Neutral Citation Number: [2013] EWCA Civ 25

Case No: C1/2012/0520, C1/2011/1660 & C1/2011/1678

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT, QUEEN'S BENCH DIVISION, ADMINSTRATIVE COURT
C1/2012/0520
MR JUSTICE KENNETH PARKER
CO74822011

C1/2011/1660
HIS HONOUR JUDGE GOSNELL
CO12942011

C1/2011/1678
HIS HONOUR JUDGE GOSNELL
CO11802011

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/1/2013

Before:

THE MASTER OF THE ROLLS
LORD JUSTICE RICHARDS
and
LORD JUSTICE DAVIS

- -

C1/2012/0520
Between:

THE QUEEN ON THE APPLICATION OF T	**Appellant**
- and –	
(1) CHIEF CONSTABLE OF GREATER MANCHESTER	**First Respondent**
(2) THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Second Respondent**
(3) THE SECRETARY OF STATE FOR JUSTICE	**Third Respondent**
(1) LIBERTY	**First Intervener**

(2) EQUALITY AND HUMAN RIGHTS COMMISSION **Second Intervener**

C1/2011/1660

THE QUEEN ON THE APPLICATION OF JB **Appellant**

- and –

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT **Respondent**

C1/2011/1678

THE QUEEN ON THE APPLICATION OF AW **Appellant**

- and –

THE SECRETARY OF STATE FOR JUSTICE **Respondent**

- -
- -

C1/2012/0520

Mr Hugh Southey QC and **Mr Nick Armstrong** (instructed by **Stephensons Solicitors LLP**) for the **Appellant**
Mr Ian Skelt (instructed by **The Greater Manchester Police**) for the **First Respondent**
Mr Jason Coppel (instructed by **Treasury Solicitors**) for the **Second and Third Respondents**
Mr Timothy Pitt-Payne QC (instructed by **Liberty**) for the **First Intervener**
Ms Caoilfhionn Gallagher (instructed by **Equality and Human Rights Commission**) for the **Second Intervener**

C1/2011/1660

Mr Stephen Cragg (instructed by **Howells Solicitors LLP**) for the **Appellant**
Mr Jason Coppel (instructed by **Treasury Solicitors**) for the **Respondent**

C1/2011/1678

Mr Stephen Cragg (instructed by **Howells Solicitors LLP**) for the **Appellant**
Mr Jason Coppel (instructed by **Treasury Solicitors**) for the **Respondent**

Hearing dates: 26 & 27 November 2012

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Judgment Approved by the court for handing down (subject to editorial corrections)

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Master of the Rolls: this is the judgment of the court.

1. In these proceedings, the claimants contend that in certain respects the provisions of the Police Act 1997 ("the 1997 Act"), the Rehabilitation of Offenders Act 1974 ("the ROA") and the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 ("the ROA Order"), which was made pursuant to the ROA, are incompatible with article 8 of the European Convention on Human Rights ("the ECHR").

The relevant legislation

The ROA

2. The purpose of the ROA is explained in the long title:

> "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."

3. The ROA provides a scheme whereby criminal convictions, cautions, warnings and reprimands in respect of certain offences are deemed to be "spent" after specified periods of time. Thereafter, the person convicted or cautioned in respect of such offences should be treated as if he had never committed the offence in question and need not make reference to the conviction or caution in answering any question which might otherwise require its disclosure.

4. There are two forms of caution. One is a simple caution, which is a non-statutory disposal for adult offenders and is administered by the police. The other is a conditional caution issued pursuant to section 22 of the Criminal Justice Act 2003. This requires the involvement of a prosecutor. For offenders under the age of 18, reprimands and warnings are available instead of cautions (pursuant to section 65 of the Crime and Disorder Act 1998). The provisions of the ROA relating to cautions apply equally to warnings and reprimands. Save where the context otherwise requires, we shall use the term "caution" to apply to each of these disposals.

5. As regards cautions, para 3 of Schedule 2 of the ROA provides so far as material:

> "(3) Where a question seeking information with respect to a person's previous cautions, 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 cautions or to any ancillary circumstances, and the answer 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 caution or any ancillary circumstances in his answer to the question.
>
> (4) 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 caution or any ancillary circumstances (whether the caution is his own or another's).
>
> (5) A caution which has become spent or any ancillary circumstances, or any failure to disclose such a caution 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."

6. Section 5 provides that sentences that are excluded from rehabilitation under the Act include a sentence of imprisonment, youth custody or detention in a young offender institution for a term exceeding 30 months. This will be increased to 48 months when section 139(2) of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 Act comes into force. But no change has been made to the rule that simple cautions, warnings and reprimands are deemed to be spent as soon as they are administered (para 1 of Schedule 2 of the ROA).

7. These provisions of the ROA are, however, subject to the ROA Order, which removes the protection otherwise given by the ROA in specified circumstances. In particular, article 3 of the ROA Order excludes the effect of para 3(3) of Schedule 2 of the ROA in the context of questions asked in order to assess suitability for employment in the various positions listed in the provisions of Schedule 1 to the Order; and article 4 excludes the effect of para 3(5) of Schedule 2 in relation inter alia to applications for jobs working with children and vulnerable adults.

The 1997 Act

8. Section 113B of the Act provides, so far as material:

> "The Secretary of State must issue an enhanced criminal record certificate to any individual who –
>
> (a) makes an application, and
>
> (b) pays in the prescribed manner any prescribed fee.
>
> …
>
> (3) An enhanced criminal record certificate is a certificate which –
>
> (a) gives the prescribed details of every relevant matter relating to the applicant which is recorded in central records and any information provided in accordance with subsection (4), or
>
> (b) states that there is no such matter or information.

> (4) Before issuing an enhanced criminal record certificate the Secretary of State must request the chief officer of every relevant police force to provide any information which –
>
> > (a) the chief officer reasonably believes to be relevant for the purpose described in the statement under subsection (2), and
> >
> > (b) in the chief officer's opinion, ought to be included in the certificate.
>
> …
>
> (9) In this section –
>
> "central records", "exempted question", and "relevant matter" have the same meaning as in section 113A."

Although these proceedings are concerned with enhanced criminal record certificates ("ECRCs"), reference will also be made later in this judgment to criminal record certificates ("CRCs") which are dealt with in section 113A of the Act.

9. The definitions referred to in section 113B(9), which appear in section 113A(6), provide as follows:

> "central records" means such records of convictions and cautions held for the use of police forces generally as may be prescribed;
>
> "exempted question" means a question which –
>
> > (a) so far as it applies to convictions, is a question in relation to which section 4(2)(a) or (b) of the Rehabilitation of Offenders Act 1974 (effect of rehabilitation) has been excluded by an order of the Secretary of State under section 4(4) of that Act; and
> >
> > (b) so far as it applies to cautions, is a question to which paragraph 3(3) or (4) of Schedule 2 to that Act has been excluded by an order of the Secretary of State under paragraph 4 of that Schedule
>
> "relevant matter" means –
>
> > (a) a conviction within the meaning of the Rehabilitation of Offenders Act 1974, including a spent conviction, and
> >
> > (b) a caution, including a caution that is spent for the purposes of Schedule 2 to that Act."

The Secretary of State for the Home Department ("SSHD") is empowered by section 113A(7) to amend the statutory definitions of "central records" and "relevant matter". This may be done by order laid before Parliament under the affirmative resolution procedure (section 113A(8)).

The Criminal Records Review

10. On 22 October 2010, the SSHD established the Criminal Records Review ("the Review") whose terms of reference were summarised as follows:

> "The Criminal Records Review will examine whether the criminal records regime strikes the right balance between respecting civil liberties and protecting the public. It is expected to make proposals to scale back the use of systems involving criminal records to common sense levels."

11. The Review has been conducted by Mrs Sunita Mason, the Government's Independent Advisor for Criminality Information Management. She first provided a report dated March 2010. Subsequently, for the purposes of the Review, she produced her *Report on Phase One* (11 February 2011) and her *Report on Phase Two* (6 December 2011). A number of her recommendations for improving the system for criminal records checks have already been implemented by provisions of the Protection of Freedoms Act 2012.

12. One of the recommendations made by Mrs Mason in her phase 1 report (recommendation 5) was that the Government should "[introduce] a filter to remove, where appropriate, old and minor conviction information from criminal records checks". She was referring to convictions which were "undeniably minor and cannot be classed as anything other than old". The Government responded to that recommendation as follows:

> "A further recommendation was that the Government should introduce a filter to remove, where appropriate, old and minor conviction information from criminal records checks. The Government will continue to consider this proposal, part of which means trying to identify an appropriate and workable filtering mechanism. It is important that old and minor disposals should not unreasonably compromise employment prospects, but equally important that potentially relevant information should be available to those employing people in sensitive positions."

13. In her phase 1 report, Mrs Mason further recommended the establishment of an Independent Advisory Panel for the Disclosure of Criminal Records ("IAPDCR") which would consider the design of a suitable mechanism to filter out old and minor convictions. Such a panel was established and it agreed the following principles:

- Filtering should include convictions and cautions, aligned to the conviction type;
- There should be a consultation process before a particular conviction type can be subject to filtering;
- Extra consideration should be given to convictions and cautions defined as minor received by individuals before their 18th birthday;
- There should be a defined period of time after which minor convictions and cautions (as defined) are not disclosed;

- The rules should ensure that no conviction is filtered if it is not "spent" under the provisions of the Rehabilitation of Offenders Act;

- Particular care should be taken before considering any sexual, drug related or violent offence type for filtering;

- Where any conviction or caution recorded against an individual falls outside of the minor definition then ALL convictions should be disclosed even if they would otherwise be considered as minor;

- The filtering rules should be both simple and understandable to individuals who are users and/or customers of the disclosure service.

14. The IAPDCR could not, however, agree on the way in which these principles should be implemented (p. 6 of the report). Mrs Mason herself proposed that the Criminal Review Board ("CRB") should adopt an automated filtering process based on a number of rules. She also noted, however, that it would not be advisable to have absolute rules on the filtering of convictions and cautions and that the police should always have the discretionary power to include minor convictions and cautions on an ECRC:

> "There will always be exceptional cases where a conviction filtered out using the standard rule is, nevertheless relevant for inclusion in a disclosure because of the particular circumstances of the post being applied for. For that reason, it would be important to retain the capacity for the police to add such convictions back into disclosures as part of local police information."

Practical difficulties in devising a filtering mechanism

15. In his witness statement in the case of *JB*, Mr John Woodcock, the Head of Criminal Records Policy within the Safeguarding and Public Protection Unit of the Home Office, has drawn attention to some "quite difficult practical questions" which arise in devising a mechanism for filtering. This statement was filed before the IAPDCR completed its work (Mr Woodcock was one of the experts consulted by Mrs Mason). The following is no more than the barest of outlines of what he says:

(1) It is not straightforward to decide which offences should be classed as "minor". There is no definition in law of a minor offence and, in many cases, reasonable views will differ as to whether an offence is minor or not. There would have to be a comprehensive classification of the many thousands of recordable criminal offences as minor or not, which would be an extremely resource-intensive undertaking.

(2) There is the additional difficulty that in the case of some offences, such as theft, a single label covers a range of offences of widely differing degrees of seriousness. If these offences are to be filtered, this would imply, at the least, a manual process either at CRB or police force level to decide whether or not particular convictions and cautions are "minor". This may be very difficult to

establish as the police national computer ("PNC") may not contain all relevant information as to the surrounding circumstances relating to an offence.

(3) Considerations of age and seriousness in deciding which convictions and cautions should be filtered would add another layer of complexity to the classification of offences.

(4) One way of avoiding the difficulties associated with the classification of each offence type is to use the method of disposal rather than the type of offence as the main criterion for the filtering process (as is done in the ROA). But this creates serious risks of filtering out convictions and cautions which are clearly appropriate for disclosure (for example, some violent and sexual offences attract relatively low sentences or are even dealt with by way of caution). These risks could be addressed by excluding certain offences (say those with a violent or sexual element) from ever being filtered, but this would again involve a large number of value judgments as to the seriousness of offences (the number of violent and/or sexual offences is very large). It would complicate the filtering process and involve considerable manual intervention to classify offences on current criminal records.

(5) Another possibility would be to take account of "clear periods". For example, a minor offence might only be filtered after a defined period if the person concerned had not committed any other offences during that period. But this would add a further layer of complexity to a system based on the age of convictions.

(6) A further option would be to give the police a discretion such as they currently have in relation to the disclosure of police intelligence. But individualised decision-making would carry the risk of inconsistency and would have serious resources implications.

(7) Mr Woodcock emphasises that any filtering system ought to be reasonably straightforward and easy to understand, both for applicants and those using disclosures as part of recruitment processes. That is particularly the case if, as at present, there is to continue to be integration between the system for disclosures under the 1997 Act on the one hand and the regime of the ROA and the ROA Order on the other. Individuals must be able easily to comprehend which convictions and cautions they are entitled to leave out of account when asked relevant questions by a prospective employer and which may provide grounds for adverse action against them in the future. Any system of filtering which incorporates the making of judgments by the police would, by definition, deprive individuals of any certain knowledge of what must be disclosed by them.

16. Mr Woodcock says that Mrs Mason's recommendations for the filtering of old and minor convictions and cautions remain under consideration by the SSHD and the Secretary of State for Justice. Having regard to the obvious complexity of defining and implementing an appropriate and effective approach to filtering, they have asked their officials to continue to collaborate on this issue.

The facts of the three cases before this court

The case of T

17. T was born on 3 May 1991. When he was 11 years of age, he received two warnings from the Manchester Police in connection with two stolen bicycles. He is now 21 years of age. Apart from these police warnings, he is a man of good character. He believed that his warnings were spent. But he was disabused of this in 2008 when (aged 17) he sought a part-time job at the local football club. The club requested an ECRC which revealed the warnings. Following representations, the police agreed to "step down" the warnings. A "stepped down" conviction or caution was one to which only the police had access and which was not disclosable to third parties.

18. Until the case of *Chief Constable of Humberside v Information Commissioner* [2010] 1 WLR 1136, there had been a policy of "stepping down" records of less serious offences. The *Humberside* case decided that such a procedure could not be accommodated within the terms of the 1997 Act.

19. T heard nothing more about the warnings. In September 2010, he enrolled on a sports studies course at a University. Because that degree involves teaching and contact with children, the University sought an ECRC. On the commencement of the course, T (believing that the warnings had been "stepped down", spent and to all intents and purposes, no longer on his record) stated, in answer to a question about his record, that he had no convictions or warnings. An ECRC was obtained by the University. This disclosed the warnings. The police stated (rightly) that, in the light of *Humberside*, they no longer had the discretion to "step down" warnings, cautions or convictions. Following representations by his solicitor, a revised ECRC was produced. This still revealed the warnings, but contained some additional information.

20. T issued judicial review proceedings. He claimed that the scheme for issuing criminal records certificates and for requiring a person to disclose spent warnings to certain future employers was incompatible with article 8 of the ECHR. Kenneth Parker J saw force in T's case, but considered that he was bound by the decision of the Supreme Court in *R (L) v Commissioner of Police of the Metropolis* [2009] UKSC 3, [2010] 1 AC 410 to dismiss the application.

The case of JB

21. In May 2001, JB went into Superdrug in Sheffield to purchase some moisturising lotion. She was in her early 40s at the time. Whilst she was in the shop, she impulsively decided to purchase a packet of false nails. On approaching the till, she says that she placed the packet of false nails under her arm to enable her to get money out of her bag. She paid for the moisturising lotion (but not the false nails) and left the shop, still with the false nails under her arm. She was apprehended by a member of staff once she had left the premises. She said that she had made an honest mistake and had not intended to steal the false nails. The police attended and decided that a caution would be appropriate. JB accepted the caution on 12 May 2001.

22. In 2009, she learnt that there were vacancies with an employer in the care sector. She was placed on a 6 week Job Centre training course. Having completed the course, she was subject to a criminal records check before she could be put forward for job opportunities. An ECRC was issued on 10 March 2010 and it revealed the caution.

She was then told that she would not be offered employment as her criminal record rendered her inappropriate for work with vulnerable people.

23. JB remains unemployed. It is her case that she would have made an excellent carer but for the single caution that she received more than 10 years ago.

24. She issued proceedings claiming that, if the legislative scheme which required the disclosure of the caution could not be read down, then it was incompatible with article 8 of the ECHR. Permission to apply for judicial review was refused by HH Judge Gosnell. The judge held that article 8 was applicable, but said that the interference with an individual's article 8 rights that was entailed by the disclosure of his or her criminal record was justified "as part of the general need to protect people with whom the subject might be working, whether they be children or vulnerable adults". But Sullivan LJ gave permission to appeal on 9 September 2011.

The case of AW

25. When she was 16 years of age, AW agreed with her boyfriend to carry out a "car-jacking". In the early hours of 5 April 2003, she operated a pedestrian crossing button causing a car to stop at a red light. The boyfriend was lying in wait in bushes nearby. He emerged when the car stopped and got into the vehicle. As the driver attempted to drive away, the boyfriend stabbed him many times in the face and chest. AW ran after the vehicle. Once the victim had been removed from the car and left in the road, AW and her boyfriend left the scene in the stolen car. AW knew that he was carrying what she thought to be a knife, but which was in fact a machete with a blade 11.5 inches in length. Eventually, the couple were apprehended. AW was charged and pleaded guilty to manslaughter and robbery. Her concurrent sentences (as reduced on appeal) were 5 years' detention for the manslaughter and 4 years' detention for the robbery.

26. She wants to serve in the Army. Her solicitor wrote to the Attorney General claiming that the effect of the scheme (that her conviction will never be considered as spent) is incompatible with article 8 of the ECHR. She started judicial review proceedings claiming that the ROA legislation should be read down so as to be compatible with article 8, and seeking in the alternative a declaration that it is incompatible with article 8.

27. On 16 June 2011, HH Judge Gosnell concluded that article 8 was not engaged; alternatively he said that, if it was engaged, the interference was proportionate and therefore justified within the meaning of article 8(2). On 14 October 2011, Sir Richard Buxton refused permission to appeal on the papers. AW has renewed her application for permission to appeal. It is this application (with application for judicial review to follow if permission is granted) that is now before this court.

The case of T considered in detail

The issues

28. We shall start by considering the case of T in detail. Once we have reached our conclusions on his case, we shall be able to deal with the other two cases relatively briefly. The following issues arise in relation to the 1997 Act: (1) are the provisions

requiring the disclosure of CRCs and ECRCs capable of interfering with the right to respect for private life within article 8(1)? (2) If so, is the interference justified within the meaning of article 8(2)? (3) Is there binding authority which is decisive of the outcome of the case in any event? There are also issues as to whether the ROA and the ROA Order are compatible with article 8.

Article 8(1) of the ECHR and interference with right to private life

29. Article 8 provides:

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

30. At para 33 of his skeleton argument, Mr Coppel says that the SSHD accepts that the provisions of the 1997 Act requiring disclosure of convictions and cautions on CRCs and ECRCs are capable of interfering with the right to respect for private life in certain cases. He accepts that, since the remedy sought in these cases is a declaration of incompatibility under section 4 of the Human Rights Act 1998 ("the HRA") that is sufficient to raise the issue of justification under article 8(2).

31. Although at times during his oral submissions, he appeared to retreat from this concession, in our view it was rightly made. The issue of what does and what does not lie within the scope of article 8 has been considered many times. The judgment of Lord Hope in *R (L)* at paras 24 to 27 contains a useful summary of the jurisprudence. There are two separate bases on which the disclosure of information about past convictions or cautions can constitute an interference with the right to respect for private life under article 8(1). First, the disclosure of personal information that individuals wish to keep to themselves can constitute an interference. In one sense, criminal conviction information is public by virtue of the simple fact that convictions are made and sentences are imposed in public. But as the conviction recedes into the past, it becomes part of the individual's private life. By contrast, a caution takes place in private, so that the administering of a caution is part of an individual's private life from the outset. Secondly, the disclosure of historic information about convictions or cautions can lead to a person's exclusion from employment, and can therefore adversely affect his or her ability to develop relations with others: this too involves an interference with the right to respect for private life. Excluding a person from employment in his chosen field is liable to affect his ability to develop relationships with others, and the problems that this creates as regards the possibility of earning a living can have serious repercussions on the enjoyment of his private life: see *Sidabras v Lithuania* (2004) 42 EHRR 104, para 48.

32. In the case of T, the disclosure of the warning on an ECRC interfered with his article 8(1) right in two ways. First, it involved the disclosure of sensitive information about

himself which he wished to keep to himself. The warning had been administered in private when he was a child of 11. The information about the warning was properly to be regarded as an aspect of his private life. Secondly, disclosure was liable to affect his ability to obtain employment and to form relationships with others. This is demonstrated by the fact that, although it did not lead to his exclusion from his sports studies degree course, or from the employment opportunities to which that course would lead, it did make it more difficult for him to pursue his studies. It took the intervention of solicitors on his behalf to persuade the University to permit him to continue on the course.

Justification under article 8(2)

33. The SSHD seeks to justify the requirement that *all* convictions and cautions must be disclosed on a number of grounds. First, the regime offers an important protection for employers and for the children and vulnerable adults in their care. Secondly, convictions and cautions necessarily involve a finding or an admission that the applicant for a CRC or ECRC has committed a criminal offence (unlike the "information" falling within the category of police intelligence which was at issue in *R (L)*). It was legitimate for Parliament to draw a clear distinction between information that the applicant for an ECRC has committed an offence (which must be disclosed) and information falling short of that (which may or may not be disclosed, depending on the police view of the proportionality of the disclosure). Thirdly, this "bright line" makes good sense and has the merit of being simple and easy to understand. As Lord Neuberger said in *R (L)*, the fact that a "bright line" may operate harshly in a minority of cases does not invalidate it. It was permissible for Parliament to consider (i) that this matter should be regulated by general rules, rather than by a finely calibrated scheme and/or individualised police decision-making in each case; and (ii) that it was appropriate to provide employers with full information about prospective employees, even if that could result in some employers acting "harshly".

34. Fourthly, the system of disclosure of convictions and cautions has its own in-built filter mechanism, in that only convictions and cautions relating to recordable offences are held on the PNC and are disclosed. Fifthly, the effect of the provisions under challenge depends in part on the data retention policies which are applied to records of convictions and cautions held on the PNC. These are not set out in legislation, but are determined by the Association of Chief Police Officers and are subject to review by the Information Commissioner and to legal challenge pursuant to the Data Protection Act 1998. The current policy was upheld by this court in *Humberside* and has not been challenged in the present proceedings.

35. Sixthly, the effect of disclosure of a conviction or caution on an ECRC is limited. The applicant is not automatically barred from employment. It is left to an employer to decide whether an offence should be regarded as minor and irrelevant. Seventhly, consideration is being given by the SSHD to the introduction of a further filtering mechanism which would serve to exclude from disclosure certain old and minor convictions and cautions, as recommended by Mrs Mason. However, this would raise significant practical difficulties and would involve the expenditure of substantial additional resources in classifying offences and in establishing a viable filter mechanism. It is submitted on behalf of the SSHD that she is entitled to have regard to these practical considerations in concluding that the current regime is proportionate and justified under article 8(2).

36. As we have seen, the IAPDCR has agreed certain principles for the design of a suitable filtering mechanism. It seems a fair inference that the SSHD has also agreed that it is important that old and minor disposals should not unreasonably compromise employment prospects (see para 14 above). But neither the IAPDCR nor the SSHD has been able to agree the details of a practicable filtering mechanism. Various criteria for disclosure have been suggested. The SSHD says that any relevant domestic and international comparator models will be studied during the further work that is currently being undertaken. But she says that the current system remains a legitimate choice and is not outside the discretionary area of judgment afforded to Parliament. Where to strike the balance between (i) the rights of employers and the children and vulnerable adults for whom they are responsible and (ii) the rights of prospective employees is a matter of social policy which falls within Parliament's margin of discretion.

37. We accept that the interference with T's article 8 rights pursues both (i) the *general* aim of protecting employers and, in particular, children and vulnerable adults who are in their care and (ii) the *particular* aim of enabling employers to make an assessment as to whether an individual is suitable for a particular kind of work. But in our judgment, the statutory regime requiring the disclosure of *all* convictions and cautions relating to recordable offences is disproportionate to that legitimate aim. It is true that disclosable offences do not include offences which are so insignificant that they are not even recorded on the PNC: the offences recorded on the PNC are those for which sentences of imprisonment *may* be imposed, but also a substantial number of other specified offences. We do not, however, consider this to be a proportionate filtering scheme in the context of article 8 considerations. It certainly has not been so regarded by the IAPDCR, nor, we suggest, by the SSHD herself. If it had been, then why go to the trouble and expense of setting up the panel in the first place? For the same reason, we do not consider that data retention policies are an appropriate filter mechanism.

38. The fundamental objection to the scheme is that it does not seek to control the disclosure of information by reference to whether it is relevant to the purpose of enabling employers to assess the suitability of an individual for a particular kind of work. Relevance must depend on a number of factors including the seriousness of the offence; the age of the offender at the time of the offence; the sentence imposed or other manner of disposal; the time that has elapsed since the offence was committed; whether the individual has subsequently re-offended; and the nature of the work that the individual wishes to do. These same factors also come into the picture when the balance is to be struck (as it must be) between the relevance of the information and the severity of any impact on the individual's article 8(1) right.

39. The force of this fundamental objection is well demonstrated by the facts of T's case. He was 11 when he received warnings in connection with the two stolen bicycles. He was and remains otherwise of good character. Some 7 years later, he wanted to enrol on a sports course. It is difficult to see what relevance the fact that, as a young child, he had received these warnings could have to the question whether he was suitable to be enrolled on a sports course and have contact with children when he was 18 years of age. The disclosure regime was introduced in order to protect children and vulnerable adults. That objective is not furthered by the indiscriminate disclosure of all convictions and cautions to a potential employer, regardless of the circumstances. A blanket requirement of disclosure is inimical to the ROA and the important

rehabilitative aims of that legislation. Disclosure that is irrelevant (or at best of marginal relevance) is "counter to the interests of re-integrating ex-offenders into society so that they can lead positive and law-abiding lives": see Mrs Mason's Phase 2 report at p 19. In our judgment, the blanket nature of the disclosure regime goes wider than is necessary to achieve its purpose of protecting children and vulnerable adults.

40. It is true that "bright-line" rules are legitimate in some circumstances and that they do not become subject to challenge simply because of cases at the margins which are not fully catered for by the rule. Mr Coppel relies on statements to this effect in the authorities. For example, in *R (Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] UKHL 15, [2008] AC 1312. para 33, Lord Bingham said:

> "[L]egislation cannot be framed so as to address particular cases. It must lay down general rules:……A general rule means that a line, and it is for Parliament to decide where. The drawing of a line inevitably means that hard cases will arise falling on the wrong side of it, but that should not be held to invalidate the rule if, judged in the round, it is beneficial'.

41. But if a rule fails in a significant way to achieve its stated purpose and/or is disproportionate, then it is unlikely to be saved merely because it is a "bright-line" rule which has the merit of simplicity and ease of administration. In *R (F) v Secretary of State for the Home Department* [2010] UKSC 17, [2011] 1 AC 331, the statutory scheme under challenge provided that those who had committed various sexual offences and were sentenced to imprisonment for a term of at least 30 months were required to notify the police of certain details for an indefinite period and without the possibility of review. It was argued on behalf of the Secretary of State that the denial of the possibility of review was justified because a reliable review of the risk posed by those convicted of serious sexual offences was not practicable. Lord Phillips said at para 56 that, if uncertainty existed, this could not render proportionate the imposition of notification requirements for life without review. There were obvious practical advantages in having a simple "bright-line" rule, but the Supreme Court decided that these did not justify a denial of the possibility of review indefinitely and in every case.

42. The appeal to resources does not seem to have been made by the Secretary of State in the argument before the Supreme Court in *R (F).* But it was made before the Court of Appeal whose decision is reported at [2009] EWCA Civ 792, [2010] 1 WLR 76. It was submitted that the vast majority of those who were subject to the indefinite notification regime would seek a review and many would challenge a refusal. But this court said at para 47 that these problems would be avoided by Parliament introducing a sensible and proportionate mechanism for review of notification requirements:

> "The spectre of the floodgates can be set at rest by Parliament setting the threshold for review at a suitably high level both as regards the time when an application may first be made, the frequency with which applications may be made and what has to be proved if the notification requirements are to be varied or discharged."

43. We would respond in the same way to Mr Coppel's appeal to resources in the present case. A proportionate scheme would not require the individual consideration of each case. Just as in the case of *R (F),* so here Parliament could produce a proportionate scheme which did not insist on an examination of the facts of every case. A number of options have been suggested, including a range of what might be called "bright-line" sub-rules. At page 22 of her initial report, Mrs Mason gave examples of criteria that could be used for a filtering process. These were (i) a spent conviction for certain specified offences must *always* be disclosed; (ii) a spent conviction for certain specified offences must *never* be disclosed irrespective of any other considerations; and (iii) some spent convictions *might or might not* be disclosed depending on a set of factors such as age when one committed the offence, whether it was a single offence, how long ago it was committed etc.

44. Mr Coppel relies strongly on the point that disclosure does not automatically lead to the barring of an applicant from employment. Parliament has left it to the employer to assess the relevance of a conviction or caution. He submits that the employer can be trusted to take into account matters such as the seriousness of the offence, the age of the offender at the time, the lapse of time since it was committed and so on. He says that it was within the margin of Parliament's discretionary judgment to decide that this was a sensible and proportionate way of balancing the interests of children and vulnerable adults on the one hand and those of applicants for employment on the other.

45. We cannot accept this argument essentially for the reasons given by Mr Southey QC. Mrs Mason put the point well in her initial report at page 20:

> "In my opinion, with the current system, it is unfair to place the onus on the employer to decipher all of the information presented to them on a CRB check. PNC extracts can be difficult to interpret and employers do not always have the resources and training to fully weigh up and understand what is being presented to them. Evidence suggests that employers do not always handle and interpret the information correctly and fairly. For example, an employer faced with a clean disclosure and one containing an extract from the PNC may err on the side of caution and employ the individual with the clean disclosure regardless of the nature of the PNC extract."

46. Lord Neuberger said in *R (L)* at para 75 that it was realistic to assume that in the majority of cases, it was likely that an adverse ECRC would represent something close to a "killer blow" to the hopes of a person who aspired to any post which fell within the scope of the statutory provision. The same point was made by the ECtHR in *MM v United Kingdom* [2012] ECHR 24029/12 at para 200. We shall need to examine these authorities in some detail shortly. But for present purposes, it is sufficient to note that the decision in *R (L)* was concerned with the discretionary disclosure of police intelligence to potential employers. The Supreme Court held that the provisions for disclosure were to be read and given effect in a way which was compatible with the applicant's article 8 right and the rights of any third party who may be affected by the disclosure. In other words, a careful balancing exercise was required. Such an approach was inconsistent with the view that no such balancing was required because the employer to whom disclosure was made would be able to

assess the significance of the conviction or caution. As we explain below, the decision in *MM* is also inconsistent with that view.

47. In approaching the question of proportionality, we have been assisted by the decision in *MM*, although, as we shall explain, that was not strictly a decision on proportionality at all. The applicant had received a caution for child abduction in 2000. In 2006, she was offered employment as a Health Care Family Support Worker. She disclosed the existence of the caution to the employer. The employer contacted the Criminal Records Office of the Police Service of Northern Ireland who verified the existence of the caution. The disclosure of the caution was made under the common law, since no statutory scheme existed at the time in Northern Ireland. The offer of employment was withdrawn on account of the disclosure. The applicant complained that the retention and disclosure of the caution interfered with her article 8 rights. Subsequently, a statutory scheme was introduced which did not materially differ from that with which the present appeals are concerned.

48. At para 193 of its judgment in *MM*, the court addressed the question whether the interference with the applicant's article 8 rights was "in accordance with the law". It said that the law must "afford adequate legal protection against arbitrariness and accordingly indicate with sufficient clarity the scope of discretion conferred on the competent authorities and the manner of its exercise". At para 197, the court referred to the decision of the Supreme Court in *R (F)* and the passage at para 56 of Lord Phillips's judgment to which we have referred at para 41 above and said:

> "The Court is of the view that similar considerations apply in the context of a system for retaining and disclosing criminal record information to prospective employers."

49. In our judgment, this is important because (i) the court saw a similarity with the issues arising in the legislation under consideration in *R (F)* and (ii) what Lord Phillips had said in relation to proportionality was applicable to its consideration of whether the statutory scheme under consideration in *MM* was "in accordance with the law". This is important because Mr Coppel submits that *MM* is irrelevant to the present appeals, since it was a decision on whether the scheme being considered was "in accordance with the law" and not a decision on whether it was proportionate.

50. At para 199, the court recognised that there may be a need for a comprehensive record of all convictions and cautions, but said that the "indiscriminate and open-ended collection of criminal record data is unlikely to comply with the requirements of Article 8 in the absence of clear and detailed statutory regulations clarifying the safeguards applicable."

51. At para 200, the court said that the obligation on the authorities responsible for retaining and disclosing criminal record data to secure respect for private life was "particularly important, given the nature of the data held and the potentially devastating consequences of their disclosure". As we have already said, the court also agreed with what Lord Neuberger said in *R (L)* that, in the majority of cases, an adverse criminal record certificate will represent something close to a "killer blow" to the hopes of a person who aspires to any post which falls within the scope of the disclosure requirements.

52. The court then referred to the safeguards that were in place at the time of the disclosure (para 203) and addressed the possibility of future disclosure of the applicant's caution in the light of the statutory framework that is now in place (para 204). It concluded as follows:

> "206. In the present case, the Court highlights the absence of a clear legislative framework for the collection and storage of data, and the lack of clarity as to the scope, extent and restrictions of the common law powers of the police to retain and disclose caution data. It further refers to the absence of any mechanism for independent review of a decision to retain or disclose data, either under common law police powers or pursuant to Part V of the 1997 Act. Finally, the Court notes the filtering arrangements in respect of disclosures made under the provisions of the 1997 Act: as regards mandatory disclosure under section 113A, no distinction is made on the basis of the nature of the offence, the disposal in the case, the time which has elapsed since the offence took place or the relevance of the data to the employment sought.
>
> 207. The cumulative effect of these shortcomings is that the Court is not satisfied that there were, and are sufficient safeguards in the system for retention and disclosure of criminal record data to ensure that data relating to the applicant's private life have not been, and will not be, disclosed in violation of her right to respect for her private life. The retention and disclosure of the applicant's caution data accordingly cannot be regarded as being in accordance with the law. There has therefore been a violation of Article 8 of the Convention in the present case. This conclusion obviates the need for the Court to determine whether the interference was "necessary in a democratic society" for one of the aims enumerated therein."

53. Mr Coppel submits that *MM* was wrongly decided, is distinguishable on the facts and, in any event, is not part of a clear and consistent line of ECtHR authority which we are obliged to follow. We do not find it necessary to decide whether the ECtHR was right to decide that the identified shortcomings in the system for disclosure meant that it was not "in accordance with the law". The important point is that (i) it identified the blanket nature of the system as a shortcoming and (ii) it stated that what was said in *R (F)* raised "similar considerations" to those which arose in the instant case. In other words, the blanket nature of the system which led the court to hold that it was not "in accordance with the law" would also have led the court to hold that it was not proportionate. We emphasise that we do not consider that we are obliged to follow *MM*. But we have found in that decision support for the conclusion that we have already reached for the reasons we have given.

54. For all these reasons, we are of the opinion that the 1997 Act is incompatible with article 8. The position is even stronger in relation to offenders who were children at the time of their offending. The courts have repeatedly stated that different principles apply to young offenders from those applicable to adult offenders. In *R (Smith) v*

Secretary of State for the Home Department [2006] 1 AC 159 at para 12, Lord Bingham said:

> "The requirement to impose a sentence of HMP detention is based not on the age of the offender when sentenced, but on the age of the offender when the murder was committed, and it reflects the humane principle that an offender deemed by statute to be not fully mature when committing his crime should not be punished as if he were. As he grows into maturity, a more reliable judgment may be made, perhaps of what punishment he deserves and certainly of what period of detention will best promote his rehabilitation."

55. In *S v United Kingdom* (2009) 48 EHRR 50 at para 124, the ECtHR made much the same point in the different context of the retention of data:

> "The Court further considers that the retention of the unconvicted persons' data may be especially harmful in the case if minors such as the first applicant, given their special situation and the importance of their development and integration in society. The Court has already emphasised, drawing on the provisions of art. 40 of the UN Convention on the Rights of the Child 1989, the special position of minors in the criminal-justice sphere and has noted in particular the need for the protection of their privacy at criminal trials. In the same way, the Court considers that particular attention should be paid to the protection of juveniles from any detriment that may result from the retention by the authorities of their private data following acquittals of a criminal offence. The Court shares the view of the Nuffield Council as to the impact on young persons of the indefinite retention of their DNA material and notes the Council's concerns that the policies applied have led to the over-representation in the database of young persons and ethnic minorities, who have not been convicted of any crime."

56. It follows that the fact that T was only 11 years of age at the time he received his warnings makes his case that the disclosure of the warnings 7 years later was a disproportionate interference with his article 8 rights even stronger than it would have been if he had been an adult at the time of the warnings. For all the reasons that we have given, we would grant T a declaration that the 1997 Act is incompatible with article 8 of the ECHR, unless Mr Coppel is right in saying that we are prevented from doing so by authority that is binding on this court.

Binding authority?

57. Kenneth Parker J considered that the Supreme Court had decided in *R (L)* that section 113B of the 1997 Act (including the requirement to disclose all convictions and cautions recorded on the PNC) was compatible with article 8 and that he was bound by that authority to reach the same conclusion. Mr Coppel submits that the judge was correct and that we are similarly bound. Indeed, he also submits that we are bound to

reach that conclusion by the decision of this court in *R (X) v Chief Constable of the West Midlands Police* [2004] EWCA Civ 1068, [2005] 1 WLR 65.

58. Mr Coppel accepts that the information at issue in *R (X)* and *R (L)* was police intelligence information falling within the predecessor of section 113B(4). Neither case was concerned with information concerning convictions or cautions. But he submits that in both cases, the court gave consideration to whether both aspects of the disclosure provisions were compatible with article 8 and they were satisfied that both were indeed compatible.

59. Since Lord Hope (with whom Lord Saville and Lord Brown agreed) endorsed what Lord Woolf had said in *R (X)*, it is sufficient to refer to *R (L)*. At para 41, Lord Hope said:

> "This raises the question whether in *R (X) v Chief Constable of the West Midlands Police* [2005] 1 WLR 65, paras 36 and 37 and especially in para 41, Lord Woolf CJ struck the balance in the right place. Before he addressed himself to this issue, however, Lord Woolf CJ noted in para 20 of the judgment that it had not been suggested in that case that the legislation itself contravenes article 8:
>
> > "No doubt this is because disclosure of the information contained in the certificate would be 'in accordance with the law' and 'necessary in a democratic society', in the interests of public safety and for the prevention of crime and for the protection of the rights and freedoms of others. This country must, through its legislature, be entitled to enable information to be available to prospective employers, where the nature of the employment means that particular care should be taken to ensure that those who are working with the appropriate categories of persons can be relied on to do so, without those in their care coming to harm if they are under the age of 18 or vulnerable to adults."
>
> I would respectfully endorse those remarks. Here too it was not suggested by Mr Cragg that the legislation itself contravened article 8, so long as it was interpreted and applied in a way that was appropriate."

60. Mr Coppel says that both Lord Woolf and Lord Hope would have understood that "the information contained in the certificate" could include conviction and caution information as well as police intelligence information and that they therefore decided that the provisions relating to the disclosure of both classes of information were compatible with article 8. He seeks to derive even more support from what Lord Neuberger (with whom Lord Brown also agreed) said in *R (L)*. At para 76, he said:

> "76. Given that, in relation to children-related posts, the section is limited to those seeking employment involving "regular" responsibility for young people, I am prepared to

> proceed on the basis that there is nothing objectionable in the requirement that an ECRC must contain the information referred to in section 115(6)(a)(i), as expanded by the definition of "relevant matter" in section 113(5), even though it may on occasions be rather harsh on the applicant concerned. As Lord Woolf CJ said in *R (X) v Chief Constable of the West Midlands Police* [2005] 1 WLR 65, para 20, Parliament
>
> > "must….. be entitled to enable information to be available to prospective employers, where the nature of the employment means that particular care should be taken to ensure that those who are working with the appropriate categories of persons can be relied on to do so …"
>
> Whether as a result of a conviction or a caution (which involves the person concerned having admitted committing the offence in question), there can be little doubt that the information in question will be accurate, and will have been sufficiently grave as to amount to a crime."

61. Lord Neuberger then went on to say that the provisions relating to the disclosure of police intelligence required "the inclusion of a different category of material, which raises very different considerations" (para 77). He concluded that these provisions acknowledged that the relevant public authority must balance the need to protect those vulnerable people whom an ECRC is designed to assist with the article 8 rights of those in respect of whom an ECRC is issued (para 80).

62. We do not consider that either *R (X)* or *R (L)* prevents us from holding that the statutory scheme for disclosure of convictions and cautions held on the PNC is incompatible with article 8. Neither case was concerned with the scheme for disclosure of convictions or cautions. In neither was it argued that this scheme was incompatible with article 8. In neither was it a necessary part of the court's reasoning in relation to the disclosure of police intelligence that the scheme for disclosure of convictions and cautions was compatible with article 8. That is not surprising since, as Lord Neuberger himself said, that category of material is different from police intelligence and raises "very different considerations". It raises very different considerations, not least because the disclosure of police information is discretionary, whereas the disclosure of convictions and cautions is mandatory. It is the very fact that it is mandatory in all cases that is the objectionable feature of the scheme and which, in our view, renders it incompatible with article 8. Finally, in para 76 of his judgment, Lord Neuberger was doing no more than making an assumption. He was not deciding the point. Moreover, it was not a necessary part of his reasoning.

The ROA Order

63. The underlying purpose of the ROA Order is the same as that of sections 113A and 113B of the 1997 Act. The effect of the material parts of the two sets of provisions is twofold. First, in circumstances including an application for employment which involves working with children or vulnerable adults, a person may be asked a question about convictions and cautions and subject to a liability or otherwise prejudiced in law if he does not acknowledge or disclose their existence. Secondly, the SSHD

assists this process by being required on application to provide the relevant information by the issue of certificates. It is for this reason that the ROA Order and the 1997 Act raise similar article 8 issues. Take the case of T. He does not want to have to answer questions about his warnings (and be potentially subjected to penalty if he does not) nor does he want to have the police disclose them. In these circumstances, it would be strange if the 1997 Act were, but the ROA Order were not, incompatible with article 8. Kenneth Parker J pointed out (para 41) that the correspondence between the two sets of provisions is not exact. But as he also pointed out (para 42), the rationale for the disclosure provisions in the 1997 Act and the ROA Order is the same, namely that those who intend to employ a person to work with children and vulnerable adults should know whether the person in question has a criminal record and the nature of that record.

64. If he had thought that he was free to do so, Kenneth Parker J would have held that the 1997 Act was incompatible. But he considered that the ROA Order was compatible. He accepted the submission of Mr Coppel that an attack on the ROA Order on the grounds of incompatibility with article 8 should be rejected because it "presupposes that the state must take positive action to intervene in relations between private individuals (in the case of private employers) and between private individuals and state employers, in order to permit individuals to conceal information about their past, and prevent employers from refusing to employ them, or taking disciplinary action against them, on grounds of failing to give truthful answers to questions about previous cautions, warnings and reprimands" (para 44).

65. The judge then cited an extensive passage from the judgment of the ECtHR in *Mosley v United Kingdom* (2100) 53 EHRR 30 at paras 106 to 111 and concluded:

> "46. If I had had to decide this issue – whether the Order as such was unlawful under Article 8 ECHR – I would not have been persuaded that the state had the positive obligation asserted by the Claimant. The factors enumerated in *Mosley* do not indicate that the present terms of the Order would be a suitable candidate for a novel positive obligation. The Order does not concern an important facet of personal identity, or an intimate aspect of private life. There does not appear to be any international convention that would require a state to exempt offenders from having to reveal information about crimes committed when they were children, and the UK's scheme for rehabilitation under the ROA does not seem obviously to lag behind similar arrangements in other convention states. That conclusion is supported by domestic case law: see *R (Pearson) v DVLA* [2002] EWHC 2482 Admin at paragraph 15; *KJO v XIM* [2011] EWHC 1768 QB, at paragraph 19."

66. In our judgment, the supposed difference between the state's positive and negative obligations under article 8 is an insecure basis for reaching a conclusion on the compatibility issue. In *Dickson v United Kingdom* (2008) 46 EHRR 41 at para 70, the court drew attention to the positive and negative aspects of the article 8 obligation and said:

> "The boundaries between the State's positive and negative obligations under Art 8 do not lend themselves to precise definition. The applicable principles are nonetheless similar. In particular, in both instances regard must be had to the fair balance to be struck between the competing interests."

67. At para 71, it added:

> "The Court does not consider it necessary to decide whether it would be more appropriate to analyse the case as one concerning a positive or a negative obligation since it is of the view that the core issue in the present case is precisely whether a fair balance was struck between the competing public and private interests involved."

This approach was not new. A similar statement was made by the court in *Stjerna v Finland* (1994) ECHR 18131/91 at para 38.

68. We reject Mr Coppel's argument for the reasons given by Mr Southey QC and Mr Pitt-Payne QC. The state has already intervened in employer/employee and similar relationships. It has done so by enacting the ROA and by making the ROA Order. It has intervened by establishing a system of civil and criminal liability for those who do not answer questions about their past criminal history. The state has altered the legal landscape and what T seeks is a mitigation of that alteration in view of the facts of his case. Whilst it is possible to characterise T's claim as seeking a positive intervention, it is also possible to characterise it as modifying an existing interference. A question of substance should not be determined by the way in which it is characterised. Instead, as the ECtHR has said, the court should concentrate on the real question which is whether the statutory scheme has struck a fair balance between the interests of employers, children and vulnerable adults on the one hand and those of offenders who seek employment on the other hand. Once the question is identified in these terms, it can be seen that it is essentially the same question as that which arises in relation to section 113B of the 1997 Act. And that is how it should be. If the disclosure regime under the 1997 Act is incompatible with article 8, but the ROA Order is not, then the absurd result is that the state cannot disclose the conviction or caution to the prospective employer, but the individual must do so (or face civil liability including being dismissed for dishonesty). That makes no sense and we reject it.

Conclusion in T's case

69. For the reasons that we have given, we are satisfied that, in the respects that we have indicated, neither the disclosure provisions of the 1997 Act nor the provisions of the ROA Order are compatible with article 8. It will be for Parliament to devise a proportionate scheme just as it was required to do following the decision in *R (F).* It is clear from the work of Mrs Mason and the IAPDCR that there are various ways of addressing the problem. It is not for the court to prescribe the solution that should be adopted. T is, however, entitled to a declaration of incompatibility in relation to the disclosure provisions of the 1997 Act and a declaration that the ROA Order is ultra vires the 1974 Act because that Act does not permit the making of regulations that breach article 8. We should add that we do not accept the submission of Mr Coppel

that, as a matter of discretion, we should decline to make a declaration of incompatibility because Parliament is considering the matter. This is not a case where we can be confident that Parliament will move swiftly to find a solution. In these circumstances, we consider that it is appropriate to make a declaration. We accordingly allow T's appeal.

JB's case

70. We have set out the relevant facts at paras 21 to 24 above. Save for the fact that JB was an adult at the time of her offending, all the arguments deployed on behalf of T in relation to the disclosure provisions of the 1997 Act would seem to apply with equal force to her case. Her offence was of a trivial nature committed some 8 years before she applied for a post working with vulnerable people. It follows that she too is entitled to a declaration of incompatibility in relation to the 1997 Act. She does not seek relief in relation to the ROA Order.

AW's case

71. The relevant facts in the case of AW are set out at paras 25 to 27 above. Her position is significantly different from that of the others. She committed a very serious offence for which she received a sentence of detention for 5 years. Had it not been for the fact that she was only 16 years of age at the time, she would undoubtedly have received a longer sentence. She seeks permission to apply for judicial review of section 5(1)(b) of the ROA on the grounds that it is incompatible with article 8. As we have said, Parliament has increased the threshold for exclusion from the benefit of the ROA regime from 30 to 48 months: see para 6 above. But this will make no difference to AW.

72. In support of AW's case, Mr Cragg advances many of the arguments relied on by T and JB. He places heavy reliance on the fact that AW was a child at the time of the offences: for the relevance of this, we refer to paras 54 and 55 above. He submits that a scheme which provides that a person such as AW can never be rehabilitated interferes disproportionately with her article 8 rights. It amounts to a blanket and indiscriminate policy.

73. In our judgment, the decision of Parliament fell within its area of discretionary judgment. It was entitled to take the view that some offences are so serious that they should never be regarded as "spent". This is not a blanket policy. It discriminates between offences which are very serious and those which are not. Some might think that Parliament has drawn the line in the wrong place or that there should be scope for review after a specific period of time. But we are not persuaded that Parliament's response to a question of social policy was disproportionate.

74. We refuse AW permission to appeal.

Overall conclusion

75. For the reasons that we have given, we allow the appeals of T and JB and refuse AW permission to appeal. We grant T and JB a declaration that the 1997 Act is incompatible with article 8 of the ECHR. We do not consider that it is appropriate for us to identify the provisions of the 1997 Act which need to be amended, still less the

precise nature of the amendments that are required. It will be a matter for Parliament to decide, in the light of this judgment, what amendments to make. We also grant T a declaration that the ROA Order is incompatible with article 8 and, therefore, ultra vires the ROA.

76. We invite the parties to agree a form of order which gives effect to this judgment.

POSTSCRIPT

77. After a draft of this judgment had been circulated, we were notified that Mr Coppel wished to make further oral submissions as to (i) the scope of any declaration of incompatibility and (ii) whether we should read and give effect to the ROA Order in a way which is compatible with article 8 of the ECHR (as required by section 3 of the Human Rights Act 1998 ("HRA")). He pointed out that the regimes of the 1997 Act and the ROA Order are inter-linked. In particular, applications for CRCs and ECRCs must be accompanied by a statement that the certificate is required for the purposes of an "exempted question" (section 113A(2)(b) and 113B(2)(b); and an "exempted question" is defined by reference to the ROA Order (section 113A(6)). He expressed the concern that, if article 3 of the ROA Order is declared to be unlawful, there is no valid definition of "exempted question" for the purposes of section 113A(2)(b) and 113B(2)(b), with the result that no valid application for a CRC or ECRC can be made. In view of the importance of these issues, we took the unusual step of allowing further oral submissions. It was unusual not least because the section 3 point had not been taken until after the draft judgment had been circulated.

78. It is convenient to start with the section 3 point, since if the ROA Order can be read and given effect in a way which is compatible with article 8, then no question of a declaration of incompatibility arises. Mr Coppel submits that a compatible interpretation of the ROA Order can be achieved by reading article 4 as subject to an implied condition as follows (his proposed additional words being underlined):

> "Neither paragraph (b) of section 4(3) of, nor paragraph 3(5) of Schedule 2 to, the [ROA] shall apply in relation to---
>
> (b) any office, employment or occupation specified in Part II or Part III of the said Schedule 1 …….<u>save where this would breach the Article 8 ECHR rights of any person</u>".

79. Mr Coppel says that the effect of this proposed re-interpretation would be that, in a case such as that of T, where it would breach a person's article 8 rights to be dismissed or excluded from an office, profession, occupation or employment or to be prejudiced in any way in an occupation or employment as a result of an old or minor disposal for a criminal offence, article 4(b) of the ROA Order would not operate to exclude section 4(3)(b) of the ROA. Read in this way, article 4(b) would continue to permit an employer to rely on a spent conviction or caution in respect of a more recent and more serious disposal without breaching a person's article 8 rights.

80. As Mr Southey points out, the effect of such a read-down would be to transfer to employers and employees the very problems that the Secretaries of State are finding it

so hard to resolve. Instead of the current blanket system, which at least has the merit that it is clear and easy to apply, employers and employees would have to determine the impact of article 8 for themselves in the particular circumstances of each case. This would create undesirable uncertainty and impose unfair burdens on them. For these reasons alone, this is not a course which the court should adopt.

81. There are various ways in which the ROA Order could be amended in order to achieve compatibility with article 8. As we have seen, these include identifying disposals as exempt from its scope by reference to the nature of the offence and/or the date when it was committed and/or the age of the offender at the date of the offence. The solution proposed by Mr Coppel would involve a major legislative change from the existing system. There is a fundamental difference between the current blanket scheme and one which leaves to employers and employees the difficult decision as to what article 8 requires on a case by case basis. Section 3 of the HRA does not require or permit the court to make legislative choices of this kind. In our view, the decision as to how theses difficult issues should be resolved should be made by Parliament.

82. As to the declaratory relief that we should grant in relation to the lawfulness of the ROA Order, Mr Coppel submits that it should be limited to what is required to meet the issues raised on the particular facts of T's case (no issues arise in relation to the ROA Order in the case of JB). He submits that the facts of T's case require no more than that relief be granted in relation to article 4(a) and that, if relief is appropriate in relation to article 3 at all, it should be limited to article 3(a); and that the relief should in each case be limited to the application of paragraphs 3(3) and 3(5) of Schedule 2 to the ROA (ie the application of cautions, but not spent convictions).

83. The reason why Mr Coppel wishes to limit the relief in this way is to preserve the integrity of the operation of the CRC and ECRC system under the 1997 Act. We fully understand this. But in our view, it would be wholly artificial and potentially confusing to limit the relief that we grant in this way. We bear in mind what Lord Phillips said in *HM Treasury v Ahmad* [2010] UKSC 5, [2010] 2 AC 534 in relation to an application to suspend the effect of its order. As he pointed out (para 4), the problem with a suspension was that the court's order would not alter the position in law; it would declare what that position was. At para 8 he said that the ends sought by the Treasury might well be thought to be desirable, but they could not justify the means that were proposed: "The court should not lend itself to a procedure that is designed to obfuscate the effect of its judgment". We consider that we should follow this approach here. It is true that, as a matter of form, Mr Coppel is not seeking an order that the declaration we grant should be *suspended pending further legislation.* But as a matter of substance, he is suggesting that we should formulate our declaration in a way that will not reflect the true effect of our reasoning. Our reasoning compels the conclusion that the entirety of articles 3 and 4 is incompatible with article 8 of the ECHR. Mr Coppel does not dispute this. If our reasoning is correct, article 3 cannot be shielded from it, whether our declaration explicitly encompasses it or not. That has inevitable consequences for the working of the CRC and ECRC scheme, whether we spell that out or not. Not to reflect this reality in the declaration that we grant does obfuscate the true effect of our judgment.

84. Nevertheless, we are willing to direct that our decision shall not take effect pending determination by the Supreme Court of an application by the Secretaries of State for

permission to appeal, provided that the application is made within 28 days from the date of our order.