

## CURRENT TOPIC: CRIMINAL RECORDS AND HUMAN RIGHTS

### Disclosure of personal information

Much judicial and academic ink has been spilled of late on the retention and use of personal data by the police and third parties such as employers.<sup>1</sup> Of course, information relating to people's movements, their appearance, genetic makeup, and criminal record is of significant operational value in detecting, tracking, and resolving criminality. Moreover, one can understand why prospective employers would attach importance to, and thus base decisions upon, details of an individual's past (criminal) behaviour. All that said, such "crime control" benefits and public protection imperatives often conflict with the rights of the individual. This tension is evident in the protracted and repeated efforts of the legislature to calibrate appropriately the different schemes of data collection, retention and use, and in the associated litigation at both the domestic and European levels. The core challenge to all of these schemes hinges on their apparent compromising of the right to privacy and family life as protected by Article 8 of the European Convention on Human Rights, and centres on the extent to which the relevant legislation is accordance with law, necessary, and proportionate.

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A pivotal decision of the European Court of Human Rights in this respect was that of *S and Marper v UK* in 2009, which found the "blanket and indiscriminate" law on DNA collection and retention in England, Wales and Northern Ireland to be a disproportionate breach of Article 8.<sup>2</sup> This judgment prompted a series of reports and subsequent legislative changes in an effort to remedy what was regarded as problematic about the regime of DNA collection and retention,<sup>3</sup> and so-called "criminality information"<sup>4</sup> more broadly. Latterly, the need for legislative change has not abated, driven by a series of critical domestic decisions, most recently in relation to criminal records.<sup>5</sup>

### Criminal records

There is a complex and overlapping legislative framework governing the retention and disclosure of cautions, reprimands and convictions in particular. In terms of an individual's obligation to disclose his criminal record the Rehabilitation of Offenders Act 1974 (as amended) provides that some convictions and cautions do not have to be revealed after questioning or request if they are "spent" by virtue of the passage of a certain period of time and depending the age of the offender at the time of conviction and the sentence imposed. In this context a person with a spent conviction will not be liable for failing to disclose such matters when he would otherwise have been required to do so. That said, the Rehabilitation of Offenders Act (Exceptions) Order 1975 (Amendment) (England and Wales) Order

<sup>1</sup> See for example *S and Marper v United Kingdom* (2009) 48 EHRR 50; *R (L) v Commissioner of Police of the Metropolis* [2009] UKSC 3; *R (T) v Chief Constable of Greater Manchester Police and others* [2014] UKSC 35; Joe Purshouse, "Article 8 and the retention of non-conviction DNA and fingerprint data in England and Wales" [2017] Criminal Law Review 253; Ed Cape, "The Protection of Freedoms Act 2012: the retention and use of biometric data provisions" [2013] Criminal Law Review 23; Liz Campbell, "A rights-based analysis of DNA retention: "non-conviction" databases and the liberal state" [2010] Criminal Law Review 889.

<sup>2</sup> *S and Marper v United Kingdom* (2009) 48 EHRR 50.

<sup>3</sup> See Home Office, *Keeping The Right People on the DNA Database* (London: Home Office, 2009).

<sup>4</sup> Sunita Mason, *A Common Sense Approach A review of the criminal records regime in England and Wales*, Report on Phase 1; Sunita Mason *A Balanced Approach Independent Review* (Home Office 2010). The term "criminality information" is used as an umbrella term to describe data relating to criminal records and charges. I have misgivings about the inclusion of intelligence and suspicion under this rubric.

<sup>5</sup> *R (on the application of P and others) v Secretary of State for the Home Department and others* [2017] EWCA Civ 321.

2013, introduced in an effort to mitigate the impact on human rights, maintains a requirement to disclose in relation to particular roles, including working with children and vulnerable adults.<sup>6</sup>

Operating alongside this, Part V of the Police Act 1997 governs the disclosure of criminal records held by the police, whereby such information must be provided relating to the suitability of a person for employment or engagement in positions of trust or involving contact with children. The Disclosure and Barring Service must issue a criminal record certificate (CRC), or an enhanced criminal record certificate (ECRC) (which also contains “soft intelligence”<sup>7</sup>) to any person who applies for such a certificate on an application countersigned by a registered person from the organisation to which the individual is applying for a position. For both CRCs and ECRCs, section 117 of the 1997 Act allows an applicant to apply to the DBS for an amendment on the ground that the certificate is inaccurate.

Originally, CRCs and ECRCs involved the disclosure of all convictions and cautions even if “spent” and whatever the nature of the offence(s) to which they related. In 2011, the Independent Advisor for Criminality Information Management, Sunita Mason, recommended the introduction of a “filter” to remove some old and minor conviction information from this requirement.<sup>8</sup> While such a provision was not included in the Protection of Freedoms Act 2012, the Police Act 1997 (Criminal Record Certificates: Relevant Matters) (Amendment) (England and Wales) Order 2013 did introduce a filter. It deemed some cautions and convictions to be “protected” and ~~as such they need not be thus not needing to be~~ disclosed. ~~As discussed below, this was because of an adverse ruling by the Court of Appeal. The 2013 Order altered the rules relating to “current” convictions, serious offences, and multiple convictions. Now disclosure is required only for a “current” conviction, namely a conviction~~

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<sup>6</sup> SI 2013/1198.

<sup>7</sup> s 117A of the Police Act 1997 as inserted by s 82(5) of the Protection of Freedoms Act 2012.

<sup>8</sup> Sunita Mason, *A Common Sense Approach A review of the criminal records regime in England and Wales*, Report on Phase 1 (2011), Recommendation 5, p27.

~~As discussed below, this was because of an adverse ruling by the Court of Appeal. As a result of this decision, the Police Act 1997 (Criminal Record Certificates: Relevant Matters) (Amendment) (England and Wales) Order 2013 altered the rules relating to 1. "current" convictions, 2. serious offences, and 3. multiple convictions. Now disclosure is required only for a "current" conviction, namely a conviction within the last 11 years for an adult and within the last five years and six months for a minor; 2. for a spent conviction or caution in respect of certain specified offences (including those in Schedule 15 of the Criminal Justice Act 2003 such as assault occasioning actual bodily harm) and any spent conviction in respect of which a custodial sentence was imposed; and 3. for any spent conviction where the person has more than one conviction.~~<sup>19</sup>

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The original statutory scheme ~~had been~~<sup>was</sup> challenged successfully in *R (T) v Chief Constable of Greater Manchester Police and others* on the ground it represented a disproportionate breach of Article 8.<sup>12</sup> The Court of Appeal made a declaration of incompatibility under section 4 of the Human Rights Act 1998, and declared the 1975 Order to be *ultra vires* to the extent that it required an employee to answer questions regarding spent convictions and cautions in relation to certain occupations and professions. Although the revised measures in the 2013 Order were in place by the time of the appeal ~~in that case to the~~, the Supreme Court, ~~that Court did~~ reviewed the lawfulness of the ~~original pre-existing~~ regime.<sup>13</sup> It ~~holding~~ that ~~it the scheme~~ violated Article 8 on the grounds that it went further than was necessary to accomplish the statutory objective, was disproportionate, and was not necessary in a democratic society. Lord Reed found that "legislation which requires the indiscriminate disclosure by the state of personal data which it has collected and stored does not contain adequate safeguards against arbitrary interferences with article 8 rights".<sup>14</sup> For an interference to be "in accordance with the law", the safeguards in place must "have the effect of enabling the proportionality of the interference to be adequately examined".<sup>15</sup> The features 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, and the absence of any mechanism for independent review of a decision to disclose data" meant that disclosure was indiscriminate.<sup>16</sup>

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#### Challenging the current law: *R (P) v Secretary of State for the Home Department*

The extant "serious offence" and "multiple conviction" rules formed the crux of the appeals in *R (on the application of P and others) v Secretary of State for the Home Department and others*, handed down by the Court of Appeal (Civil Division) on 3<sup>rd</sup> May 2017.<sup>20</sup> There the four appellants challenged the legality of the retention and disclosure of information relating to criminal cautions and convictions. As Sir Brian Leveson P reminds us, the purpose of the amendments in 2013 was to address the criticism accepted ~~by the Supreme Court~~ in *T* that disclosure was "indiscriminate and provided no (or ... very little) flexibility of approach".<sup>21</sup> The appeals in *P* challenged the latest amendments, arguing that they were inadequate to remedy the failure to comply with Articles 8 and 14, and alternatively that the retention of the data represented a breach of Article 8 and that the failure to expunge or delete the caution, reprimand or warning on reasonable request was actionable.

Four appeals were ~~collected together~~<sup>conjoined</sup> for the purposes of this hearing, involving P, G, W, and Krol. It is useful to sketch briefly the details of each case, given that the ultimate decision as to whether the legislation was "in accordance with the law" and if so, whether it was disproportionate, was context-specific. The diverse facts also illustrate the range of behaviours captured by the provisions and the breadth of their impact.

In 1999 P had committed two offences of theft by shoplifting while suffering from undiagnosed schizophrenia, and as a result acquired two convictions. The requirement that these be disclosed served to preclude her from getting paid employment as a teaching

assistant, and *de facto* entailed an explanation of her past mental health history.

When G was 13 years old he was reprimanded by the police (following a police inquiry involving the Crown Prosecution Service) for engaging in sexual touching and anal intercourse with two younger boys (aged 11 and 12), over a period of months. Though these boys did not have legal capacity to consent it appears the behaviour involved sexual curiosity and experimentation. At the time, it was believed that the reprimands would be “weeded” from police records after five years, or when G reached the age of 18, whichever was the later. Police practice changed subsequently, and so the reprimands were to be disclosed, as G was over the age of 18 and was working at a college library, where he could have contact with children. The Chief Constable of Surrey Police refused to erase G’s reprimands.

W was convicted of assault occasioning actual bodily harm, contrary to s. 47 of the Offences Against the Person Act 1861, in 1982, when aged 16 years. W has committed no offence since. He wished to obtain a qualification teaching English as a second language; as this is one of the “serious” offences, it must be disclosed on any criminal record certificate.

Ms Krol was cautioned for assault occasioning actual bodily harm when patrolling police witnessed her hitting her three-year-old daughter. Her caution has been disclosed to potential employers and, she claims, has restricted her chances of obtaining preferred employment. An application to the Metropolitan Police Commissioner to expunge her caution was refused, most recently in 2013, although the police expressed a willingness to review its retention five years thereafter (i.e. in 2018), if she so requested.

Sir Brian Leveson P, with whom Lord Justice Beatson and Lady Justice Thirlwall agreed, allowed the appeals in part. [Sir Brian Leveson P](#) dismissed the appeals by the Secretaries of State in *P* and *G*; refused permission to appeal the challenge by *G* to the refusal to expunge the reprimands, allowed the appeal in *W*, and dismissed the appeal brought by Ms Krol.

As [the President of the Queen’s Bench Division](#) [Leveson P](#) emphasised in opening his judgment, the appeals concerned “the interface of two important principles of social policy”, namely the rehabilitation of offenders and public protection.<sup>22</sup> This concept of social policy was something to which he returned later, in demarcating strictly the parameters of appropriate judicial action in this context. [Leveson P](#) [his lordship](#) considered whether the scheme was “in accordance with the law” and if so, whether it was, in a rather curious term, “structurally disproportionate”.<sup>23</sup>

As regards the proper construction of “in accordance with the law” there was fundamental disagreement before the court as to the *ratio* of [T. C.](#) [with counsel for P](#) [arguing argued](#) that there had to be safeguards which enabled proportionality to be examined, whereas counsel for the Secretaries of State argued that the cumulative effect of a number of features of the scheme needed to be

<sup>9</sup> ~~s. 113A(6E)(c), Police Act 1997.~~

<sup>10</sup> ~~s. 113A(6)(a)ii.~~

<sup>11</sup> ~~s. 113A(6)(b).~~

<sup>12</sup> [2013] EWCA Civ 25.

<sup>13</sup> [2014] UKSC 35.

<sup>14</sup> [113].

<sup>15</sup> [114].

<sup>16</sup> [119].

<sup>17</sup> [s. 113A\(6E\)\(c\), Police Act 1997.](#)

<sup>18</sup> [s. 113A\(6\)\(a\)ii.](#)

<sup>19</sup> [s. 113A\(6\)\(b\).](#)

<sup>20</sup> [2017] EWCA Civ 321.

<sup>21</sup> [13].

<sup>22</sup> [1].

<sup>23</sup> [15].

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considered, and none alone could be considered determinative. [Sir Brian Leveson P](#) rightly held that “the precise articulation of the ratio in *T* is contained in a combination of paras. [113], [114] and [119] of Lord Reed’s judgment”.<sup>24</sup> He cited the features of the framework in *T*<sup>25</sup> and concluded that while an independent review is not a prerequisite, the less discriminating the other features the greater the need for such review. If a rule does not discriminate by reference to any of the features and there is no mechanism for review, then it will not be in accordance with the law.

Applying this test, [Leveson P his lordship](#) concluded that the multiple conviction rule and the serious offence rule were not, “without a mechanism for refinement, ‘in accordance with the law’”.<sup>26</sup> The multiple conviction rule, [which requires disclosure of spent convictions where the person has been convicted more than once](#), was described as “indiscriminate” in applying automatically regardless of the nature of the offences, the disposal, the time elapsed or the relevance of the information to the employment sought, and the lack of an independent review mechanism.<sup>27</sup> In contrast, the serious offence rule was deemed not to be totally indiscriminate insofar as it distinguishes between the offences included in Schedule 15 to the Criminal Justice Act 2003 and those that are not. Nonetheless, [Sir Brian Leveson P](#) judged it to be “insufficiently calibrated so as to ensure that the proportionality of the interference is adequately examined”.<sup>28</sup>

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Moving beyond this, [Sir Brian Leveson P](#) stressed that even if the revised scheme were “in accordance with law”, it is not necessarily compatible with Article 8 if not necessary in a democratic society.<sup>29</sup> Moreover, although the question did not strictly fall to be answered, he deemed the operation of the multiple conviction rule in this case to be disproportionate, and not necessary in a democratic society.<sup>30</sup>

In terms of the role of the court, [Leveson P the Court his lordship](#) [emphasised indicated](#) that some of the reasons for Blake J’s judgment in *G*’s case in the High Court<sup>31</sup> extended beyond [what constitutes sufficient appropriate](#) grounds for judicial intervention, and “stray into what is properly within the margin of appreciation available to the legislature”.<sup>32</sup> [Sir Brian Leveson P](#) regarded Blake J “as importing into his judgment an assessment of social policy which goes beyond that required to pass through the filter of what is proportionate for the purposes of Article 8”, namely his consideration of the “age of criminal responsibility, the filtering decisions in relation to prosecution of children and young persons, the rehabilitation periods, the modifications to the weeding and ‘stepping down’ rules”.<sup>33</sup> It is questionable whether there is as clear a demarcation between social policy and law in this context as [Sir Brian Leveson P](#) [suggests claims](#). That said, [Leveson P his lordship](#) was robust in his call for legislative action, stating that “if left to the courts as the scheme is presently devised, in my judgment, it will generate many challenges which will require resolution on a case by case basis: such an approach cannot possibly be in the public interest.”<sup>34</sup>

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[Sir Brian Leveson P](#) was careful to stress that nothing in this judgment requires “the adoption of a bespoke system providing an individual right of review”, and suggested that it may be feasible to

<sup>24</sup> [39]. See above.

<sup>25</sup> [41].

<sup>26</sup> [44].

<sup>27</sup> [45].

<sup>28</sup> [45].

<sup>29</sup> [46].

<sup>30</sup> [77].

<sup>31</sup> *R(G) v Chief Constable of Surrey Police* [2016] EWHC 295 (Admin).

<sup>32</sup> [53].

<sup>33</sup> [55].

<sup>34</sup> [66].

devise a filter system akin to that which applies to removal of individuals from the Sex Offender Register.<sup>35</sup> He outlined an additional or alternative way of approaching the issue through an expungement mechanism for misconduct at the lower end of the spectrum which does not involve a criminal conviction.<sup>36</sup> Ultimately he declared there to be “a problem with the operation of the scheme (at the margins)”,<sup>37</sup> but deferred to the legislature as to how to remedy this.

### Concluding remarks

The decision of the Court of Appeal in *R (P) v Secretary of State for the Home Department* continues a line of critical rulings that necessitate immediate legislative change to remedy an overreaching, uneven and problematic approach to data retention and disclosure. Despite numerous incremental alterations, the law on criminal record disclosure and filtering still is fragmented, complex, and prioritises public protection to the detriment of individual privacy and rehabilitation.

It is likely that the Supreme Court would uphold this ruling if appealed. I am convinced by the reasoning of Sir Brian Leveson P, both doctrinally and in principle, and indeed follow Blake J in noting the particular implications of the scheme, given the low age of criminal responsibility. And of course, the Supreme Court in *R (T) v Chief Constable of Greater Manchester Police* held “indiscriminate” disclosure of records and the absence of review to be disproportionate, issues that formed the basis for the Court of Appeal’s judgment as to legality here. It does not appear that sufficient substantive change has been made to the scheme deprecated in *R (T)*. All that said, in 2015 in *R (Catt) v Association of Chief Police Officers* the Supreme Court upheld the police retention of records of an elderly and non-violent man’s participation in political demonstrations as proportionate.<sup>38</sup> While I have misgivings about this decision, the facts stand in contrast to *P*, where the issue was whether the disclosure of historical and sometimes minor offences without adequate means of review was in accordance with law. This is a distinguishable and more expansive scheme than upheld in *Catt*, lending weight to my suggestion that appeal would not be successful.

Widening our focus to the question of law reform in this area, the Law Commission has recently completed a rather tightly defined project considering the effectiveness of certain aspects of the list of “non-filterable” offences.<sup>39</sup> I endorse fully the Commission’s view that there is a “compelling case” for a wider review of the disclosure system as a whole.<sup>40</sup> Retaining and disclosing records of convictions and suspicion engages human rights and affects certain (sometimes intersecting) constituencies especially, such as young people and individuals from BME backgrounds; ~~so~~ thus a considered analysis by Parliament regarding the purpose, consequences and breadth of any “non-filter” list as well as the mechanism of review is crucial. This would be far preferable to the piecemeal and reactive changes required by what feels like a constant series of cases ~~from~~ in the superior courts.

<sup>35</sup> [124].

<sup>36</sup> [67].

<sup>37</sup> [122].

<sup>38</sup> *R (Catt) v Association of Chief Police Officers of England, Wales and Northern Ireland and another* [2015] UKSC 9.

<sup>39</sup> Law Commission, *Criminal Records Disclosure: Non-Filterable Offences* no 371 (2017).

<sup>40</sup> <http://www.lawcom.gov.uk/project/criminal-records-disclosure/>