr Knight relied on the judgment of Purchas LJ in *Dickinson v Yates* 1986 WL 406872 (1986) who described section 7(3) as a *"safety valve to prevent an injustice occurring through the rigid application of section 4"*. Purchas LJ added that:

> *"Therefore the judge's approach must be, first of all, to see if there is a danger of an injustice being committed as a result of the rigid application of section 4 and unless he is satisfied that that is the case, in other words that justice cannot be done without avoiding the provisions of section 4, then the provisions of section 4 ought to stand unaffected by the provisions of section 7."*

63. Mr Knight drew attention to Sedley J's judgment in *Adamson v Waveney District Council* [1997] 2 All ER 898 at 904 where guidance was given as to the procedural steps which should be taken by justices hearing an appeal against the refusal of a hackney carriage license where an application is made to rely on spent convictions. But Mr Knight argued that this guidance was context specific, as was what Sedley J said in *R v Hastings Magistrates Court ex parte McSpirit* (1998) 162 JP 44, on which Mr Truter relied.

Mr Truter's response

64. In response to Mr Knight's arguments, written and oral, Mr Truter argued that this is not a case to which section 4(1) applies:

i) Section 4(1) does not govern section 4(2) and does not contain a gateway requirement which has to be satisfied before section 4(2) can apply. Section 4(2) is a free-standing rule, which applies in this case.

ii) Even if section 4(1) does govern section 4(2), the OSP assessment is carried out for *"a purpose in law"* and section 4(1) is therefore satisfied. The Guidance is issued pursuant to the Secretary of State's powers under section 47 of the Prison Act 1952, and the data relating to an offender's convictions is subject to regulation under the Data Protection Act 2018 and is required to be processed in accordance with the data protection regime.

iii) The case cannot be forced into section 4(1) on the basis that HMPPS was acting as a judicial authority as defined in section 4(6) when it carried out the OSP assessment. When it did this it was carrying out one of a range of administrative tasks which are undertaken by HMPPS, discharging a purely administrative function. The only circumstances in which HMPPS acts as a judicial authority is when it is determining disciplinary issues under Rule 51 of the Prison Rules 1999. The Defendant was seeking to *"fly a flag of convenience"* by arguing that it is a judicial authority so as to evade the consequences of section 4(2), and this sort of approach was deprecated in *R v Hastings Magistrates Court ex parte McSpirit* (supra) where Sedley J said:

> *".. If it were open to justices in a situation such as faced the Hastings justices simply to say, "The management of licensed premises is a responsible situation and it is important that we should know anything that*

may be known to the detriment of the individual concerned", then there would be very little point in having s 4(1) of the Rehabilitation of Offenders Act on the statute book at all… the purpose of s 7(3) is not to confer a dispensing power to be exercised by way of discretion by adjudicating bodies but to ensure that spent convictions stay spent, unless in the classes of case where it is permissible to do so the party applying to put the spent conviction in can satisfy the judicial authority concerned that there is no other way of doing justice…."

iv) Even if the case does fall within section 4(6) this is not a case in which the section 7(3) safety valve applies. On the contrary, HMPPS's approach is unjust in that it is acting as a judge in its own cause. The Guidance does not differentiate between different types of spent conviction according to potential relevance – how could Mr Truter's driving offence in 2008 be relevant to the risk of him committing further sexual offences, for example – and offenders are not given an opportunity to make representations as to whether a given spent conviction should be taken into account. Instead, a blanket and mandatory approach is taken and one which is procedurally unfair.

Discussion

65. Although I agree with Mr Knight's proposed conclusion in relation to the preliminary issue, I do not entirely agree with his analysis of section 4. I am not convinced that the "general statement" in section 4(1), as it was described by Hickinbottom LJ in [16] of his judgment in *Hussain* (cited at [53] above), contains a condition – that the purpose of the reference to the spent conviction must be a purpose in law - which requires to be satisfied if sections 4(1)-(3) are to bite. Indeed, I am doubtful that it is a rule in itself or anything other than a general statement.

66. Firstly, section 4 as a whole is oddly worded and structured if the intention was that it would operate in the way that Mr Knight contends.

i) In terms of wording, the "general statement" is *"subject to sections 7 and 8"* whereas the logic of it being an overarching rule is that it would be subject to all of the qualifications to which the sub rules are subject, including any exceptions or modifications introduced pursuant to section 4(4).

ii) The subject matter of section 4(1) is essentially evidence and disclosure in proceedings before judicial authorities whereas the subject matter of section 4(2) and (3) is different, as I have sought to illustrate in my analysis of the provisions at [9]-[43], above.

iii) In terms of structure, the "general statement" is presented as part of section 4(1) with the particulars or resulting rules being provided in (a) and (b). Sections 4(2) and (3) are not presented as being particulars of, or "subject to", section 4(1), which is the effect of Mr Knight's argument. They are not drafted as subsections (c) and (d) of section 4(1) but, rather, they appear as separate rules with exceptions which apply to them and not to section 4(1).

iv) Finally, Mr Knight's analysis leads to a need to grapple with the meaning of *"for all purposes in law"* so as to decide whether this alleged condition is satisfied, and to read this phrase down in order to avoid results which are wider than the particular rules in section 4 and/or absurd or unreasonable.

67. Second, I do not think that [16] of Hickinbottom LJ's judgment in *Hussain* lends real support to Mr Knight's analysis. I agree with Mr Knight that what he said deserves the highest respect. Given the eminence of the judge in question, it may not matter whether this passage is technically binding on me: either way, if he had decided the point I would have been highly likely to accept what he said and apply it. What matters is that the issue in *Hussain* – whether section 4(1)(a) of the 1974 Act prevents evidence of the underlying conduct constituting the offence which was the subject of the spent conviction from being admissible - did not give rise to any question as to whether the "general statement" in section 4(1) is a rule in itself or a precondition to the application of the rest of section 4, let alone require the Court of Appeal to decide such an issue. It therefore seems to me that it would be wrong in principle to read [16] as expressing a view on this issue one way or the other: see *Finzi v Jamaican Redevelopment Foundation Inc* [2024] 1 WLR 541 at [60].

68. Third, although I respectfully agree with the conclusion in *N*, nor do I think that *N* unequivocally assists Mr Knight's "gateway" argument. The reality of that case appears to be that the actions of the Governor did not infringe any of the specific rules in section 4(1)(a) or (b) or, indeed, sections 4(2) and (3). The applicant therefore fell back on an argument that the general statement in section 4(1) is itself a rule, and the case for the applicant was put purely on the basis of this subsection, which Turner J duly interpreted. Although he considered other parts of the 1974 Act and section 4 as a whole, Turner J was not being asked to decide what the relationship was between sections 4(1) on the one hand, and section 4(2) and (3) on the other. I accept that he treated the general statement as a rule, but that appears to be because no one argued otherwise.

69. Fourth, I also consider, without any criticism of Turner J given the way in which the case was argued, that *N* illustrates that attaching decisive importance to the words *"for all purposes in law"*, and then interpreting them or reading them down, is liable to produce glosses which are uncertain in scope. At [17] Turner J appears to have accepted the Defendant's formulation - "*for all legal purposes or purposes required by the law"* – whereas Mr Knight put it in terms of" purposes *which have or are intended to have a direct legal consequence"*. In *Bradshaw*, Eyre J interpreted *N* as referring to cases where *"disclosure of the convictions would otherwise be required as a matter of law"*. But the application of these formulations may not be straightforward in a given factual situation: why, for example, is the use of spent convictions in the OSP not *"for a legal purpose"* given the context and the consequences of the OSP risk level, and when will a legal consequence be direct as opposed to indirect? Limiting the application of section 4 to cases where disclosure of the spent convictions would otherwise be required by law may result in the 1974 Act having a more limited protective effect than Parliament intended, although the implications of this approach were not considered in argument and I express no firm view on this.

70. Fifth, I do, however, accept that the general statement in section 4(1) is a statement of the principle underpinning section 4, to which the rules in sections 4(1)(a) and (b) and

(2) and (3) give effect. I do not think that Hickinbottom LJ said or intended to say anything more than this at [16] of *Hussain*. The general statement therefore assists in the interpretation of these rules, which should be read as stating the position *"in law"*. Indeed, each of sections 4(1)(a) and (b), (2)(a) and (b) and (3)(a) and (b) should be read as if prefaced by these words. The rules do not amount to general prohibitions on any reference to spent convictions. Rather, they are specific and limited in scope as Eady J observed in *KJO* (supra – see [52(ii)], above).

71. Sixth, read in this way, it seems to me that the answer to Mr Truter's argument is more straightforward than it appeared to be on Mr Knight's analysis of section 4. Section 4(2) should be understood as saying that, subject to subsection (4), *"in law"* a question about spent convictions will be treated as not relating to spent convictions or circumstances ancillary to such convictions (section 4(2)(a)). A person may therefore frame their answer to such a question accordingly and they will not face any adverse legal consequences if they do so (section 4(2)(b)). On this interpretation, even assuming that section 4(2) applies (as to which see, further, [76] below), it does not prevent HMPPS personnel from referring to spent convictions in answering the questions in the OSP: it merely means that they would not be acting illegally if they did not.

72. Seventh, in coming to this conclusion I have not overlooked the Claimants' argument based on *Julius* and *Padfield*. In *Julius* the Church Discipline Act 1840 provided that with regard to certain charges against any Clerk in Holy Orders it *"shall be lawful"* for the Bishop of the diocese *"on the application of any party complaining thereof"* to issue a commission for inquiry. It was held that the words *"it shall be lawful"* conferred a power rather than a duty on the Bishop and that he had a complete discretion whether to issue or decline to issue such a commission. However, Earl Cairns LC and the other members of the judicial committee of the House of Lords acknowledged that in principle language in a statute which on its face confers a power, interpreted in context, could give rise to a duty to exercise the power conferred *"when called upon to do so"*.

73. As is well known, in *Padfield* the House of Lords held that although the Minister had a discretion as to whether to appoint a committee of investigation, that discretion could not be exercised in a way which frustrated the policy and objects of section 19 of the Milk Marketing Act 1958. At 1030B Lord Reid said:

> "*Parliament must have conferred the discretion with the intention that it should be used to promote the policy and objects of the Act, the policy and objects of the Act must be determined by construing the Act as a whole and construction is always a matter of law for the court. In a matter of this kind it is not possible to draw a hard and fast line, but if the Minister, by reason of his having misconstrued the Act or for any other reason, so uses his discretion as to thwart or run counter to the policy and objects of the Act, then our law would be very defective if persons aggrieved were not entitled to the protection of the court. So it is necessary first to construe the Act."* (emphasis added)

74. However, the House of Lords did not accept an argument, based on *Julius*, that the 1958 Act obliged the Minister to appoint a committee of investigation if this was requested. Their Lordships' decision was based on the conclusion that the Minister had a discretion under the statute, albeit that discretion was not absolute.

75. Thus, as Lord Reid said in *Padfield*, the starting point in the present case is to interpret the words of the statute in question, in this case the 1974 Act, so as to understand its purpose. *Julius* indicates that there could in principle be a case where apparently permissive statutory words should be interpreted as giving rise to a duty to exercise a power which has been conferred on a public body if the body is called on to do so, but this will be rare. Here, the contrast between the words *"shall"* and *"may"* in section 4(2)(a) of the 1974 Act, together with my analysis of section 4 set out above, clearly demonstrate that they were intended to have different meanings and that there is no prohibition on the person questioned about the offender's convictions (here a member of HMPPS personnel, on Mr Truter's argument) referring to spent convictions when answering the OSP questions. This is not a claim for judicial review but, for completeness, nor in my view is there any conceivable *Padfield* argument available to the Claimants. Based on my interpretation of the 1974 Act, the purposes of that Act are limited, and the approach of HMPPS to the OSP assessment is not inconsistent with those purposes and does not frustrate any of them.

76. Eighth, I would not have accepted the Mr Truter's argument on section 4(2) in any event. I agree with Mr Knight's submission that this subsection is concerned with one person disclosing information to another in answer to a question, where the answer may have legal consequences for the person who answers. That is not the substance of what happens when HMPPS personnel fill in the OSP. They are using information which is already in the possession of HMPPS to input data into an actuarial tool. As Mr Knight argued, it cannot have been intended by Parliament that the application of section 4(2) would depend on whether the data entry points were framed as instructions e.g. "insert total number of convictions" rather than questions.

77. Finally, I turn to the question whether the carrying out of the OSP assessment amounts to *"proceedings before a judicial authority"*. Ironically, on the basis of the analysis set out above, both parties were arguing somewhat against their interests in relation to this point: if Mr Knight's alternative argument is right, and the case therefore falls within section 4(1), he would need to succeed on his "safety valve" argument under section 7(3) given that the evidence of the Claimants' spent convictions would in principle be inadmissible; if Mr Truter is right, and the case falls within section 4(2) because it is not concerned with proceedings before a judicial authority, the Defendant succeeds for the reasons I have given.

78. I accept that, as was held in *Hussain*, section 4(6) is not limited to proceedings in which the body or person determines legal rights as between third parties. I also accept that, on a very broad reading of section 4(6), the HMPPS practitioner who carries out an OSP assessment has a power "*to receive evidence affecting the determination of"* a *"question affecting the rights, privileges, obligations or liabilities of [a] person"* in the sense that they receive evidence of the offender's convictions which they use to carry out the OSP assessment which leads to an actuarial determination of their level of risk which, in turn, affects or may affect (depending on their overall risk assessment), their eligibility for certain measures within the prison system and other decisions about how they are dealt with. But, in my view, when section 4(6) is read in the context of the 1974 Act as a whole, including section 4(1) and the qualifications and exceptions under sections 7 and 8, it is plain that the carrying out of the OSP assessment does not fall within section 4(6). I agree with Mr Truter that this is essentially an administrative task. Unlike in *Hussain*, the OSP

assessment does not involve an application which leads directly to a formal determination of a person's legal rights. There are no *"proceedings"* and nor is the process *"before"* anyone. Nor does the assessment itself involve *"receiving evidence"*; and nor, in my view, does the word *"affecting"* contemplate a connection between the receipt of the evidence, or the determination of the offender's rights and privileges, which is as indirect as in the present case.

79. I therefore take the view that this is a case in which section 4(2) applies but that it does not prevent the use of spent convictions as part of the OSP assessment. Accordingly, it is unnecessary for me to decide the arguments under section 7(3). What I would say, however, is that the fact that there would be difficulties in the present context in applying Sedley J's guidance, in *McSpirit* and *Adamson* (supra – see [64(iii)] and [63], above), as to procedural fairness where there is a proposal to admit spent convictions in evidence in proceedings before a judicial authority, may be a further indication that Mr Knight's suggested interpretation of section 4(6) is artificial and overly literal. One would have thought that procedural fairness is an essential requirement of the sorts of proceedings contemplated by section 4(1) and yet the OSP process, at least as currently conducted, does not contemplate such safeguards.

Conclusion

80. The claims of Mr Truter and Mr Amponsah are dismissed.