30 January 2019

PRESS SUMMARY

In the matter of an application by Lorraine Gallagher for Judicial Review (Northern Ireland)
R (on the application of P, G and W) (Respondents) v Secretary of State for the Home Department and another (Appellants)
R (on the application of P) (Appellant) v Secretary of State for the Home Department and others (Respondents)
[2019] UKSC 3
On appeal from: [2016] NICA 42 and [2017] EWCA Civ 321

JUSTICES: Lady Hale (President), Lord Kerr, Lord Sumption, Lord Carnwath, Lord Hughes

BACKGROUND TO THE APPEALS

The respondents to these appeals (Mrs Gallagher, P, G and W) have all been convicted or received cautions or reprimands in respect of relatively minor offending. The disclosure of their criminal records to potential employers has made, or may in future make, it more difficult for them to obtain employment. In each case, the relevant convictions and cautions were "spent" under the legislation designed for the rehabilitation of ex-offenders, set out below. Nonetheless, criminal records had to be disclosed if they applied for employment involving contact with children or vulnerable adults.

In 1996, Mrs Gallagher was convicted of one count of driving without wearing a seatbelt, for which she was fined £10, and three counts of carrying a child under fourteen years old without a seatbelt, for which she was fined £25 on each count. In 1998, she was again convicted of two counts of the latter offence and fined £40 on each count. Mrs Gallagher has no other convictions. In 2013, having qualified as a social carer, she was admitted to the Northern Ireland Social Care Council Register of Social Care Workers. In 2014, she applied for a permanent position at a day centre for adults with learning difficulties and received a conditional offer of employment. On a disclosure request, she only disclosed the 1996 convictions regarding her children, but not the 1996 conviction as to herself, nor the 1998 convictions. Her job offer was withdrawn after the Enhanced Criminal Record Certificate disclosed all her previous convictions.

In 1999, P received a caution for the theft of a sandwich from a shop. In the same year, P was convicted of the theft of a book worth 99p and of failing to surrender to the bail granted to her after her arrest for that offence. She received a conditional discharge for both offences. At the time of the offences, P was 28 years old, homeless and suffering from undiagnosed schizophrenia which is now under control. She has committed no further offences. P is qualified to work as a teaching assistant but has not been able to find employment. She believes this is the result of her disclosure obligations.

In 1982, W was convicted of assault occasioning actual bodily harm. He was 16 years old at the time when the assault occurred during a fight between a number of boys on their way home from school. He received a conditional discharge, and has not offended since. In 2013, aged 47, he began a course to obtain a certificate in teaching English to adults. He believes that his chances of obtaining teaching employment will be prejudiced by the need to obtain a criminal record certificate for a job as a teacher.

In 2006, G, aged 13, was arrested for sexually assaulting two younger boys. The offences involved sexual touching and attempted anal intercourse. There was exceptional mitigation. The police record indicates that the sexual activity was consensual and "seems to have been in the form of 'dares' and is

believed to have been a case of sexual curiosity and experimentation on the part of all three boys." The Crown Prosecution Service decided it was not in the public interest to prosecute but suggested a reprimand. G received two police reprimands in September 2006. He has not offended since. In 2011, when working as a library assistant in a local college, he was required to apply for an enhanced criminal record check because his work involved contact with children. The police proposed to disclose the reprimand, with an account of the mitigation. As a result, G withdrew the application and lost his job. He has since felt unable to apply for any job requiring an enhanced criminal record check.

In all four of the appeals, the respondents challenge two related statutory disclosure schemes as being incompatible with Article 8 of the European Convention on Human Rights 1950 ("ECHR"), protecting the right to respect for private and family life. This raises two separate questions, namely whether any interference with Article 8 ECHR is: (1) "in accordance with the law" ("the legality test") and (2) "necessary in a democratic society" ("the proportionality test").

The first scheme, governing disclosure by the ex-offender, is that under the Rehabilitation of Offenders Act 1974 ("the 1974 Act") in England and Wales and the corresponding provisions of the Rehabilitation of Offenders (Northern Ireland) Order 1978 (SI 1978/1908) in Northern Ireland, which are materially the same. By sections 4(2)-(3) of the 1974 Act, where a question is put to an ex-offender about previous convictions, offences, conduct or circumstances, there is no duty of disclosure. However, for any of thirteen specified purposes in the Rehabilitation of Offenders Act 1974 (Exceptions) Order (SI 1975/1023) ("1975 Order") and the Rehabilitation of Offenders (Exceptions) Order (Northern Ireland) (SR(NI) 1979/195) ("1979 Order"), there is a duty of disclosure.

The second scheme, governing disclosure by the Disclosure and Barring Service in England and Wales or Access NI in Northern Ireland, is governed by Part V of the Police Act 1997, as amended ("the 1997 Act"). Sections 113A and 113B deal with Criminal Record Certificates and Enhanced Criminal Record Certificates. These provisions create a system of mandatory disclosure of all convictions and cautions on a person's record if the conditions for the issue of a certificate were satisfied.

In 2014, a more selective system for disclosure was introduced under the second scheme by the Disclosure and Barring Service – the Police Act 1997 (Criminal Record Certificates: Relevant Matters) (Amendment) (England and Wales) Order (SI 2013/1200) and the Police Act 1997 (Criminal Record Certificates: Relevant Matters) (Amendment) (Northern Ireland) Order (SI 2014/100). Broadly corresponding limitations were imposed in relation to the first scheme by the Rehabilitation Act 1974 (Exceptions) Order 1975 (Amendment) (England and Wales) Order (SI 2013/1198) and the Rehabilitation Act 1974 (Exceptions) (Amendment) Order (Northern Ireland) Order (SI 2014/27).

The Court of Appeal in England and in Northern Ireland ("EWCA" and "NICA"), affirming the decisions of the Divisional Court or High Court (except in W's case), upheld the respondents' case. First, the statutory schemes were considered incompatible with Article 8 ECHR for failing the legality test because of the breadth of the categories in the legislation. Secondly, the statutory schemes were considered disproportionate for failing to sufficiently distinguish between convictions and cautions of varying degrees of relevance. The appellants now appeal to the Supreme Court. P's cross-appeal concerns the refusal to quash article 2A(3)(c) of the 1975 Order for breach of Article 8 ECHR.

JUDGMENT

The Supreme Court dismisses the appeals (except in W's case), but varies parts of the orders below. A majority of the Court (Lord Sumption, Lord Carnwath, Lord Hughes and Lady Hale) reach that result based on a partial breach of the proportionality test. Lord Sumption (with whom Lord Carnwath and Lord Hughes agree) gives the lead judgment. Lady Hale (with whom Lord Carnwath also agrees) gives a concurring judgment. On the cross-appeal, the Court varies the order of the Divisional Court by adding a declaration that article 2A(3)(c) of the 1975 Order is incompatible with Article 8 ECHR.

Lord Kerr gives a separate judgment, disagreeing with the majority's approach to the legality test and its application of the proportionality test. Lord Kerr would have dismissed the appeals (including in W's case) and affirmed the declarations of incompatibility made by the EWCA and NICA.

REASONS FOR THE JUDGMENT

All members of the Supreme Court agree that Article 8 ECHR is engaged and that two conditions thus apply, namely satisfaction of: (1) the legality test and (2) the proportionality test **[12], [73], [153]**. They also all agree that the legality test requires, at least, accessibility and foreseeability **[16], [73], [182]**.

Majority judgments (Lord Sumption and Lady Hale):

Lord Sumption considers that the legality test, whether under Article 8 ECHR or otherwise, does not involve questions of degree **[14]**. For him, accessibility requires that it must be possible to discover what the provisions of a legal measure are, while foreseeability requires that a measure does not confer an unconstrained discretion **[17], [31]**. However, if the issue is how much discretion is too much (i.e. a question of degree), only the proportionality test can be used for review **[17]**. In the ECHR case law, in particular *MM v United Kingdom* (App. No. 24029/07), the Strasbourg Court has treated the need for safeguards as part of the foreseeability requirement and applied it as part of the legality test in cases where a discretionary power would otherwise be unconstrained and lack certainty of application **[24]**. There must be sufficient safeguards, exercised on known legal principles, against the arbitrary exercise of a discretion, so as to make its application reasonably foreseeable **[31]**.

Lord Sumption disagrees with the EWCA and NICA as to the effect of the Supreme Court's decision in *R (T) v Chief Constable of Greater Manchester Police* [2014] UKSC 35, concerning the regime governing disclosure of criminal records in England before the changes introduced in March 2014 **[15], [35-41]**. He does not accept that *R (T)* decided that a measure may breach the legality test even where there is no relevant discretion and the relevant rules are precise and entirely clear **[37]**.

For Lord Sumption, the rules governing the disclosure of criminal records under both the 1974 Act and the 1997 Act are highly prescriptive, mandatory and leave no discretion **[42]**. There is thus no real difficulty in assessing the proportionality of the two statutory schemes, so the legality test is satisfied – both schemes are "in accordance with the law" for the purposes of Article 8 ECHR **[42-45]**.

As to proportionality, Lord Sumption considers that two questions arise: (1) whether the legislation can legitimately require disclosure by reference to pre-defined categories at all and (2), if so, whether the current boundaries of these categories are acceptable **[46]**. As to the first question, Lord Sumption considers that legislation by reference to pre-defined categories is justified **[50]**. This is because: (1) the final decision about the relevance of a conviction should be that of the employer, who is best placed to assess the individual circumstances; (2) there is limited evidence that employers cannot be trusted to take an objective view; (3) the 1997 Act scheme is carefully aligned with the disclosure scheme under the 1974 Act, necessitating a category-based approach; and (4) it would be impracticable to require a system of individual assessment **[51-54]**. On the second question, Lord Sumption considers that, with two exceptions, the carefully drawn categories in the legislation are not disproportionate **[61-62]**. The first exception is the multiple convictions rule, which does not achieve its purpose of indicating propensity as it applies irrespective of the nature, similarity, number or time intervals of offences **[63]**. The second exception concerns warnings and reprimands for younger offenders, the purpose of which is instructive and specifically designed to avoid damaging effects later in life through disclosure **[64]**.

In P's case, the disclosure was based on the multiple convictions rule under the 1997 Act, so the appeal against the declaration of incompatibility falls to be dismissed on that limited ground **[65]**. However, as to P's cross-appeal, article 2A(3)(c) of the 1975 Order is only to be declared incompatible with Article 8 ECHR (rather than quashed) **[66]**. As Mrs Gallagher's case also concerns the multiple convictions rule, she is also entitled to a declaration of incompatibility both as to the 1997 Act and the 1979 Order **[67]**. In G's case, concerning a reprimand against a younger offender, the declaration of incompatibility as to the mandatory disclosure requirement under the 1997 Act is affirmed **[68]**. In W's case, the High Court's order is restored since assault occasioning actual bodily harm may be a serious offence and it was appropriate to include it within the category of offences requiring disclosure **[69]**.

Lady Hale agrees with Lord Sumption that, given the changes to the statutory schemes in 2014, the legality test is satisfied **[72-73]**. She considers that the law in question does not have to contain an individual review mechanism in every case. The requirement is only that it is possible to test, both the

law itself and the decisions made under it, for proportionality **[73]**. The present schemes are not indiscriminate in nature and have been carefully devised to balance the competing public interests in (1) rehabilitation, (2) safeguarding and (3) practicability **[75]**. Given the need for a practicable and proportionate scheme, bright-line rules are necessary **[76-77]**. She agrees with Lord Sumption that the categories used are proportionate, save as to the two exceptions above, and accordingly agrees with him on the disposal of each appeal and the cross-appeal **[78-79]**.

Lord Kerr's minority judgment:

Lord Kerr would have would have dismissed the appeals (including in W's case) and affirmed the declarations of incompatibility made by the EWCA and NICA. Lord Kerr disagrees with the majority on compliance with the legality test and the proportionality test. He illustrates the issues with the current statutory schemes by reference to a fuller account of the circumstances of each of the respondents **[80-100]**. He also reviews in detail the operation of the two statutory schemes before and after the 2014 amendments **[101-146]**.

Lord Kerr considers that two important points follow from the Supreme Court's decision in *R (T)*. These are: (1) that there must be adequate safeguards built into a disclosure scheme which allow for a proper evaluation of proportionality and (2) that the provisions then in force were condemned for the lack of any mechanism for independent review **[149]**. Lord Kerr identifies five central precepts that are relevant to the legality test **[153, 158]**, but adds that not all of these must necessarily be satisfied **[159]**. He considers that the fundamental requirement is that the operation of the safeguards must permit a proper assessment of the proportionality of the interference with the Article 8 ECHR right **[159]**. He also clarifies that his approach to the legality test goes beyond only satisfying the two requirements of accessibility and foreseeability, contrary to Lord Sumption's approach **[182-187]**.

Lord Kerr would have found the scheme in England and Wales to fail the legality test since the cases show that there is at least the potential for widespread disproportionate outcomes in disclosure **[162]**. Therefore, it cannot be said that there are safeguards adequately to examine proportionality **[162]**. He suggests two potential modifications: (1) a provision which linked the relevance of the data to be disclosed to the nature of the employment sought **[165-173]** and (2) an individual review mechanism in some cases, such as that introduced in Northern Ireland in 2016 **[174-175]**. Further, Lord Kerr would have found the scheme disproportionate **[188-190]**.

References in square brackets are to paragraphs in the judgment.