

Neutral Citation No: [2021] NIQB 97

Ref: COL11507

*Judgment: approved by the Court for handing down  
(subject to editorial corrections)\**

ICOS No: 20/8658/01

Delivered: 01/11/2021

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION  
(JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY JR123  
FOR JUDICIAL REVIEW

Mr Hugh Southey QC with Mr Stephen J McQuitty (instructed by the NI Human Rights Commission) for the Applicant

Dr Tony McGleenan QC with Mr Philip McAteer (instructed by the Crown Solicitor's Office) for the Respondent

COLTON J

[1] I am obliged to counsel for their able written and oral submissions.

**Introduction**

[2] The applicant is now 62 years old.

[3] In or around January 1980, the applicant then aged 21 was involved with a group of young men in the petrol bombing of a house. He was convicted of possession of a petrol bomb, for which he received a four year prison sentence, and arson for which he received a five year prison sentence. He was also convicted of two offences of burglary and theft for which he was sentenced to 12 months' imprisonment in respect of each offence. Those offences preceded the more serious offences and were served concurrently with the longer sentence related to the attack on the home.

[4] He was remanded in custody shortly after the commission of the serious offences in and around February 1980 and remained on remand until November 1980 when he was convicted and became a sentenced prisoner. He was released from custody in or around September or October 1982, now some 33 years ago.

[5] In relation to the offence his account is that no-one was injured in the attack although the property was damaged. It was not a paramilitary attack but appears to have been motivated by a desire for revenge on the resident of this home for having given information to police about an earlier burglary wherein some of those involved in the attack on the house were said to be implicated. The applicant denied any involvement with this gang or the previous burglary. He was an associate of one member of the gang and felt pressurised to participate.

[6] Since that time the applicant has had no involvement with the criminal justice system and has no further convictions. He has sought since his release from prison to build a life for himself, completing various qualifications and starting a business. He is actively involved in his local community and has had a partner for about the last 14 years although he has felt too ashamed of his past to tell her about the convictions. He has experienced a number of difficulties and negative consequences of his convictions over the years, for example, in securing employment and insurance. He finds the process of repeatedly having to disclose the convictions to be oppressive and shaming.

### **The Challenge**

[7] The applicant seeks judicial review challenging the legality of Article 6(1) of the Rehabilitation of Offenders (Northern Ireland) Order 1978 ("the 1978 Order"). The effect of this provision is to prevent his previous convictions from ever becoming "spent." He argues that the relevant provision is incompatible with his right to private and family life under Article 8 of the European Convention on Human Rights ("ECHR"). By these proceedings he seeks to have the impugned legislation struck down as incompatible with his Article 8 rights along with declaratory relief. The applicant is supported in this case, to include financial support, by the Northern Ireland Human Rights Commission.

[8] The Department of Justice ("the Department") says that the provisions, which are in any event already in the process of amendment, are not incompatible with the Convention.

[9] The applicant's case is supported by NIACRO and UNLOCK whose representatives have filed supporting affidavits. NIACRO is a charity which has been working for 50 years to reduce crime and its impact on people and communities in Northern Ireland. In the course of its work it supports people who have been convicted of criminal offences including assistance to support resettlement, gaining qualifications, preparation for job interviews and employment. It seeks to influence decision-makers, service providers, community leaders and the wider public. Part of its work involves offering advice to those on the Working Well Programme and others about issues around disclosing their criminal record. The associated Helpline takes calls from any individual seeking advice about what information they need to disclose to various bodies and individuals including prospective or current employers, insurance providers, travel visa providers and

mortgage lenders. The organisation also takes calls from employers seeking advice about their responsibilities and compliance requirements.

[10] UNLOCK is an independent advocacy charity that provides a voice and support for people with criminal records in England and Wales. The organisation campaigns for legislative reforms to ensure people with convictions have a genuine opportunity to move on from their past without facing unjust discrimination. It has engaged with successive British governments regarding reform to criminal record disclosure legislation and has expertise working in this policy area.

[11] The 1978 Order provides for the rehabilitation of offenders. The impact of rehabilitation is captured by Article 5(1) of the Order which provides:

*“5. – (1) ... a person who has become a rehabilitated person for the purposes of this Order in respect of a conviction shall be treated for all purposes in law as a person who has not committed or been charged with or prosecuted for or convicted of or sentenced for the offence or offences which were the subject of that conviction ...”*

[12] However, the applicant cannot benefit from the Order by reason of Article 6(1) which provides that:

*“6. – (1) The sentences excluded from rehabilitation under this Order are –*

*...*

*(b) a sentence of imprisonment or corrective training for a term exceeding thirty months.”*

[13] As a consequence Article 6(1) means that the applicant’s conviction never becomes spent. He will never become rehabilitated for the purposes of the Order and he will not benefit from Article 5. As a result he will never be treated in law as a person who has not committed a criminal offence.

[14] The applicant points to a number of adverse consequences as a result:

- (a) He can never apply to the independent reviewer under Schedule 8A of the Police Act 1997 for a decision that his conviction should not be disclosed as part of criminal record checks.
- (b) He needs to disclose his conviction when applying for insurance. He asserts that this has resulted in insurance being refused and which prevents him from obtaining competitive quotes.

- (c) He has found it difficult to obtain employment in the past. As a result he started his own business.
- (d) Others may ask for details of previous convictions. For example, the Universities and Colleges, Admission Service (“UCAS”), mortgage providers and landlords will or may ask about unspent convictions.
- (e) He will never be permitted to be fully rehabilitated in law.

[15] That this has an adverse impact on a person such as the applicant is supported by an affidavit from Olwyn Lyner (NIACRO). In his affidavit he points to the impact such disclosure can have on employment and adds at paragraph [19]:

*“... criminal history can produce barriers in many other areas of life including education, training, volunteering, insurance, accommodation/housing, travelling abroad as well as access to financial products including mortgages.”*

[16] A supporting affidavit from Mr Sam Doohan from UNLOCK refers to successive reforms that had been implemented by the Westminster Government in relation to the relevant legislation in that jurisdiction namely the Rehabilitation of Offenders Act 1974 (“the 1974 Act”). Mr Doohan refers to a report prepared by UNLOCK in respect of this case which expresses the opinion that:

*“The criminal record disclosure system used in Northern Ireland is unjust, not backed by evidence and fails to protect the public from reoffending.”*

[17] The applicant refers to an article from a Dr Henley which provides an analysis of the legislative history of the 1974 Act which is the equivalent of the 1978 Order. Dr Henley argues that:

*“... it would be quite wrong to reframe the original rationale of the ROA as being about ‘striking a balance’ between protecting the public or businesses from recidivist crime verses the rights of people with convictions to ‘live down’ their past offending.”*

The court will refer to this issue further when analysing the history of the legislation later in the judgment.

[18] The applicant also refers to a recent Ministry of Justice paper (2020) on reoffending rates which demonstrates that after 7 years without offending, people sentenced to 4 years are at the same level of risk of reoffending as the general population.

[19] It is contended that this material supports the argument that there is no justification to impose a life-long disclosure requirement on the applicant and others like him.

### **The relief sought by the applicant**

[20] The applicant seeks the following relief:

- “(i) An order of certiorari to bring up and quash the impugned legislation (Article 6(1) of the 1978 Order), or an order striking down or otherwise disapplying the impugned legislation.*
- (ii) Alternative to the relief at (i) above, a declaration of incompatibility in respect of the impugned legislation, pursuant to section 4(4) of the Human Rights Act 1998.*
- (iii) A declaration that the impugned legislation operated to breach the applicant’s right to respect for his private life under Article 8 ECHR.*
- (iv) A declaration that impugned legislation is ultra vires and of no force or effect.*
- ...*
- (vi) Damages and/or just satisfaction.”*

### **Are the Applicant’s Article 8 rights under the European Convention on Human Rights (ECHR) engaged?**

[21] The applicant’s conviction took place in open court and is a matter of public record. That said, the authorities support the contention that previous convictions can become an aspect of an individual’s private life and thus engages Article 8.

Article 8 provides:

#### ***“Right to respect for private and family life***

- 1. Everyone has the right to respect for his private and family life, his home and his correspondence.*
- 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the*

*protection of health or morals, or for the protection of the rights and freedoms of others."*

[22] In *R(T) v Chief Constable of Manchester* [2015] AC 49 the court was dealing with disclosure of previous warnings and cautions which were deemed to be spent pursuant to the Rehabilitation of Offenders Act 1974. In his judgment Lord Wilson states (Lord Nuberger, Baroness Hale and Lord Clarke agreeing) as follows:

*"[17] Building on the comments in those two main judgments in the L case, the Court of Appeal in the present cases held that, in that a caution takes place in private, the receipt of a caution was part of a person's private life from the outset. The proposition calls for careful thought but in the end I find myself in agreement with it. My receipt of a caution, whenever received, is a sensitive, certainly embarrassing and probably shameful, part of my history, which may have profound detrimental effects on my aspirations for a career; and the unchallengeable fact that I did commit the offence for which I was cautioned makes it no less sensitive but, on the contrary, more sensitive.*

*[18] These appeals do not relate to the disclosure of a spent conviction which will have been imposed in public. But it might be helpful to refer to Lord Hope's comment in the L case at para 27, quoted at para 16 above, that 'as it recedes into the past, it becomes a part of the persons private life ...' Liberty, an intervener in these appeals, suggests that the point at which conviction recedes into the past as part of a person's private life will usually be the point at which it becomes spent under the 1974 Act. It is a neat and logical suggestion which this court should adopt."*

[23] In the case of *R(L) v Commissioner of the Police of the Metropolis* [2010] 1 AC 410 to which Lord Wilson referred Lord Hope was dealing with disclosure by police in the context of an enhanced criminal record certificate. At paragraph 25 Lord Hope says:

*"25. There is another aspect of the right to respect for private life that needs to be brought into account, as it is directly relevant to the effect on a person's private life of the release of information about him that is stored in public records. In *R v Chief Constable of the North Wales Police, Ex p AB* [1999] QB 396, 414 Lord Bingham of Cornhill CJ said in the Divisional Court that he was prepared to accept (without deciding) that disclosure of personal information that the applicants wished to keep to themselves could in principle amount to an interference*

*with the right protected by article 8: [1999] QB 396, 414. At p 416 Buxton J put the point more strongly when he said:*

*'I do however consider that a wish that certain facts in one's past, however notorious at the time, should remain in that past is an aspect of the subject's private life sufficient at least to raise questions under article 8 of the Convention.'*

*Buxton J's observations were endorsed by Lord Woolf MR, delivering the judgment of the Court of Appeal: [1999] QB 396, 429. The Convention was not, of course, then part of domestic law and Buxton J's observations in Ex p AB were not supported by reference to any decisions in Strasbourg. But subsequent decisions by the European Court do, I think, provide support for them."*

[24] In *R(P) v Secretary of State* [2020] AC 185 (referred to in more detail below) at paragraph 70 of the Supreme Court's judgment Baroness Hale notes:

*"[70] In R (T) v Chief Constable of Greater Manchester Police (Liberty intervening) [2015] AC 49 ..., the majority of this court held that the statutory scheme for the disclosure of convictions, cautions and reprimands under sections 113A and 113B of the Police Act 1997 constituted an interference with the right to respect for private life, protected by article 8.1 of the European Convention on Human Rights, which was not "in accordance with the law", as an interference is required to be before it can be justified under article 8.2."*

[25] The court considers therefore that the failure to provide for the applicant's conviction to become spent engages the applicant's rights under Article 8.

### **Has there been an interference with the applicant's Article 8 rights?**

[26] In his affidavit evidence the applicant has set out the circumstances in which he has in the past been compelled to disclose his conviction and also the potential adverse consequences arising from the impossibility of his conviction becoming "spent" under the 1978 Order. Dr McGleenan on behalf of the respondent does not say that the applicant has failed to establish an interference with his Article 8 rights but submits that any interference is limited. He says that the applicant has not been denied the opportunity to rehabilitate. He points out that he has obtained qualifications and employment. He has established permanent and stable relationships and has not reoffended. He is not uninsured. Any interference he submits is at the lower end of the scale.

[27] In reply Mr Southey suggests that the interference is significant and points to the importance afforded by the ECtHR to rehabilitation in cases such as *Dixon v United Kingdom* [2008] 46 EHRR 41 and *Murray v Netherlands* [2017] 64 EHRR 3 – which dealt with persons sentenced to life imprisonment. He adopts the pithy description of Lord Wilson in the *R(T)* case at paragraph 48 when he (Mr Southey) describes the effect of Article 6 as:

*“A regime which condemned people to suffer, like an albatross which they could never shake off, permanent adverse consequences of ancient wrongdoing notwithstanding completion of the ostensible punishment (if any) and irrespective of its continuing significance.”*

[28] The court concludes that there has been an interference with the applicant’s Article 8 rights and accepts his evidence that the interference has had a significant effect on him.

### **Proportionality**

[29] In light of the court’s findings in relation to the engagement and interference of the applicant’s Article 8 rights it must consider whether any such inference is in accordance with law, pursues a legitimate aim and is proportionate. There is no real issue in relation to the first two limbs of the test. The real issue for the court is one of proportionality/justification. In this regard the applicant’s primary submission is that the absence of a mechanism under the current legislative regime by which the applicant could apply to have his conviction considered to be spent, irrespective of the passage of time and his personal circumstances is fatal to the respondent’s submission that the legislation is compatible with the applicant’s rights under Article 8.

[30] The respondent’s primary submission is 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. The State, which enjoys a margin of appreciation in determining the need for interference of Article 8 rights, is entitled to draw a “*bright line*” in respect of the designation of certain offences. This approach is, he submits, supported by the Supreme Court’s recent judgment in *R(P) v Secretary of State* [2020] AC 185 “*P*.”

### **The Legislative History**

[31] Before considering the legal arguments it is useful to set out the background to the relevant legislation. In this regard the court refers to the affidavit filed by Mr Andrew Laverty (“AL”) on behalf of the respondent.



[32] Prior to the devolution of justice to Northern Ireland in 2010 rehabilitation legislation in Northern Ireland essentially maintained parity with legislative developments in England and Wales. In the context of the specific provision under consideration in this case the line drawn in Article 6(1) of the 1978 Order which presently exclude a sentence of imprisonment for a term exceeding 30 months from rehabilitation, was initially established by the 1974 Act in England and Wales and then adopted in Northern Ireland in the 1978 Order.

[33] The 1974 Act and the 1978 Order both have their origins in the report "*Living it Down*" which was published in 1972. The report was prepared by a Committee made up of the Ministry of Justice ("MoJ"), The Howard League for Penal Reform and the National Association for the Care and Resettlement of Offenders (NACRO).

[34] The Committee ultimately recommended that a conviction for imprisonment for two years should be the maximum limit for which "*legal rehabilitation*" would be possible.

[35] Paragraphs 33-39 of the Report set out much of the thinking behind its recommendations:

*"33. Although there is a strong case for saying that all offenders, regardless, of the gravity of the offence, should sooner or later be entitled to have their criminal past buried, we fear that such a proposal would be too radical to command general support. Accordingly, we think it better to confine our proposals in the first instance to those whose past offences have not been so grave as to arouse really strong punitive reactions. We therefore need to draw a line somewhere, and this requires an assessment of the gravity of the offence, and all the circumstances of the individual case. Since this is precisely the task which the court of conviction has to undertake in deciding what sentence to impose, we consider that the sentence should be treated as the yardstick of the seriousness of the offence for the purpose of rehabilitation."*

[36] The Report also looked at the issue of periods of time before an offender should be treated as rehabilitated. Dealing with the matter in issue in this case paragraph 36 provides as follows:

*"36. It will be seen that we have chosen a sentence of two years' imprisonment as the maximum for which 'legal rehabilitation' is possible. Here again, there is room for argument, but we have come to the conclusion that in the current circumstances this provides a convenient watershed between redeemable offenders and those whom society is likely to regard either as hardened professionals, or as people whose offences have been such that the notion of rehabilitation evoked*

*strong feelings of resentment. A sentence of two years is also the longest which, under our present law, can be suspended."*

[37] Finally, in the relation to the Committee Report at paragraph 38 it says:

*"At the same time, we do not regard any of these periods as immutable. The principles and practices of sentencing may change, and practical experience with our proposals may show up anomalies which we have not foreseen. Accordingly, we think that the Home Secretary should have power, with the approval of Parliament, to change both the watershed and rehabilitation periods (upwards or downwards) in the light of experience."*

[38] As a result of the debate on the Bill in Parliament the recommended period of two years was extended to 30 months. After debating the Bill which followed the Committee Report the 1974 Act was passed into law and the 1978 Order in this jurisdiction mirrored the Act.

[39] There matters lay until a fundamental review of the 1974 Act was announced to Parliament in 2001 by the then Home Secretary, Jack Straw. The Review's Report, *"Breaking the Circle"* was published as a public consultation document in July 2002.

[40] The report recommended that the then 30 month cut-off should be removed so that the scheme applies to all offenders who have served their sentence.

[41] A subsequent submission was prepared on 29 May 2003 recommending, amongst other things, approval of a similar consultation in Northern Ireland.

[42] The consultation process proceeded and a draft government response to the public consultation on the Review of Rehabilitation of Offenders legislation in Northern Ireland was prepared in 2005 which was the subject of a submission dated 27 July 2005.

[43] As per AL's affidavit at paragraph 21:

*"It appears that this report was never published. The gap between consultation and the draft response coincides with the Bichard Review of Soham murders, whereby the Government focus switched to increasing Vetting and Barring arrangements instead of reforming rehabilitation legislation."*

[44] Although the draft recommended a further consultation exercise, for various reasons nothing occurred in relation to this issue in this jurisdiction at that time.

[45] In 2010 further consultations to proposed reform of the 1974 Act in Great Britain were initiated. As a result from 10 March 2014 rehabilitation periods (as set out in the 1974 Act) were changed in England and Wales by provisions in the Legal Aid Sentencing and Punishment Act 2012 (“the 2012 Act”). The main changes that were brought forward were to include sentences of imprisonment of up to four years in the rehabilitation regime and to shorten rehabilitation periods for other sentences. It will be noted that if a similar change were introduced in Northern Ireland this would not benefit the applicant.

[46] MoJ announced proposals on 15 July 2019 to further reform rehabilitation of offenders’ 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 (but not where offences attract the most serious sentences, including life, or for serious sexual, violent and terrorism offences). A White Paper published on 16 September 2020 included proposals which included 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. If such a change were introduced in Northern Ireland this would have the potential to be of benefit to the applicant.

[47] The Police, Crime, Sentencing and Courts Bill is currently being debated in Parliament.

[48] The current position in Scotland is that as of 3 November 2020 the Rehabilitation Scheme was amended to broadly reflect the 2012 and 2014 changes in England and Wales to allow sentences of up to four years’ imprisonment to become spent although there are differences in the banding of custodial sentences and a marginally shorter rehabilitation period for custodial sentences of between 30 months and 48 months. There is also a commitment to create a review mechanism for sentences of over 48 months in due course.

[49] In Northern Ireland since the devolution of justice in Northern Ireland there have been calls to shorten the rehabilitation periods in line with the changes made in England and Wales in 2014. Because of what is described as “*a particularly busy legislative programme*” there was insufficient legislative time available between 2011 and 2016 to effect any changes in the 1978 Order. When the Assembly was re-established in January 2020 the new Minister of Justice approved a review of rehabilitation periods for Northern Ireland. The intention is that the Department will bring forward a legislative instrument to amend Article 6(1) of the 1978 Order to both reduce current rehabilitation periods and to increase the range of sentences capable of becoming spent. As per the affidavit of AL at paragraph 43:

*“The changes will be based on the analysis of re-offending and reconviction rates in conjunction with a detailed scrutiny of responses to a public consultation exercise on proposals to reform rehabilitation periods that closed on Friday 12 March 2021 ...”*

[50] The Department is now analysing the responses with a view to providing the Minister with a Summary of Responses document and an Options Paper to set out a number of choices for her consideration and decision on how she wishes to move forward.

[51] As per the affidavit of AL at paragraph 62:

*“An initial analysis of the responses indicates broad support for a review of the rehabilitation period for custodial sentences in Northern Ireland, for rehabilitation periods for existing sentences to be reduced and for sentences over 30 months to be capable of becoming spent.”*

[52] It is anticipated that a draft legislative instrument will be prepared for intended introduction and debate in the Assembly during Autumn 2021. This will be subject to the Minister’s decision and the views of the Justice Committee. It will further be subject to a suitable window being identified by the Assembly Business Committee during which, according to AL, *“is expected to be a particularly congested legislative period.”*

### **Is Article 6(1) of the 1978 Order compatible with the Convention?**

[53] The answer to this question requires a review of three significant decisions.

[54] The first case is *R(JF) v Secretary of State* [2010] 1 AC 331. The judgment dealt with two claimants who had been convicted of a number of serious sexual offences. By virtue of the nature of their offences and the length of their sentences the claimants became automatically subject for an indefinite period to the notification requirements in sections 82-86 of the Sexual Offences Act 2003. The claimants sought judicial review by way of a declaration of incompatibility under section 4 of the Human Rights Act 1998 that the absence of any mechanism for review of the notification requirements in the 2003 Act was a disproportionate interference with the right to respect for private and family life guaranteed by Article 8 of the ECHR. The notification requirement under consideration by the court applied to all offenders who were sentenced to 30 months’ imprisonment or more for a sexual offence, which resonates with the length of sentence under consideration in this case.

[55] The Supreme Court reviewed the statutory provision, domestic jurisprudence and the Strasbourg jurisprudence.

[56] In analysing the Strasbourg jurisprudence Lord Phillips refers to the decision in *S v United Kingdom* [2018] 48 EHRR 1169 which dealt with the retention of cellular samples and DNA samples. The complainants alleged that the fact the police were lawfully entitled to retain these indefinitely infringed their Article 8 rights.

[57] At paragraph 31 Lord Phillips says:

*“31. In holding that there has been a violation of Article 8 the court had regard to a number of matters; the blanket and indiscriminate nature of the power of retention; the fact that nature and gravity of the suspected offence was immaterial, as was the age of the suspected offender; the fact that the power to retain was unlimited in time and, at para 119:*

*‘In particular there is no provision for independent review of the justification for the retention according to defined criteria, including such factors as the seriousness of the offence, previous arrests, the strength of the suspicion against the person and any other special circumstances.’”*

[58] At paragraph 34 of the judgment Lord Phillips, referring to the effect of the jurisprudence, says:

*“34. ... those decisions show, however, that the Strasbourg court considers that the possibility of reviewing the retention of sensitive personal information and notification requirements, in respect of such information is highly material to the question of whether such retention and notification requirements are proportionate and thus compliant with Article 8.”*

[59] The Supreme Court accepted that the notification requirements associated with life time sexual registration *“were capable of causing significant interference with Article 8 rights”* in light of the risk of disclosure [44]. It concluded that life time sexual registration was disproportionate because:

*“[57] ... It is obvious that there must be some circumstances in which an appropriate Tribunal could reliably conclude that the risk of an individual carrying out a further sexual offence can be discounted to the extent that continuance of notification requirements is unjustified.”*

[60] The Supreme Court upheld the decision of the Divisional Court and Court of Appeal which resulted in a declaration of incompatibility under section 4 of the Human Rights Act 1998 on the grounds that the absence of any mechanism for review of the notification requirements in the 2003 Act was a disproportionate interference with the right to respect for private and family life guaranteed by Article 8 of the ECHR.

[61] Following *JF* a system that permitted people to apply for exemption from registration was established, see the Sexual Offences Act 2003 (Remedial) Order 2012 (“the 2012 Order”).

[62] Similarly, in *Gaughran v UK App 45245/15* it was found by the ECtHR that Article 8 had been violated where the Police Service of Northern Ireland had indefinitely retained the applicant's DNA profile, fingerprints and photograph after he was convicted of a recordable offence.

[63] At paragraph 96 of the judgment the court says:

*"96. For the reasons set out above, the court finds that the indiscriminate nature of the powers of retention of the DNA profile, fingerprints and photograph of the applicant as a person convicted of an offence, even if spent, without reference to the seriousness of the offence or the need for indefinite retention and in the absence of any real possibility of review, failed to strike a fair balance between the competing public and private interests. The court recalls its finding that the State retained a slightly wider margin of appreciation in respect of the retention of fingerprints and photographs (see paragraphs 84 above). However, that widened margin is not sufficient for it to conclude that the retention of such data could be proportionate in the circumstances, which include the lack of any relevant safeguards including the absence of any real review.*

*97. Accordingly, the respondent State has overstepped the acceptable margin of appreciation in this regard and the retention at issue constitutes a disproportionate interference with the applicant's right to respect for private life and cannot be regarded as necessary in a democratic society."*

[64] Clearly the court focussed on the lack of any relevant safeguards including the absence of any real review.

[65] Following *Gaughran*, the Department issued a consultation paper entitled *"Proposals to amend the legislation governing the retention of DNA and fingerprints in NI."* The Department's aim is stated:

*"[4.1] The Department is proposing to make provisions within CJA for a regulation making power that will enable the Department to set out clearly in secondary legislation a detailed review mechanism that will apply to all material falling within the 75/50/25 maximum retention period set out in section 3. We envisage the regulations will include detail on the review periods; the criteria to be applied; who will conduct the review; how it will be conducted; and how individuals can request a review of their retained data."*

[66] Mr Southey submits that the approach in *JF* and *Gaughran* and the schemes enacted following those judgments are highly relevant in the context of this application.

[67] However, these decisions need to be considered in light of the recent judgment of the Supreme Court in *R(P) v Secretary of State* [2020] AC 185. Dr McGleenan submits that the judgment in *P* should be considered in detail. Whilst he acknowledges what he describes as “*nuanced differences*” between the facts in that case and the facts at hand he argues that the principles laid out by the Supreme Court in the particular context of the disclosure regime in respect of conviction, and the relevance of its findings and reasoning are obvious. He argues that the decision addresses all the issues that the court is required to consider in this case and, in effect, provides a full answer to the applicant’s case.

[68] In *P* the Supreme Court was considering challenges to the disclosure of spent convictions under both a system of Criminal Record Checks (“CRC”) 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 court concluded the scheme was a proportionate interference with Article 8 rights. In particular, it held 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 court held that the particular scheme under consideration was a good example of such a scheme that was justified, inter alia, because of various difficulties arising with respect to a system which allowed for examination of the facts of individual cases.

[69] The leading judgment was delivered by Lord Sumption. In relation to pre-defined categories Lord Sumption addresses the principle at paragraph [48] of his judgment:

*“[48] In principle, the legitimacy of legislating by reference to pre-defined categories in appropriate cases has been recognised by the Strasbourg court for many years. The fullest modern statement of the law is to be found in its decision in **Animal Defenders International v United Kingdom** [2013] 57 EHRR 21, where the court summarised the effect of a substantial body of earlier case law. At paras 106-110, the court observed:*

*‘106. ... It is recalled that a state can, consistently with the Convention, adopt general measures which apply to pre-defined situations regardless of the individual facts of each case even if this might result in individual hard cases ...*

107. *The necessity for a general measure has been examined by the court in a variety of contexts such as economic and social policy and welfare and pensions. It has also been examined in the context of electoral laws; prisoner voting; artificial insemination for prisoners; the destruction of frozen embryos; and assisted suicide; as well as in the context of a prohibition on religious advertising.*

108. *It emerges from that case law that, in order to determine the proportionality of a general measure, the court must primarily assess the legislative choices underlying it. The quality of the parliamentary and judicial review of the necessity of the measure is of particular importance in this respect, including to the operation of the relevant margin of appreciation. It is also relevant to take into account the risk of abuse if a general measure were to be relaxed, that being a risk which is primarily for the state to assess. A general measure has been found to be a more feasible means of achieving the legitimate aim than a provision allowing a case by case examination, when the latter would give rise to a risk of significant uncertainty, of litigation, expense and delay as well as of discrimination and arbitrariness. The application of the general measure to the facts of the case remains, however, illustrative of its impact in practice and is thus material to its proportionality.*

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

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

49. *The court's reference in para 108 to the risk of uncertainty is supported by a footnote citation of its earlier*



decision in *Evans v United Kingdom* [2008] 46 EHRR 34. In that case, it held that the absence of any provision for individual scrutiny in legislation requiring the consent of both parties to the implantation of stored embryos was consistent with article 8 of the Convention. The Grand Chamber found (para 60) that:

*'strong policy considerations underlay the decision of the legislature to favour a clear or 'bright-line' rule which would serve both to produce legal certainty and to maintain public confidence in the law in a sensitive field.'*

It went on to observe, at para 89:

*'While the applicant criticised the national rules on consent for the fact that they could not be dis-applied in any circumstances, the court does not find that the absolute nature of the law is, in itself, necessarily inconsistent with article 8. Respect for human dignity and free will, as well as a desire to ensure a fair balance between the parties to IVF treatment, underlay the legislature's decision to enact provisions permitting of no exception to ensure that every person donating gametes for the purpose of IVF treatment would know in advance that no use could be made of his or her genetic material without his or her continuing consent. In addition to the principle at stake, the absolute nature of the rule served to promote legal certainty and to avoid the problems of arbitrariness and inconsistency inherent in weighing, on a case by case basis, what the Court of Appeal described as 'entirely incommensurable' interests. In the courts view, these general interests pursued by the legislation are legitimate and consistent with article 8.'*

50. In those cases where legislation by pre-defined categories is legitimate, two consequences follow. First, there will inevitably be hard cases which would be regarded as disproportionate in a system based on case-by-case examination. As Baroness Hale observed in *R (Tigere) v Secretary of State for Business, Innovation and Skills (Just for Kids Law intervening)* [2015] 1 WLR 3820, para 36, the Strasbourg court's jurisprudence 'recognises that sometimes lines have to be drawn, even though there may be hard cases which sit just on the wrong side of it.' Secondly, the task of the court in such

*cases is to assess the proportionality of the categorisation and not of its impact on individual cases. The impact on individual cases is no more than illustrative of the impact of the scheme as a whole. Indeed, as the Strasbourg court pointed out at para 109 of **Animal Defenders** 57 EHRR 21, the stronger the justification for legislating by reference to pre-defined categories, the less the weight to be attached to any particular illustration of its prejudicial impact in individual cases. In my judgment, the legislative schemes governing the disclosure of criminal records in England and Wales and Northern Ireland provide as good an example as one could find of a case where legislation by reference to pre-defined categories is justified. ..."*

[70] Lord Sumption goes on to explain that he reaches this view for four main reasons. It is necessary therefore to examine each of the reasons.

[71] These four reasons can be summarised as follows:

[72] First, Lord Sumption took the view that it was entirely appropriate that the final decision about the relevance of a conviction to an individual's suitability for some occupations should be that of the employer. He contrasts the position of the employer with the administrative authorities responsible for disclosure who know only (i) the job title, which usually gives only the most general notion of what the entails; and (ii) the broad category of offence for which the candidate was convicted or cautioned, the implications of which may be affected by a wide variety of mitigating or aggravating circumstances that are not apparent from the criminal record database. He does, however, acknowledge at paragraph [51] that:

*"A system of administrative review on the application of the candidate may be possible. It has existed in Northern Ireland since 2016."*

[73] He goes on to identify some difficulties with such a system but the focus of his reasoning remains that the employer is in the best position to make an assessment.

[74] The second reason also focused on the question of the approach by employers. Lord Sumption noted the objection based on the argument that employers could not be trusted to take an objective view of the true relevance of a conviction and that although it must be assumed that some employers will take the line of least risk and decline to employ actual offenders, he formed the view that there was no evidence that this was the norm. There was guidance available governing the use of conviction information by employers to safeguard against misuse.

[75] The third reason related to the important value of certainty which he described as “*particularly high.*” The benefits of this were that candidates know where they stand at the time when they complete application forms for employment where disclosure by Access NI or under the Police Act 1997 is involved.

[76] The fourth reason related to practicality. He points out at para [54] of his judgment that some four million applications for CRCs are made every year in England and Wales. They have to be dealt with promptly, because a conditional offer of employment will commonly have been made to the candidate. A system of individual assessment will require an assessment to be made or reviewed according to, among other things, the circumstances of the offence, the sentencing remarks of the judge, any relevant mitigating or aggravating factors and presumably any representations of the candidate. The evidence before the court was that this was not a practical proposition in the case of a volume of disclosure applications as large as that in England and Wales. He does however point out that:

*“It is true that any administrative problems appear to have been overcome in Northern Ireland. But Northern Ireland is a much smaller jurisdiction.”*

[77] In her judgment agreeing with Lord Sumption’s disposal of the cases it is clear that Baroness Hale was particularly influenced by the practicality of introducing a form of assessment of the relevance of data to be disclosed.

[78] At paragraph 75 of her judgment she says:

*“[75] ... There is also, in my view, a public interest in devising a scheme which is practicable and works well for the great majority of people seeking positions for which a CRC is required. Neither they nor their prospective employers should have to wait too long for the results of their enquiry.*

*[76] It is for that last reason that I am persuaded that it cannot be a pre-requisite of any proportionate scheme that it seeks to assess the relevance of the data to be disclosed to the employment or activity in question. There may be other contexts involving interference with article 8 rights where this would be both practicable and necessary. ...”*

[79] At paragraph [77] she says:

*“[77] I am also persuaded that the only practicable and proportionate solution is to legislate by reference to pre-defined categories or, as these are sometimes pejoratively described, ‘bright line rules.’ For me, the most important of the four*

*reasons given by Lord Sumption is his third, the need for certainty."*

### **Application to the present case**

[80] The case of *P* supports 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.

[81] The court must recognise that Member States enjoy a margin of appreciation in determining the need for interference with Convention rights.

[82] Ultimately, it is for the court to assess the issue of proportionality. In assessing whether the balance between the identified competing rights is appropriate it should accord proper deference to the legislator as to where the balance should be struck.

[83] Given the reliance placed by the respondent on the decision in *P* it is important to analyse the four reasons upon which Lord Sumption reached his conclusions. It seems to the court that the application of all four reasons can be distinguished from the circumstances of this application. In relation to the first reason it will be noted that Lord Sumption indicated that it was entirely appropriate that the final decision about the relevance of a conviction to an individual's suitability for "*some occupations*" should be that of the employer. This is unsurprising given that the court was considering applications relating to "*sensitive occupations*" and other circumstances in which the need for disclosure was pressing.

[84] The applicant in this case does not seek a declaration to the effect that his conviction should not be subject to the regime analysed in *P*. Rather he seeks to establish that the failure to provide a mechanism whereby he can apply to have his conviction considered to be spent is disproportionate. 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. If the applicant was able to have his conviction declared as spent he would still be subject to the process considered in *P*.

[85] In relation to the second reason the focus of Lord Sumption was in respect of employers and their ability to be trusted to take an objective view of the true relevance of a conviction. However, the scope of disclosure under the 1978 Order goes beyond employers in sensitive occupations.

[86] In relation to the third reason put forward by Lord Sumption the certainty he identifies in relation to disclosure for sensitive occupations is absent in the wider circumstances in which disclosure may be sought by reason of the 1978 Order. For example a person seeking insurance, a non-sensitive job or a tenancy will not know

in advance whether any of the people/institutions to which he applies will seek details of previous convictions.

[87] As for practicality (the fourth reason put forward by Lord Sumption was one of practicality), it is expressly noted by him that a smaller jurisdiction such as Northern Ireland has the capacity to establish review mechanisms. The court in this application is not dealing with a context in which four million applications are made per annum which require prompt decisions. What is at issue here is the ability of the applicant to seek a review whereby his previous conviction can be treated as spent for the purposes of the 1978 Order. In this regard what the applicant is seeking is not dissimilar to the scheme that has been established by the 2012 Order in relation to the Sexual Offences Notification Requirements.

### **The court's approach to proportionality**

[88] The court adopts the approach of Lord Phillips set out in *R(F)* case at paragraph 17 as follows:

*"[17] In order to decide whether interference with a fundamental right is proportionate to the legitimate end sought to be achieved the court has to ask the questions identified by the Privy Council in de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing [1999] 1 AC 69 at p 80:*

*'whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective.'*

*However, as Lord Bingham of Cornhill observed in Huang v Secretary of State for the Home Department [2007] 2 AC 167 at para 19, there is an overriding requirement to balance the interests of the individual against those of society."*

[89] The State's rationale for the rehabilitation of offenders is an important objective. The rehabilitation of offenders is something given weight in an Article 8 context. There is a clear public interest and benefit to society in providing offenders the opportunity 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.

[90] 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 is sufficiently important to justify limiting a fundamental right and the measures designed to meet the legislative object have a rational connection to the objective.

[91] Thus, the next question for the court is to consider 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, of course, has to always be considered in the context of the overriding requirement to balance the interests of the individual against those of society.

[92] In assessing the balance struck in the interests of the State and the individual the court notes that it is clear from the history of the policy and legislative background set out above that the thinking behind the 1974 Act and the 1978 Order in respect of the necessity for “*bright lines*” which ensures 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.*”

[93] This thinking was long before the Human Rights Act became part of our domestic law and the court engaged in the type of balancing exercise now necessary as a result. That this thinking still persists is clear from the consultation process currently underway in this jurisdiction. Thus, AL avers in paragraph 77 of his affidavit that:

*“An important consideration here is the importance of maintaining the public’s acceptance of the legitimacy of the law and confidence in the justice system. Without this support the justice system could not operate effectively and public safety would be fatally compromised.”*

[94] Whilst of course confidence in the justice system is an important consideration it seems to the court that the idea that a conviction can never be spent, irrespective of individual circumstances, pays insufficient weight to the interests protected by Article 8.

[95] In considering the appropriate balance the court considers that the actual and potential interference with the applicant’s Article 8 rights and those in a similar position is significant. The significance is enhanced by reason of the fact that the circumstances in which disclosure can be required is wide. It is not confined to

applications for employment. The scheme in question can positively require disclosure despite the fact that the person seeking disclosure by asking about previous convictions may have no legitimate interest in disclosure. Again, it is important to understand that even if the applicant is granted the relief he seeks this will not prevent the necessity for disclosure for sensitive occupations in accordance with the vetting procedures under the Police Act 1997. In any event the Police Act does provide the opportunity of a review by an independent reviewer for spent convictions.

[96] 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.

[97] The evidence of the effect of the 2012 Order or Schedule 80 of the Police Act 1997 suggests that in a small jurisdiction such as Northern Ireland it has been demonstrated that it has the capacity to establish systems of administrative review that would enable an individual to demonstrate that his or her personal circumstances do not justify them being subject to the scheme in question. The review mechanisms established suggest that there is no reason why such mechanisms are not practicable in this jurisdiction.

[98] 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.

[99] The impugned legislation is arbitrary both in substance and effect. In the words of Lord Kerr in his dissenting judgment in the *P* case the applicant, and those like him, "*... should not be consigned to the category of unfortunate casualties at the margins. They represent the significant impact that the current policy choice has on a potentially substantial number of individuals.*"

[100] For these reasons the court considers that the ongoing interference with the applicant's Article 8 rights is not proportionate. 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.

[101] The court notes that the whole question of rehabilitation of offenders is under review. There is, of course, no guarantee that the review will result in new legislation having regard to the matters set out in AL's affidavit. Dr McGleenan argues, in any event, 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.

[102] 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 (NI) Order 1978 is incompatible with Article 8 of the ECHR 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.

[103] The court will hear submissions on whether any further relief is necessary as sought in paragraphs 4.1(iii) and (v) of the Order 53 Statement.