HOUSE OF LORDS SESSION 2008–09

[2009] UKHL 3

on appeal from:[2007]EWCA Civ 999

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

R (on the application of Wright and others)(Appellants) *v* Secretary of State for Health and another (Respondents)

Appellate Committee

Lord Phillips of Worth Matravers
Lord Hoffmann
Lord Hope of Craighead
Baroness Hale of Richmond
Lord Brown of Eaton-under-Heywood

Counsel

Appellants:
Martin Spencer QC
Jeremy Hyam
Jamie Carpenter

(Instructed by Director of Legal Services
Royal College of Nursing)

Respondents:
Nathalie Lieven QC
Zoë Leventhal

(Instructed by Department of Health)

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LORD PHILLIPS OF WORTH MATRAVERS

My Lords,

1. I have had the privilege of reading in draft the speech of my noble and learned friend Baroness Hale of Richmond. From the reasons which she gives I would allow this appeal and make the declaration of incompatibility which she proposes.

LORD HOFFMANN

My Lords,

2. I have had the advantage of reading in draft the speech of my noble and learned friend Baroness Hale of Richmond. I agree with her and would make the declaration of incompatibility which she proposes.

LORD HOPE OF CRAIGHEAD

My Lords,

3. I have had the advantage of reading in draft the speech of my noble and learned friend Baroness Hale of Richmond. I agree with it and make the declaration of incompatibility which she proposes.

BARONESS HALE OF RICHMOND

My Lords,

4. It is well known that children need protecting from harm, not only in their own homes but in schools, nurseries and other places where they may be looked after away from home. One way of protecting them is to try and ensure that people who pose a risk to children are not allowed to work with them. A system of listing such people is laid down under section 218 of the Education Reform Act 1988 and the Protection of Children Act 1999. It is now also recognised that adults who need special care, either because they are living in care homes or receiving personal care in their homes, should have the equivalent protection. Under Part VII of the Care Standards Act 2000, therefore, care workers employed in looking after such vulnerable adults may be placed on a list of people considered unsuitable to work with vulnerable adults (the "POVA list"). The effect of listing is to deprive the care worker of her employment as a care worker and to prevent her from getting any other such employment. This might be acceptable if there had been at least an opportunity for a judicial hearing before being placed on the list. But the 2000 Act scheme only provides such an opportunity after a lengthy administrative process during most of which the care worker is provisionally on the list. The question for us is whether this aspect of the scheme is compatible with the care worker's rights under articles 6 and 8 of the European Convention on Human Rights.

The statutory scheme

5. The process of inclusion on the POVA list is closely modelled on the process for inclusion on the lists of those considered unsuitable to work with children (the "POCA list") under the 1999 Act. For the most part inclusion on the one list automatically leads to inclusion on the other. The POVA scheme applies to any "care worker", defined in section 80(2) as:

> "(a) an individual who is or has been employed in a position which is such as to enable him to have regular contact in the course of his duties with adults to whom accommodation is provided at a care home;…

> (c) an individual who is or has been employed in a position which is concerned with the provision of personal care in their own homes for persons who by reason of illness, infirmity or disability are unable to provide it for themselves without assistance."

This extremely wide definition covers not only professional carers, such as registered nurses, but also people employed in quite different capacities in care homes. Section 80(4) adopts the same wide definition of "employment" contained in section 12(1) of the 1999 Act, which covers paid or unpaid employment, under a contract of service, contract for services or no contract at all. On the face of it, both professionals such as doctors and voluntary workers who regularly visit a care home would be included. On the other hand, the definition only covers care homes and domiciliary services. Section 80(1)(b), dealing with people employed in independent hospitals, clinics, medical agencies or the National Health Service, has never been brought into force.

6. Various persons and authorities are required to refer care workers to the Secretary of State for Health in certain circumstances. We are concerned with section 82(1). This requires the person who carries on a care home or domiciliary service (whom for convenience I shall call the "employer") to refer a care worker in the circumstances set out in section 82(2) and (3). These cover workers who have been dismissed "on the grounds of misconduct (whether or not in the course of his employment) which harmed or placed at risk of harm a vulnerable adult" (section 82(2)(a)); and also workers whom the employer would have considered dismissing if they had not resigned, retired or been made redundant (section 82(2)(b)), workers who have been transferred to a non-care position (section 82(2)(c)), workers who have been suspended or provisionally transferred (section 82(2)(d)), and workers who have left in other circumstances but the employer would have considered dismissing had information which has since come to light been available at the time (section 82(3)), all of these for the same grounds as those set out in section 82(2)(a) above.

7. The key provision with which we are concerned is the process for provisional inclusion on the list under section 82(4):

> "If it appears from the information submitted with a reference under subsection (1) that it may be appropriate for the worker to

be included in the list kept under section 81, the Secretary of State shall–

> (a) determine the reference in accordance with subsections (5) to (7); and
>
> (b) pending that determination, provisionally include the worker in the list."

8. Under section 82(5), the Secretary of State must invite observations from the worker on any information submitted with the reference and from the employer on any observations submitted by the worker. Section 82(5) does not expressly require that this be done *after* the worker has been provisionally included in the list under section 82(4), but the sequence of subsections strongly suggests that this was the intention. Section 82(6) requires that, having considered the information and observations submitted, and any other information he considers relevant, the Secretary of State must then decide whether the test set out in section 82(7) is met:

> "This subsection applies if the Secretary of State is of the opinion–
>
> > (a) that the provider reasonably considered the worker to be guilty of misconduct (whether or not in the course of his employment) which harmed or placed at risk of harm a vulnerable adult; and
> >
> > (b) that the worker is unsuitable to work with vulnerable adults."

Thus the test is not whether the misconduct actually took place, but whether the employer reasonably considered that it did. The Secretary of State must then make a judgment as to the suitability of the worker. If he is of the opinion that this test is met, section 82(6) provides that he must confirm the worker on the list (provided that a worker who was suspended or provisionally transferred has now been dismissed or her transfer confirmed). If he is not of that opinion, the worker must be removed from the list.

9. This can all take some time. The worker is not listed immediately on receipt of the reference. The officials to whom the Secretary of State has delegated these functions not only check whether the person making the reference is qualified to do so, but also address their minds to whether there is a prima facie case that the grounds in section 82(7) will in due course be made out. We were told that over the last 18 months a fairly constant proportion of 45% of referrals have been provisionally listed. In the four cases with which we are concerned it took between four and six months from the referral to the provisional listing. During this time no contact is made with the worker. Once the worker is provisionally listed, and further enquiries begin, it can again take months for the decision whether or not to confirm the person on the list to be made. In these four cases, it took eight or nine months. One of the four was confirmed and the other three were not confirmed. We were told that around 80% of referrals are not in the end confirmed on the list. Under section 81(3), the Secretary of State may, however, take a worker off the list at any time if satisfied that she should not have been included in it.

10. If a worker is confirmed on the list, she has a right of appeal to the Care Standards Tribunal under section 86(1)(a). A worker may also appeal, under section 86(1)(b), provided that the Tribunal gives her leave, if the Secretary of State refuses to remove her from the list under section 81(3). And, perhaps most importantly for present purposes, a worker cannot remain provisionally listed indefinitely without a right to a judicial hearing. Section 86(2) provides that a worker who has been provisionally listed for nine months may apply to the Tribunal for leave to have the issue of her inclusion in the list determined by the Tribunal rather than the Secretary of State.

11. Unlike the Secretary of State, the Tribunal is concerned with whether the alleged misconduct actually took place. Section 86(3) provides:

> "If on an appeal or determination under this section the Tribunal is not satisfied of either of the following, namely–
>
> > (a) that the individual was guilty of misconduct (whether or not in the course of his duties) which harmed or placed at risk of harm a vulnerable adult; and
> >
> > (b) that the individual is unsuitable to work with vulnerable adults,

> the Tribunal shall allow the appeal or determine the issue in the individual's favour and (in either case) direct his removal from the list; otherwise it shall dismiss the appeal or direct the individual's inclusion in the list."

12. Most of the people provisionally included on the list are no longer working for the person who referred them. But the effect of listing is to prevent any new employer from employing them in a care position or to deprive them of such a position if they have one. Section 89(1) requires a care provider to check whether a person to whom he is considering offering employment is on the list and, if she is, not to offer her the job. Section 89(2) provides:

> "Where a person who provides care to vulnerable adults discovers that an individual employed by him in a care position is included in that list, he shall cease to employ him in a care position.
>
> For the purposes of this subsection an individual is not employed in a care position if he has been suspended or provisionally transferred to a position which is not a care position."

Section 89(5) makes it a criminal offence for anyone whose inclusion on the list has been confirmed knowingly to apply for, offer to do, accept or do any work in a care position. This does not apply to someone who is only provisionally listed, but the Royal College of Nursing very properly advises its members that they must inform their employers and stop work if they are employed in the care home sector.

The individual appellants

13. All of the appellants are registered nurses and these proceedings are brought with the support of the Royal College of Nursing. Mrs Wright qualified in 1969. From 1995 she worked in care homes. She was dismissed on 25 November 2003 for gross misconduct based on events which had happened at the latest in May 2003, referred for inclusion in the POVA list on 11 October 2004, provisionally placed on both the POVA and the POCA lists on 4 February 2005, and confirmed on both lists on 22 November 2005. She has now successfully appealed to the Care Standards Tribunal.

14. Ms Quinn qualified in 1970. She worked in care homes from 1998. In 2004, the home where she was Assistant Matron changed hands. In May 2005 disciplinary proceedings were begun against both her and Mrs Gambier, who was Matron of the home. The allegation against Ms Quinn was giving incorrect medication to two residents, and poor documentation and supervision of junior staff. The allegation against Mrs Gambier was that her inadequate supervision had led to the incidents of incorrect medication. Ms Quinn resigned on 25 June 2005 before the disciplinary proceedings were concluded. Mrs Gambier left under an agreement with the owners dated 30 August 2005. Ms Quinn obtained a new post, caring for profoundly disabled adults. Mrs Gambier, having reached retirement age, did not seek new employment. Both were referred for listing on 30 June 2005 and informed that they were provisionally placed on both the POVA and the POCA lists on 13 December 2005 and 30 November 2005 respectively. Ms Quinn thereupon left her new post. The observations which they submitted in response to the referral contained complete answers to the allegations made against them. On 4 August 2006 both were informed that their names had not been confirmed on the lists.

15. Mr Jummun qualified as a nurse in 1974. From 1988 to July 2003 he was employed as a team leader by a Learning Disability NHS Trust providing domiciliary services to people with learning disabilities. In February 2003, an allegation of indecent assault was made against him by a patient with multiple mental health problems which made it particularly difficult to assess the reliability of her evidence. Mr Jummun was suspended on 4 February 2003. He retired on 31 July 2003. This was according to plan and had nothing to do with the allegation. A police investigation led to charges upon which the prosecution eventually offered no evidence. The Trust's investigation concluded that they were unable to specify whether sexual abuse occurred. A referral to the POVA list was made on 11 May 2005, with apparent hesitation because the referrer was unable to say whether he would have been dismissed if he had not retired. Mr Jummun was provisionally placed on both the POVA and the POCA lists on 23 November 2005. On 18 August 2006 he was informed that his name had not been confirmed on the lists.

These proceedings

16. Stanley Burnton J held that the automatic effect of provisional listing upon a care worker's employment was a determination of her civil rights and obligations within the meaning of article 6 of the

Convention. The care worker's employment might be terminated on the ground of alleged misconduct without any opportunity of her being heard. This necessarily involved a breach of article 6. Judicial review of the Secretary of State's decision could not cure this because the Secretary of State was not obliged to decide whether the misconduct had actually taken place. Although he accepted that there had to be some way of protecting vulnerable adults while cases were investigated, he did not think the scheme was fair. Its adverse effects upon the rights of care workers were disproportionate. He also held that the right to respect for private life protected by article 8 was engaged. Although the Convention did not confer a right to work in a chosen profession, POVA listing was calculated to interfere, not only with employment, but also with personal relationships with colleagues, the vulnerable people with whom they worked, and with others. For the same reasons as those under article 6, the procedures did not ensure due respect for the care workers' rights. He declared, therefore, that section 82(4)(b) of the 2000 Act is incompatible with the rights afforded by articles 6 and 8 of the Convention: [2006] EWHC 2886 (Admin), [2007] 1 All ER 825.

17. The Court of Appeal reversed that decision in part: [2007] EWCA Civ 999, [2008] QB 422. The majority (Dyson and Jacob LJJ) held that provisional listing did engage article 6, but that a breach could be avoided by giving the care worker a right to make representations before being placed on the list. This could be catered for under section 3(1) of the Human Rights Act 1998 by a declaration that section 82(4) was to be read and given effect by reading in the words "and after giving the worker an opportunity to make representations (unless the Secretary of State reasonably considers that the delay resulting from affording such an opportunity would place a vulnerable adult at risk of harm)". May LJ dissented: the overall structure of the scheme was fair. The Court did not consider it necessary to consider article 8.

18. The Secretary of State has accepted the majority's decision and does not appeal against it. Guidance has been issued on the cases to which the so-called "Wright exception" applies. The appellants, however, contend that both articles 6 and 8 are engaged; that they are broken both by the lack of a right to an oral hearing before provisional listing and by the low threshold applied to provisional listing; and that these defects cannot be cured by interpretation and application. Only a declaration of incompatibility will do.

Article 6

19. Article 6(1) requires that "in the determination of his civil rights and obligations . . . , everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law." This raises two questions. First, are we here concerned with a civil right at all? This is uncontroversial. As Lord Hoffmann explained in *Runa Begum v Tower Hamlets London Borough Council (First Secretary of State intervening)* [2003] UKHL 5, [2003] 2 AC 430, at paras 28 to 31, the scope of the concept of civil rights has been greatly expanded from the sorts of dispute which the original framers of the Convention had in mind. But since 1981, it has been held to include the right to practise one's profession (*Le Compte, Van Leuven and De Meyere v Belgium* (1981) 4 EHRR 1; see, for example, *Bakker v Austria* (2004) 39 EHRR 548). The right to remain in the employment one currently holds must be a civil right, as too must the right to engage in a wide variety of jobs in the care sector even if one does not currently have one.

20. More controversial is the second question. Does provisional listing amount to a "determination" of a civil right, given that the listed person will eventually have the opportunity of taking the case before the Care Standards Tribunal? No-one disputes that the Tribunal provides a full merits hearing which is article 6 compliant in every way. But it is a general principle, frequently reiterated by the European Court of Human Rights, that "Article 6 does not apply to proceedings relating to interim orders or other provisional measures adopted prior to the proceedings on the merits, as such measures cannot, as a general rule, be regarded as involving the determination of civil rights and obligations" (see, for example, *Dogmoch v Germany* (Application No 26315/03) (unreported) 18 September 2006.

21. There are exceptions to that general rule. Some interim measures have such a clear and decisive impact upon the exercise of a civil right that article 6(1) does apply (see, for example, *Markass Car Hire Ltd v Cyprus* (Application No 51591/99) (unreported) 23 October 2001; *Zlinsat, Spol SRO v Bulgaria* (Application No 57785/00) (unreported) 15 June 2006. It is one thing temporarily to freeze a person's assets, so that he cannot divest himself of them before an issue is tried; it is another thing to deprive someone of their employment by operation of law. If article 6(1) applies to the suspension of a doctor from medical practice (as in *Le Compte*), it must apply to the permanent separation of a person from her current employment.

22. This, too, the Secretary of State accepts. But there are cases in which provisional listing may not have quite such a drastic effect. The scheme allows for a temporary suspension or transfer to a non-care position. However, it is unlikely that an employer will take this option. They will have to employ another person to do the work which the listed person was employed to do. The reality is that that particular job will be lost to the listed person for good. Of course, some listed people will no longer be employed in care positions and so will not lose their existing jobs. Much was made on behalf of the Secretary of State of the wide range of jobs, even within the care sector, which remained open to a listed person, including any job in an independent or NHS hospital. But, once again, the reality is that a listed person is most unlikely to be able to obtain such a job or to keep it if she does not disclose that she has been listed. The main answer to this point, however, is that the scheme cannot assume that article 6(1) will never apply to provisional listing. There will undoubtedly be some cases, perhaps the majority, where it does apply. While the Strasbourg court has the luxury of looking back at the particular circumstances of a concrete case, and deciding whether there has been a breach of article 6 in that case, our national law has to devise a scheme which will be generally applicable before the particular impact of the decision is known. As Dyson LJ put it in the Court of Appeal, "the question whether article 6 is engaged should not be decided by examining on a case by case basis the actual effect of provisional listing on an individual worker" (para 88). The Secretary of State has therefore accepted that the Court of Appeal's order was appropriate in the light of the challenge to the whole scheme, because it is designed to ensure that breaches do not occur.

23. The difficult question is how the requirements of article 6(1) apply in cases such as this. It is a well-known principle that decisions which determine civil rights and obligations may be made by the administrative authorities, provided that there is then access to an independent and impartial tribunal which exercises "full jurisdiction": *Bryan v United Kingdom* (1995) 21EHRR 342, applied domestically in *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 AC 295 and *Runa Begum v Tower Hamlets London Borough Council* [2003] 2 AC 430. What amounts to "full jurisdiction" varies according to the nature of the decision being made. It does not always require access to a court or tribunal even for the determination of disputed issues of fact. Much depends upon the subject-matter of the decision and the quality of the initial decision-making process. If there is a "classic exercise of administrative discretion", even though determinative of civil rights and obligations, and there are a number of safeguards to ensure that the procedure is in fact both fair and impartial, then judicial review may be

adequate to supply the necessary access to a court, even if there is no jurisdiction to examine the factual merits of the case. The planning system is a classic example (*Alconbury)*; so too, it has been held, is the allocation of "suitable" housing to the homeless (*Runa Begum)*; but allowing councillors to decide whether there was a good excuse for a late claim to housing benefit was not (*Tsfayo v United Kingdom* (Application No 60860/00) (unreported) 14 November 2006.

24. Stanley Burnton J did not address this line of authority, concluding only that judicial review was inadequate because "what the listed person cannot do is obtain a speedy judicial determination of the underlying facts: did he commit the misconduct alleged?" (para 48). In the Court of Appeal it was argued that this amounted to an attack upon the substantive law rather than the procedure: the Secretary of State is not required to decide whether the misconduct did take place, but only whether it may be appropriate for the care worker to be listed. This argument was accepted in the Court of Appeal and it will be necessary to consider it further under the heading of article 8.

25. Nevertheless, Dyson LJ considered that there were two reasons why the failure to afford the care worker an opportunity to make representations before provisional listing could not be cured by the possibility of being taken off the list under section 81(3), or by judicial review, or by the later access to the tribunal. The first was that denial of the right to make representations was "not a mere formal or technical breach. It is a denial of one of the fundamental elements of the right to a fair determination of a person's civil rights, namely, the right to be heard" (para 106). He reached this conclusion having reviewed the cases holding that the composite approach could be applied to deciding whether a person is fitted to pursue a particular profession or activity (see *Stefan v United Kingdom* (1997) 25 EHRR CD 130, *X v United Kingdom* (1998) 25 EHRR CD 88, *Kingsley v United Kingdom* (2002) 35 EHRR 177). In all of these cases the procedures followed by the initial decision-making body were such as to give the person concerned a proper opportunity of meeting the allegations made against him. Secondly, the detrimental effect of provisional listing was often irreversible and incurable (para 107). Hence he concluded that there should be a right to make representations before provisional listing, unless it was outweighed by the immediate need to protect vulnerable adults from harm. He explained (in para 108) that he had in mind "cases where the allegations of misconduct are so serious that, if they are true, the care worker is potentially a serious danger to vulnerable adults" although the words read into section 82(4) did not put it as strongly as this.

26. My Lords, the scheme appears premised on the assumption that permanently to ban a person from a wide variety of care positions does require a full merits hearing before an independent and impartial tribunal. That premise is, in my view, correct. The issue is what should be done on the way to that decision. How is a proper balance to be struck between the need to protect the vulnerable adults, who may be at risk from a care worker who has been referred to the Secretary of State, and the need to protect the care worker from suffering irreversible damage to her civil rights, as a result of allegations which later turn out to be unfounded, even frivolous or malicious, or at the very least blown up out of all proportion? We have seen one very clear example of that in the course of this case.

27. No-one can be in any doubt of the need for some scheme such as this to protect children and vulnerable adults from being harmed by the people who regularly come into contact with them in the course of work. The most practicable way of providing such a scheme may well be to have a list of banned individuals which is maintained administratively and where the initial decisions are made by officials. Stanley Burnton J was told that there are about 900,000 care workers within the scope of the scheme. Referrals run at the rate of 200 a month. There were then about 2000 provisional listings and about 500 confirmed listings but only 37 cases had gone to the tribunal. If the process is working as it should, many people will accept that they should indeed be on the list.

28. However, in my view, Dyson LJ was entirely correct in his conclusion that the scheme as enacted in the Care Standards Act 2000 does not comply with article 6(1), for the reasons he gave. The process does not begin fairly, by offering the care worker an opportunity to answer the allegations made against her, before imposing upon her possibly irreparable damage to her employment or prospects of employment.

29. Unfortunately, however, I cannot agree that the solution devised by the Court of Appeal is sufficient to solve the problem. This is principally because of what has come to be called the "Wright exception". The care worker suffers possibly irreparable damage without being heard whatever the nature of the allegations made against her. The care worker may have a good answer to the allegations no matter how serious they are. There may well be cases where the need to protect the vulnerable is so urgent that an "ex parte" procedure can be justified. But one would then expect there to be a swift method of hearing both sides of the story and doing so before irreparable damage

was done. That is not provided for in the "Wright exception". Nor is there any method provided of assessing the true urgency of the case. As it happens, no great urgency was felt in the four cases before us, where there was a gap of four to six months between the referral and the provisional listing. A greater sense of urgency may have been felt since the "Wright exception" criteria were devised. But this is not apparent from the details supplied to us about the 21 (out of 278) referrals to which the "Wright exception" has been applied since 2 October 2008. Most involved delays between three and six months between referral and provisional listing and even longer since the misconduct complained of. The "Wright exception" criteria relate solely to the nature of the allegation made and to the possible harm which might be suffered; they do not relate to the circumstances of the particular care worker and whether in fact she presents any current risk of harm. There is the further difficulty that, if she is currently employed in a care position, the risk may be greater but so too will be the effect upon her civil rights. The problem, it seems to me, stems from the draconian effect of provisional listing, coupled with the inevitable delay before a full merits hearing can be obtained. That cannot be cured by offering some of the care workers an opportunity to make representations in advance, while denying that opportunity to other workers who may have been just as unfairly treated by their former employers. Before turning to the consequence of this conclusion, it is necessary to say a few words about the article 8 challenge.

Article 8

30. Article 8 protects a person's "right to respect for his private and family life, his home and his correspondence". It is, as Stanley Burnton J remarked, "the least defined and most unruly" of the Convention rights (para 60). But, as Lord Rodger of Earlsferry pointed out in *R (Countryside Alliance) v Attorney General* [2007] UKHL 52, [2008] 1 AC 719, at para 92, "the European Human Rights Commission long ago rejected any Anglo-Saxon notion that the right to respect for private life was to be equated with the right to privacy". As long ago as *X v Iceland* (1976) 5 DR 86, it was held to "comprise also, to a certain degree, the right to establish and develop relationships with other human beings". In *Niemietz v Germany* (1992) 16 EHRR 97, at para 29, the court held

> "it would be too restrictive to limit the notion to an 'inner circle' in which the individual may live his own personal life as he chooses and to exclude therefrom entirely the outside world not encompassed within that circle. Respect for private life must also

comprise to a certain degree the right to establish and develop relationships with other human beings."

31. *Niemietz* itself involved the extension of private life to the business of a lawyer whose office had been searched. Since then it has been applied to a number of so-called "lustration" cases from the former Warsaw pact countries which have now joined the Council of Europe. Many enacted laws to cleanse their public life of former officials in the discredited communist regimes, particularly those who had been employed by the security services. In several cases the European Court has held that they went too far. In *Sidabras v Lithuania* (2004) 42 EHRR 104, former KGB officers were banned, not only from public sector employment, but also from many private sector posts. This "affected [their] ability to develop relationships with the outside world to a very significant degree, and has created serious difficulties for them as regards the possibility to earn their living, with obvious repercussions on their enjoyment of their private life" (para 48). There was also a considerable stigma attached to being former KGB officers, which was "an impediment to the establishment of contacts with the outside world" (para 49). This therefore fell within the ambit of article 8 for the purpose of the prohibition of discrimination in the enjoyment of Convention rights in article 14.

32. An actual breach of article 8 was found in *Turek v Slovakia* (Application No 57986/00) (unreported) 14 February 2006. The consequences of being listed as an "agent" of the state security agency were much less far-reaching than in *Sidabras* but were nevertheless an interference with the applicant's right to respect for his private life. The procedural aspect of article 8 (which dates back at least to the case of *W v United Kingdom*) therefore required that "the decision-making process involved in measures of interference must be fair and such as to ensure due respect [for] the interests safeguarded by article 8" (para 111). The applicant was unable to disprove the allegation that he was an agent because he had not been allowed access to the guidelines governing inclusion on the list.

33. Hence Mr Martin Spencer QC, on behalf of the applicants, argues that POVA listing is an interference with the right to respect for private life. It prohibits the listed persons from a wide range of employments, it carries a considerable stigma affecting their standing with colleagues and the community, and it interferes directly with their personal relationships, not only with their colleagues, but also with the vulnerable people for whom they work and with whom they often develop close

relationships which are also important for the welfare of the vulnerable people themselves. Miss Nathalie Lieven QC, for the Secretary of State, accepts that article 8 might be engaged, for example, if a person were prevented from continuing as a foster parent. But in general she argues that there are so many other positions available to listed people that article 8 is not engaged.

34. Stanley Burnton J accepted Mr Spencer's argument. In general, the Convention did not confer any right to engage in a chosen profession, so that dismissal, suspension or disqualification from particular employments would not normally engage article 8. But listing on suspicion of such serious misconduct as to indicate that the worker posed a risk to vulnerable people was calculated to interfere with her relationships with colleagues, with the vulnerable people with whom she worked, and with others (para 65). For the same reasons as those given under article 6, the procedures were unfair and did not ensure due respect for the care workers' article 8 rights.

35. The Court of Appeal found it unnecessary to consider article 8. But Mr Spencer revives the argument before this House, not only to bolster his procedural case under article 6, but also to attack the low threshold for provisional listing laid down in section 82(4): "that it may be appropriate for the worker to be included in the list". The evidence of the officials is that, when considering provisional listing, they do address their minds to whether it may turn out that the two criteria for full listing are met – that is, that the employer reasonably believed the worker to be guilty of misconduct which harmed or placed at risk of harm a vulnerable adult, and that the worker is unsuitable to work with vulnerable adults. Nevertheless, it is a low threshold to be applied without having heard both sides of the story. The main thrust of Mr Spencer's argument is to bridge the gap between substance and procedure. If, which he does not accept, the low threshold for interim measures is a matter of substance, then it can be attacked as a disproportionate interference with article 8 rights. If it is a matter of procedure, it contributes to the overall unfairness of the scheme.

36. For my part, I am inclined to take the same view of whether article 8 is engaged as to whether article 6 is engaged. There will be some people for whom the impact upon personal relationships is so great as to constitute an interference with the right to respect for private life and others for whom it may not. The scope of the ban is very wide, bearing in mind that the worker is placed on both the POVA and the POCA lists. The ban is also likely to have an effect in practice going

beyond its effect in law. Even though the lists are not made public, the fact is likely to get about and the stigma will be considerable. The scheme must therefore be devised in such a way as to prevent possible breaches of the article 8 rights.

37. Mr Spencer does not, of course, argue that such interference will never be justifiable under article 8(2). The point is that the procedures must be fair in the light of the importance of the interests at stake. I would agree that the low threshold for provisional listing adds to the risk of arbitrary and unjustified interferences and thus contributes to the overall unfairness of the scheme.

Conclusion

38. My lords, I have concluded above that the procedure for provisional listing does not meet the requirements of article 6(1) and that the solution favoured by the Court of Appeal does not cure the problem. No other solution could properly be adopted by way of the interpretative obligation in section 3(1) of the Human Rights Act 1998. I would therefore return to the solution adopted by Stanley Burnton J and make a declaration that section 82(4)(b) of the Care Standards Act 2000 is incompatible with the Convention rights.

39. However, I would not make any attempt to suggest ways in which the scheme could be made compatible. There are two reasons for this. First, the incompatibility arises from the interaction between the three elements of the scheme – the procedure, the criterion and the consequences. It is not for us to attempt to rewrite the legislation. There is, as I have already said, a delicate balance to be struck between protecting the rights of the care workers and protecting the welfare, as well as the rights, of the vulnerable people with whom they work. It is right that that balance be struck in the first instance by the legislature. Secondly, both the Care Standards Act 2000 and the Protection of Children Act 1999 will in due course be replaced by a completely different scheme laid down by and under the Safeguarding Vulnerable Groups Act 2006. While we have been informed of its existence, we have not heard argument upon whether or not that scheme is compatible with the Convention rights as the question does not arise on these appeals. Nothing which I have said in this opinion is intended to cast any light upon that question.

LORD BROWN OF EATON-UNDER-HEYWOOD

My Lords,

40. I have had the advantage of reading in draft the speech of my noble and learned friend Baroness Hale of Richmond. I agree with her and would make the declaration of incompatibility which she proposes.