Neutral Citation Number: [2016] EWHC 295 (Admin)

Case No: CO/12243/2015

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

IN A MATTER OF AN APPLICATON FOR JUDICIAL REVIEW

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/02/2016

Before :

MR JUSTICE BLAKE

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Between :

THE QUEEN on the application of G	**Claimant**
- and -	
(1) THE CHIEF CONSTABLE OF SURREY POLICE **(2) THE SECRETARY OF STATE FOR THE HOME DEPARTMENT** **(3) THE SECRETARY OF STATE FOR JUSTICE**	**Defendants**

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- -

Tim Owen QC and Quincy Whitaker
(instructed by **Hodge Jones and Allen**) for the **Claimant**
Ann Studd QC and Robert Talalay
(instructed by **Surrey Police Legal Services**) for the **First Defendant**
Kate Gallafent QC and Naina Patel
(instructed by **Treasury Solicitors)** for the **Second** and **Third Defendants**

Hearing dates: 10 – 11 February 2016

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Judgment

THE HONOURABLE MR JUSTICE BLAKE :

Introduction

1. This is a troubling case concerning the vexed issue of the interconnected legal regimes for the retention of data relating to the administration of a caution for offences committed as a juvenile, the exercise of the discretion by the data controller to delete such data, and the duty to provide data that is retained to a prospective employer under the enhanced disclosure regime.

2. On 5 September 2006, the claimant then aged 13 years was issued with two reprimands by an officer of the Surrey police for offences of sexual activity with a child contrary to section 13(in conjunction with s.9) of the Sexual Offences Act 2003. The terms of the cautions revealed that the activity had taken place between March 2005 and July 2006. The complainant children were: D, who would have been between 8 years and 8 months and 10 years of age during the period of activity, and C, who was aged between 8 years and six months and 9 years six months. G himself was aged 11 at the start of the period the activity and reached his 13th birthday 3 weeks before the end of it. In this judgment I will refer to him as being aged 12 at the time of the offences. Reporting restrictions are in place preventing the identification of any of these children or former children.

3. At the time of the reprimands G's mother was handed a leaflet that informed her that the consequence of the reprimand was that G would

> 'have a record for five years or until … 18 years whichever is the longer'.

The information in the leaflet was out of date, inaccurate and incomplete. It would reasonably have lead G to conclude that by September 2011, if he did not come to adverse attention, the record of his reprimands would no longer be retained.

4. In 2011, when he was over 18, G worked for an employment agency at the library of a local college. He was asked to apply to the Criminal Records Bureau for enhanced disclosure, because the work involved some contact with children. By this time, reprimands given to juveniles were to be treated as cautions. By way of exemption from the principle of non-disclosure in the Rehabilitation of Offenders Act 1974 (ROA,) convictions and cautions were required to be disclosed in certain circumstances. By the terms of the Police Act 1997 (PA) disclsoure was required if an employer asked the data subject to obtain enhanced disclosure. In February 2012, G received a letter from Nick Edwards, the Data Bureau Supervisor, advising that the fact of reprimands for two counts of sexual assault on a male under 13 was to be disclosed and observations were invited on a proposed explanatory comment about the circumstances of the offences.

5. This letter led to G withdrawing his application and a sequence of events that may be summarised as follows. He learned for the first time that the information that had been given to his mother in September 2006 was inaccurate. In March 2006 there had been a change of the data retention policy recommended by the Association of Chief Police Officers (ACPO). The changed policy replaced the practice of 'weeding out' of reprimands or cautions after a period of time in the event of no subsequent offending, with a policy of 'stepping down' such information. For sexual offences of the kind we are concerned with in this case, steeping down would have been after 10 years. In October 2009 the 'stepping down' practice was itself abandoned. This meant that by 2012 reprimands would remain on the Police National Computer (central records) indefinitely or until G was 100 years old.

6. A detailed exposition of the legislative scheme is not necessary. The essential features are as follows:-

i) Exemptions from the ROA may be made by order of the Secretary of State for particular purposes pursuant to s. 4 (4) and 7(4) ROA.

ii) The Disclosure and Barring Service (DBS) must issue a criminal record certificate or an enhanced certificate on application duly made for an exempt purpose (s.113 A and 113 B PA).

iii) Such a certificate must include all relevant matters.

iv) Pursuant to s.113 (A)(6) and s.113(B) (6) current caution or a caution for a specified offence (such as those set out in Schedule 15 Criminal Justice Act 2003) is a relevant matter if held on central records.

7. Although there was some discretion in the Chief Constable to delete information held on central records, the guidance given by ACPO at 4.3 of the Retention Guidelines for Nominmal Record on the Police National Computer was that the discretion should only be exercised in very limited exceptional circumstances.

8. The claimant's solicitors wrote in July 2014 to the Chief Constable asking her to expunge the record of the reprimands because, having regard to the circumstances of the offence and relevant CPS Rape and Sexual Offences Guidance: Chapter 11 (that includes guidance relating to the prosecution of child offenders under the Sexual Offences Act 2003a reprimand should never have been issued in the first place. The Chief Constable decided in February 2015 that the reprimands were lawfully administered and there was no sufficient reason within the terms of the applicable policy to expunge the records of the reprimands. As it happens, new guidance was issued by the National Police Chiefs Council, the following month, although I do not consider that the changes made has any material impact on the exercise of discretion, and if the refusal to delete was lawful under the policy in force at the time of the decision, it would also be under the subsequent policy.

9. The claimant sought judicial review and I granted permission in July 2015. He seeks the following relief:

i) Against the Chief Constable: an order quashing her February 2015 decision refusing to erase the data, on the basis that her exercise of discretion was flawed as the reprimands should never have been issued;

ii) In the event that he failed in the claim against the Chief Constable, declaratory relief against the respective Secretaries of State with responsibility for the exemption regulations made under the ROA (Justice Secretary) and the regime of statutory disclosure under the PA (Home Secretary). In the latter case, relief would be limited to a declaration of incompatibility under the Human Rights Act 1998 on the basis of an unjustified interference with the right of respect to private life pursuant to Article 8 of the ECHR.

10. The context of the claim is a series of changes in law and policy dealing with two opposing aspects of a matter of serious public concern. The first is the principle that offenders who are sentenced to terms of imprisonment or detention of less than four years should at some point be treated as rehabilitated if they do not further offend. Under the ROA, once rehabilitated, they do not generally have to reveal their previous

criminal history. To this general principle should be added the special concern that the law and policy has for the effective rehabilitation of young offenders. This is reflected in the UN Convention on the Rights of the Child 1984 and measures (domestic and international) to give its principles effect.

11. The second aspect is the public interest that those who work with vulnerable people, and notably children, should be the subject of risk assessment by an employer or other supervising body, and those making the assessment should have access to all relevant information held by the police. This was the purpose of the exemptions were made under the ROA, and the parallel duty of disclosure imposed by the PA. The murder of two young children by Ian Huntley and a consequent review of practices by Sir Michael Bichard resulted in changes of practice as to record retention. The March 2006 change of ACPO policy already noted was one such change resulting from this review.

12. In 2008 cautions were brought within the scheme of the ROA and an unconditional caution would become spent as soon as it was administered. 'Relevant matters' under s.113B (3) PA included all convictions, whatever the sentence or disposal, and all reprimands and cautions. It was subsequently recognised that this was too broad and so, after a period of reflection and review, changes including some restrictions on the types of offences that were to be disclosed were introduced in legislative changes made in May 2013.

13. Material that was not 'relevant matter' might also be held by the police. Other information was held as intelligence on a database other than central records (ie the Police National Computer). It might still be required to be disclosed in response to an enhanced disclosure request if, the Chief Constable reasonably believes it to be relevant for the purpose described in the request for the certificate and in the opinion Of the Chief Constable it ought to be included in the certificate (see s.113(B)(4) PA).

14. Alongside the development of the legislative and policy framework, there have been a number of significant decisions of the senior courts relating to the compatibility with the right to respect for private life of the disclosure regime and other measures of a preventive nature. I note the following decisions:

    i) Regina (R) v Durham Constabulary [2005] UKHL 21, [2005] 1 WLR 1184, (Durham): The Appellate Committee reversed the Court of Appeal. It concluded that, by contrast with a caution administered to an adult, a warning administered to a juvenile who admitted an offence did not require the consent of the child or responsible adult and was not the determination of a criminal charge within the meaning of Article 6 ECHR.

    ii) Chief Constable of Humberside and others v Information Commissioner [2009] EWCA Civ 1079, [2010] 1 WLR 1136, (Humberside): The Court of Appeal reversed the Information Tribunal and concluded that indefinite retention of information about convictions and cautions (spent or not) by Chief Constables did not infringe the Data Protection Act. It was the reasoning in this judgment that led ACPO to abandon the former practice of 'stepping down' certain material after 10 years without incident.

iii) R v JTB [2009] UKHL 20, [2009] 1 AC 1310: A decision of the House of Lords confirmed that s.34 Crime and Disorder Act 1998 had removed altogether, the old common law defence of a presumption (capable of rebuttable) that a child over 10 and under 14 was incapable of committing a crime.

iv) R (L) v Commissioner of Police for the Metropolis [2009] UKSC 3: The Supreme Court concluded that disclosure of information, considered by the Commissioner to be relevant within the meaning of s.113 B (4) PA, violated the claimant's rights under Article 8 ECHR.

v) Regina (F (A Child)) v Secretary of State for the Home Department [2010] UKSC 17, [2011] 1 AC 331 (F): The Supreme Court dismissed the Secretary of State's appeal from a decision of the Court of Appeal. Sections 82 to 86 Sexual Offences Act 2003 required convicted sexual offenders to notify the police of certain information indefinitely. A declaration was made that indefinite application of the notification requirements, without an opportunity being afforded to the offender to demonstrate that he presented no measurable risk of re-offending, was incompatible with Article 8.

vi) MM v United Kingdom, 13 November 2012: The Fourth Section of the European Court of Human Rights found a violation of Article 8 in a case from Northern Ireland where the applicant had been required to disclose information about a caution for a child abduction offence in an enhanced disclosure request. The statutory provisions and case law in the UK were reviewed as was the common law regime then applicable in Northern Ireland, for the retention and disclosure of such data. The arguments had been directed to proportionality but the Court of its own motion concluded that if a disclosure regime did not provide for sufficient safeguards to protect private life, it would not be in accordance with the law, within the meaning of the case law in Strasbourg. An interference that is not in accordance with the law cannot be justified as a proportionate measure in pursuit of a legitimate aim.

vii) R (T) v Chief Constable of Manchester [2013] EWCA Civ 25, [2013] 1 WLR 2515: The Court of Appeal concluded that the requirement for disclosure in an enhanced certificate, under the legislative regime before amendment in May 2013, of two warnings issued to the claimant when he was 11 years old for stealing bicycles, was disproportionate and incompatible with Article 8.

viii) R (T) v Chief Constable of Manchester [2014] UKSC 35, [2015] AC 49; The Supreme Court dismissed the defendants' appeal from the decision of the Court of Appeal in (vii). Lord Wilson did so on the basis that the requirements were disproportionate. He noted, in particular, the subsequent amendments to the category of convictions for which disclosure was required that had been brought in May 2013 between the decision of the Court of Appeal and the hearing in the Supreme Court. He thought at [38] that other matters mentioned by the Strasbourg Court in MM as relevant to legality should have been considered as aspects of proportionality. Lord Reed, with whom the other members of the Court agreed on this point, concluded, applying MM v United Kingdom, that the disclosure was not in accordance with the law and therefore

incapable of justification under Article 8, irrespective of arguments about proportionality.

ix) R (on the application of) W v Secretary of State for Justice [2015] EWHC Admin 1952 (8 July 2015): Simon J (as he then was) examined a proposed disclosure of a conviction for assault occasioning actually bodily harm when the claimant was 16, for which the claimant received a conditional discharge. He concluded that this was not a disproportionate interference with Article 8 rights as, in the May 2013 amendments, Parliament had made a bright line rule that the courts should respect as to the category of offence where retention of data and provision under the duty of enhanced disclosure would be indefinite. No submissions had been advanced as to whether the safeguards were sufficient to be considered in accordance with the law.

x) Gallagher's Application [2015] NIQB 63: Mr Justice Treacy concluded that the proposed disclosure of six convictions between 1996 and 1998 of driving without a seatbelt or carrying a child under 14 without a seatbelt was disproportionate, despite the filtering of some single minor convictions under the May 2013 amendments. By this time there was a statutory regime in Northern Ireland similar to that in the rest of the UK.

xi) R (on the application of P and A) v Secretary of State for Justice [2016] EWHC 89 (Admin) (22 January 2016): a Divisional Court, with Lord Justice McCombe presiding, concluded that the disclosure of information about more than one minor offence, under the regime as amended in May 2013, violated Article 8. The amended regime still did not have sufficient safeguards to be in accordance with the law. The court reached this conclusion applying Lord Reed's judgment in T in the Supreme Court.

15. At the time of the hearing there were applications for permission to appeal to the Court of Appeal (or the Court of Appeal of Northern Ireland) outstanding in the last three of these cases; . In the light of their importance for the claim against the second and third defendants, in this application I have abstracted the material parts of the reasons of Lord Reed in T and Lord Justice McCombe in P and A in an appendix to this judgment.

The circumstances resulting in the claimant's reprimands:

16. The police investigation that resulted in G's reprimands started with a report to social services about concern of inappropriate sexual behaviour at school between two small boys J and C. On interview, J disputed sexual activity but C accepted that such activity had occurred, not only with J but also two other boys, naming D and G. C made subsequent disclosure to his father of further activity with G over a period of time ranging from 'hand jobs' and extending to 'bum sex' with some degree of penile anal penetration. In an ABE interview, C indicated that this had all started a year earlier when C, D and G were playing together in G's shed and he had instituted a game of dares. D at first disputed engaging in such activity but subsequently told his mother that hand jobs had occurred.

17. G was the only one of these children over the age of criminal responsibility at the time that these events had occurred. He was some 2-3 years older than the other boys. He

attended the police station on 1 August 2006 with his mother and was arrested on suspicion of sexual assault and incitement of a child under 13 to engage in sexual activity. Following the attendance of a duty solicitor, G was interviewed in the presence of his mother and solicitor, and admitted that mutual masturbation had taken place graduating to 'bum sex' with C and D. He said he had not forced C and D to do anything. At times they had approached him to suggest sexual acts and at other times it was he who had suggested it. He was tearful and acknowledged that what he was doing was wrong.

18. At the conclusion of the investigation, the officer reported the matter to the CPS prosecutor. The crime report entry indicated the officer's conclusion that both C and D consented to the activity with G and no force was used. It seems that the version of events that was considered reliable for the purpose of a potential prosecution was G's own admissions in interview.

19. The prosecutor analysed the matter as follows:

> 'Sexual experimentation by a thirteen year old boy and other younger boys. The matter has been investigated by both police and social services who are satisfied that it is not something sinister and serious just misguided. I understand that none of the parents has been demanding tough action either. I can see no benefit in criminalising this behaviour unnecessarily and giving this young man a criminal record…There is a public interest in marking our concern about this behaviour due to its repetition. In view of his age a reprimand is appropriate.'

20. The record of the decision reveals that a gravity factor score of 1 was assigned. G's previous good character was noted. The advice from CPS and the social services was noted and it was agreed that a reprimand was the most appropriate form of action.

The claim against the Chief Constable

21. The claimant's case was a narrow one. It was accepted that in the light of the decision in Durham, the law did not require parental consent for the reprimand of a juvenile. Accordingly, the fact that the claimant's mother had been misled as to the effect of a reprimand did not mean that the reprimand should be set aside on the basis of lack of informed consent, (as it might well have been in the case of an adult caution). It was further accepted that this was not a case where the inducement of a reprimand had led G to make admissions that he would not have otherwise have done.

22. The highest that Mr Owen QC for the claimant put this aspect of the case was that the misleading information given to the mother and the apparent confusion of both police officer and prosecutor as to the future impact of a reprimand was material to whether it should ever been issued, had the true consequences been known. Further, if the mother had been aware of what the consequences really were, she would have sought legal advice to contend that no reprimand should be issued and might have sought judicial review if it had been.

23. The principal submission, however, was that on the information before her, the Chief Constable should have concluded that the reprimand should never have been issued in

the first place. It was contended that the factual conclusion of sexual experimentation between boys of a similar age and the material parts of the CPS guidance should have resulted in the conclusion that neither prosecution nor a reprimand was appropriate in the public interest.

24. If a reprimand had been issued contrary to the CPS guidance, this brought the case within the narrow category of exceptional circumstance identified by ACPO when data should be deleted: e.g. where the material results from a wrongful arrest, or a reasonable suspicion as to guilt of a suspect that proves to be ill founded. Mr Owen points to the North Yorkshire Police policy that says expressly that a reprimand will be deleted if it was inappropriately issued.

25. Ms Studd QC for the Chief Constable, did not dispute that if the reprimand had been unlawfully issued, this was an exceptional circumstance that could justify deletion. I agree. If the reprimand should never have been issued the police would never have been in receipt of it and it should not remain in central records as evidence of an admission of an offence. This is particularly so where G's mother was unintentionally misled as to the consequences of a reprimand and as a result had taken no advice on whether it could have been set aside at the time.

26. It was common ground between the parties that if the reprimand were to be deleted from central records, it could still be retained as intelligence information elsewhere in the Chief Constable's system. In those circumstances, if a request for enhanced disclosure were ever to be subsequently made, the information might then be disclosed but only if a judgment were made under s.113 (B) (4) PA as amended that is to say the Chief Constable reasonably believed it to be relevant for the purpose described in the application and in the Chief Constable's opinion ought to be included in the certificate. The exercise of this judgment required a consideration of the justification for the interference of the right to private life (see the decision of the Supreme Court in L (above)) and in the event of a dispute about relevance or proportionality, as a public authority the decision of the chief officer would be amenable to the supervision of this court in judicial review.

27. The claimant cannot show any breach of a statute with respect to the issue of the reprimand. The statutory conditions for issuing it had clearly been met. His contention was that the CPS, an independent public authority, had erred in approving a reprimand as opposed to informal action because no or no sufficient regard had been had to the CPS guidance on s the prosecution of sexual offences.

28. Mr Owen pointed out that during the passage of the Sexual Offences Act 2003 assurances were given by the Lord Chancellor and Secretary of State for Justice that the purpose of the measure was to protect young people from abuse and exploitation rather than mutually agreed sexual activity between a 12 and 13 year old (Hansard HL 19 May 2003 col 591). The guidance issued by the CPS for prosecutions under the Sexual Offences Act 2003 faithfully reflects that. As the following extracts demonstrate:

> 'The 2003 Act protects all children from engaging in sexual activity at an early age, irrespective of whether or not a person under 13 may have the necessary understanding of sexual matters to give ostensible consent. The intention behind

> sections 5 – 8 is to provide maximum protection to the very young……However; prosecutors may exercise more discretion where the defendant is a child. The overriding public concern is to protect children. It was not Parliament's intention to punish children unnecessarily or for the criminal law to intervene where it is wholly inappropriate.'
>
> 'It is essential that before any decision is made on whether or not to prosecute, prosecutors have as much information as possible from sources, such as the police, Youth offending Teams (YOT's), and any professionals assisting those agencies about the defendant's home circumstances and the circumstances surrounding the alleged offence as well as any information known about the victim'.
>
> 'It is important to note that these sections are designed to protect children, not punish them unnecessarily or make them subject to the criminal justice system where it is wholly inappropriate. *Young people should not be prosecuted or issued with a reprimand or final warning where sexual activity was entirely mutually agreed and non-exploitative.'*
>
> 'Guidance set out above in relation to sections 5 – 8 also applies to the child sex offences. The factors that prosecutors should consider are repeated below. The weight to be attached to a particular factor will vary depending on the circumstances of each case. However, in deciding whether it is in the public interest to prosecute a person, prosecutors may exercise more discretion in relation to child sex offences (where the victim is a child ages 13 – 15) than for offences against children under 13.
>
> In summary, where a defendant, for example, is exploitative, or coercive, or much older than the victim, the balance may be in favour of prosecution, whereas if the sexual activity is truly of the victim's own free will the balance may not be in the public interest to prosecute.
>
> In addition, it is **not** in the public interest to prosecute children who are of the same or similar age and understanding that engage in sexual activity, where the activity is truly consensual for both parties and there are no aggravating features, such as coercion or corruption. In such cases, protection will normally be best achieved by providing education for the children and young people and providing them and their families with access to advisory and counselling services'

29. Mr Owen placed particular emphasis on the words I have placed italics in the third of these extracts showing that it was the intention that there should be no prosecution or reprimand where the activity was entirely mutually agreed and non-exploitative.

Conclusion

30. I am not satisfied that the prosecutor in 2006 failed to have regard to the guidance or that he otherwise reached a decision that was irrational or unlawful. In my judgment, the CPS guidance must be read as a whole and no single paragraph is dispositive. The fact that no force was used, the younger boys agreed to participate in the dare or sexual experiment and the complainants may have had some previous sexual encounters before voluntarily engaging in the activity with G, are relevant but not conclusive factors against a reprimand being issued. The prosecutor was also entitled to note that C and D were under 13, incapable of giving consent and it is the policy of the law that children of such a young age needed particular protection from sexual experiences they are unlikely to have fully understood at their early age. The activity was not confined to a single incident or a single child but had carried on for a year or so suggesting that some expression of official concern was needed.

31. I am conscious that in response to this application for judicial review, the Chief Constable has filed evidence of a review of the 2006 decision by a new prosecutor in 2015, who has concluded that further information should have been contained and doubted that the starting point of a gravity assessment score of 4 could have been reduced and that there was thus a case for prosecution. I have disregarded that opinion in considering the challenge to the actual decision made and the reasons given for it and I am uncertain as to the purpose for which this evidence was commissioned. If the 2015 opinion had been the determinative decision in the case, Mr Owen advances a number of criticisms of it such as the reliability of the inculpatory data to which it refer, and how the CPS guidance on sexual offences relating to young offenders has been applied. Although the opinion expresses concern as to the use of the word 'consent' in the earlier reports, in my view it was apparent that everyone involved with the 2006 decision was well aware that a child under 13 cannot consent to sexual activity, as a matter of law. The guidance however refers to activity agreed between children of roughly the same age without features of concern such as force, seduction and improper pressure on vulnerable children.

32. However, for the reasons I have already given, the challenge to the legality of the decision to issue a reprimand fails and with it any basis to contend that the Chief Constable erred in the understanding and application of the information deletion policy. Accordingly, the challenge to the Chief Constable's decision also fails.

The claim against the Secretaries of State

33. The claim as originally pleaded challenged the proportionality of the scheme under the PA and the ROA regulations. The policy making history leading to the May 2013 amendments to the scheme is well set out in the decisions in W and P and A and I do not propose to repeat them.

34. I have been provided with substantially the same material as was before those courts. I have been able to read it with interest and care. I recognise that both Secretaries of State have had some difficult decisions to make in this sensitive area.

35. The problem for the claimant is that a policy decision was made and approved by Parliament in a positive resolution of both Houses, that any caution or reprimand for any offence that is considered to be sufficiently serious to be included in Schedule 15

of the Criminal Justice Act 2003 was considered to be clearly relevant to risk assessment by an employer. It continued, therefore, to be mandatorily included in any enhanced certificate under s. 113(B) (3) PA, whatever the form of disposal or the age of the offender at the time of the caution, or the subsequent passage of time and good behaviour. It was considered that these were matters for the employer to consider in the light of the disclosure made.

36. Mr Owen does not, of course, dispute that reprimands for offences under s.13 of the Sexual Offences Act 2003 should, in principle, be disclosed in the enhanced certificate procedure. He does not complain of the continued inclusion of such an offence within the scheme as it operates after May 2013. Nor does he take issue with the policy choices made by the second and third defendants that disclosure should turn on the category of offence rather than the form of disposal whether custodial, community order, conditional discharge or reprimand.

37. What he does dispute is the justification for and proportionality of the statutory scheme that seriously interferes with the private life of a young adult who for the rest of his life will face the serious disadvantage of disclosure of these reprimands when seeking future employment. It is apparent from the statistics that increasing numbers of employers, academic institutions and others require enhanced disclosure certificates for one reason or another. The reprimand was issued to him shortly after his 13 birthday for conduct committed aged 12. Despite the label attached to the offences, this was not exploitation or abuse of young children, but sexual experiments between members of the same peer group, that can and should be seen as part of the process of growing up and nothing more sinister than that. Despite this, he will bear the reprimand indefinitely as a mark of Cain and with no ability to demonstrate that its disclosure is irrelevant and unnecessary in the light of who is he is now.

38. He points to the recognition of previous decisions of the courts that an employer is likely to be risk adverse and always prefer the candidate who has no offending history disclosed in the enhanced disclosure certificate. It seems that nearly 3.83 million enhanced disclosure requests were made in 2014/15 of which there was a relevant caution/conviction in 304,151 cases. After the application of the new May 2013 filter criteria, this number reduced by 32% to 97,858. The number of requests shows how extensive is the need for enhanced disclosure in modern life. The employer is not necessarily a public authority or amenable to public law and human rights review in their risk assessments based on the product of the disclosure. There is no private law claim for discrimination on the basis of previous offending history, costly and difficult as the bringing of any such claim may be. There may well be evidence that many employers and voluntary organisations are not troubled by historic incidents in a person's previous life, but the label of a sexual offender against young children will be simply fatal to any realistic prospects of success in vast number of occasions where voluntary and employment activities interact with people under 18.

39. Mr Owen points to the recognition by Mr Edwards in 2012 of the disproportionate impact on G's prospects of the revelation of data held in central records. Mr Edwards was an experienced disclosure officer employed by the Chief Constable. He recorded as follows:

> "This was a rather unusual case in that the proposed disclosure regarding the enhanced CRB check essentially had the intention

> of assisting the applicant by replacing the information held on the PNC in a fairer context. We were also concerned that the applicant was likely to have been informed at the time of the reprimand that it would be deleted after a period of 5 years as was once the case. However this is no longer the case and no information is now automatically or routinely removed from the PNC …. There was also a concern that automatic disclose of the reprimand particularly in view of the nature offence would likely cause an employer more concern than perhaps the circumstances actually warranted.
>
> The reprimand suggests a sexual assault however this is not really the case and the incidents appear to have been consensual and involved sexual curiosity and experimentation between young boys albeit the applicant was a slightly older party.
>
> This is a strange situation in that it is the automatic disclosure of the PNC record that would likely provide an unfair picture of events causing the potential adverse effect on the applicant. In view of the lack of a specific risk this potential adverse effect is disproportionate when viewed alongside the applicant's rights."

40. In substance the claimant contends that there is no rational connection between the disclosure in 2015 and after for the purpose of a risk assessment by an employer of G's childish sexual behaviour in 2005 and 2006.

41. Shortly before the hearing, the claimant became aware of the decision of the Divisional Court in P and A and the additional submission that was available to him on the basis of Lord Reed's decision in T that a disclosure scheme without sufficient safeguards to assess relevance and proportionality was not in accordance with the law. He accordingly applied to amend his grounds without opposition from Ms Gallafent QC for the second and third defendants. He contended that Lord Justice McCombe's observations at [87] to [89] were of general effect and equally applicable to the claimant's case, whilst recognising that the context of the case was different to the present.

42. In substance, his submission was that the statutory scheme and the interference with private life was not in accordance with the law within the ECHR context because there is no mechanism available that enables the data subject to submit to the public authority, prior to disclosure to the private body, that the data to be disclosed has no rational connection with the risk assessment for which it is sought.

43. Ms Gallafent recognises that I am bound to follow Lord Justice McCombe's judgment in P and A, unless I consider it to be plainly wrong. I certainly do not consider it wrong. In my judgment, it properly explains the central importance to this issue of Lord Reed's analysis of the principles identified in MM v United Kingdom. If there are insufficient safeguards to ensure that the data retained is relevant to and necessary for the purpose for which it is disclosed to the third party, then, despite the existence of the filtering process under the more recent national measures that have the status of law domestically, the overall regime for disclosure cannot be said to have the

characteristics that the ECHR requires in order for the interference with private life caused by the transmission to be in accordance with the law.

44. She, nevertheless, made a sustained submission that the reasoning of the Divisional Court decision, although disputed by the Secretary of State, could be distinguished. In both Gallagher and the joined applications in P and A the problem was that although the offences were considered to be minor enough to be filtered out of the disclosure regime by the May 2013 changes, there were more than one of them and this lead to the 'startling' consequences that could be described as 'arbitrary'.

45. In the present case the offences for which the reprimands were issued were manifestly serious enough to require disclosure and the claimant was seeking an individualised assessment scheme that had been rejected in the discussions leading to the May 2013 amendments as impractical. The reasons for this conclusion were given by Ms Foulds of the Ministry of Justice in her witness statement made for the case of P and A. I do not attempt to summarise all the points made but the conclusion is reached:

> "The above considerations highlight the difficulties with the suggestion that a central authority should exercise discretion on what is disclosed to an employer or other body. The decision as to what is relevant is an extremely complex and nuanced one and would need to be reviewed on a regular basis and in relation to each application.
>
> Consideration also has to be given as to what information might be available on which to base such a decision. If such a policy were adopted it would have to apply retrospectively and it is difficult to see how this could operate fairly and objectively for all individuals when the level of information available in relation to their circumstances and those of their offences may not be consistent. For convictions dating back a number of years there may not now be access to any additional information beyond the PNC record whereas detailed information, including sentencing remarks, is likely to be more readily available for recent convictions.
>
> Finally there is a risk of creating a perverse situation where an employer gives greater weight to any disclosed cautions and convictions than they merit simply because discretion has been exercised to disclose them."

46. Whilst I recognise the factual distinctions between the cases, I do not accept that the present case can be distinguished given the underlying principle identified by Lord Reed.

47. In my judgment, the claimant has at least a highly arguable case that despite the statutory scheme as amended, disclosure of the data to a third party is not relevant and proportionate:-

    i) Until 1998 it is unlikely that a 12 year old would have been held to have criminal responsibility for an act of sexual exploration with his peers. The UK

has one of the youngest ages of criminal responsibility in Europe. It is necessary to temper the long arm of the criminal law with other measures designed to ensure that children do not become stigmatised as criminals for engaging in activity that might be seen as an ordinary part of the process of growing up.

ii) Given the investigator and prosecutor's assessment of the nature of the offending and the CPS guidance on sexual offences, the public interest did not require a prosecution and it was arguably a borderline line case for a reprimand. In reaching the decision that he did, the prosecutor did not consider that it was in the public interest to give G a record and did not intend to give him one and thereby damage his welfare and prospects of rehabilitation.

iii) Until March 2006, any reprimand given to a juvenile would have been weeded out under the terms of earlier document retention policy and therefore not available for mandatory disclosure

iv) Until October 2009 such material would have been 'stepped down' after 10 years because of the absence of any other conduct causing concern and thus, as the police understand the law, not available for automatic disclosure. This practice changed after the Humberside case but that case did not consider the justification of interference with Article 8 by disclosure to a private employer.

v) If the material had been weeded out and stepped down from central records but not deleted altogether, it would still be available for disclosure in an enhanced certificate if the Chief Constable considered it relevant and proportionate. This is the very judgment that the claimant submits is needed before a spent caution administered to a juvenile is ever disclosed.

vi) Here the Chief Constable's own experienced disclosure officer considered that provision of the statutory information to an employer would have had a disproportionate effect. He sought to mitigate this by adoption of some explanation of the surrounding circumstance that tended to show that the offending was not abusive or exploitative and thus not evidence that G was a potential risk to young people.

vii) Since 1974 Parliament has maintained the ROA scheme where offenders sentenced to less than 4 years imprisonment or detention can treat their sentences as spent. In 2008 Schedule 2 paragraph 1 (1)(b) of the ROA provided that an unconditional caution as this reprimand is now considered to be lapses immediately that it is issued. The provisions of the ROA and the previous 'weeding out' and 'stepping down' practices all point to a starting point in the proportionality analysis that not all such maters should be automatic disclosed.

viii) Filtering out of single minor convictions is one way of achieving proportionality. In that context, the policy choice of which classes of conviction should not be filtered out is a matter to which a margin of appreciation should be afforded to the executive and the legislature, for the reasons given in W. However, merely filtering out of single minor convictions is insufficiently sensitive a means of distinguishing between disclosures that

are relevant, necessary and proportionate to the legitimate aim that would justify interference with significant aspects of private life (see Gallagher and P and A).

ix) In the present case, the issue is not multiple cautions, but an overall examination of relevance and proportionality. These considerations could be sufficiently addressed by treating spent convictions and cautions as intelligence data that should only be disclosed when relevant and proportionate to the purpose of the request rather than automatically.

x) Further, even if different considerations should apply to adult offenders, who could be assumed to be mature enough to understand what they were doing at the time they offended and the need to make a persuasive case that they had changed, the case for procedural safeguards where reprimands have been administered to offenders under 14 is that much more compelling. An interference with Article 8 rights that does not comply with the requirements of the international law obligations of the United Kingdom is unlikely to be justified. The requirements of international law relating to the welfare of the child generally are well known and have been applied in the Article 8 context. They were reviewed by Lady Hale in Durham and Lord Reed in T. Disclosure of a child's reprimand has a deleterious effect on subsequent social life and there are strong pointers that this should only take place where strictly necessary and proportionate.

xi) Contrary to the concerns of the Secretaries of State and Ms Foulds, there is no complexity or impracticality about devising a procedure that enables such a judgement to be made as the statutory mechanism already exists in s.113 B cases.

xii) It is unfair to require the employer to make that kind of judgement, with no legal remedy available to the claimant to supervise errors of approach and ensure proportionality of decision making.

48. Cumulatively, in my judgment, these reasons amount to a compelling case that a review mechanism is both needed and is practicable. The claimant, therefore, falls within a class of people within the criteria set out in MM v United Kingdom. The Strasbourg Court concluded that 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, might reasonably result in a decision by a public authority applying human rights principles that disclosure was not relevant or necessary.

49. The claimant has no means of seeking to persuade a public authority of this fact, just as in F the registered sex offender, with indefinite notification requirements had no means of demonstrating that the continuation of those requirements remained necessary and proportionate.

50. In the circumstances, the conclusion is the same as in P and A. In my judgment there are insufficient safeguards and the interference with the claimant's Article 8 rights was not in accordance with the law.

51. In the end, it was the absence of procedural safeguards or other means to enable the data controller to take all the Strasbourg relevant considerations in to account that was the only way in which the claimant pursued his case against the second and third defendants in the oral submissions at the hearing. I make no determination on whether, if the scheme had sufficiently flexible to accommodate these considerations in the context a child given reprimands for sexual behaviour when aged 12, disclosure of the claimant's data would in fact be unjustified and disproportionate. However, I am satisfied the absence of any procedure enabling these matters to be examined by the decision maker before the case proceeds to this court results in the statutory regime being incompatible with the claimant's rights. I, therefore, propose to grant declaratory relief.

APPENDIX

T v Chief Constable of Manchester

Extracts from the judgment of Lord Reed.

91. Under article 1 of the Convention, the member states undertake to secure to everyone within their jurisdiction the rights and freedoms defined in Section I. Those include the right set out in article 8, which provides:

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

92. There is a substantial body of judgments of the European court concerned with the effect of article 8 in relation to the retention and use by the state of personal data. As I have indicated, many of the judgments concern the United Kingdom. The issue has also been considered by the courts of this country, but none of the domestic judgments cited to us fully reflects the Strasbourg court's approach to the application of article 8 in this context, or appears to me to provide an answer to the present appeals.

93. In particular, although the judgments of Lord Hope and Lord Neuberger in *R (L) v Comr of Police for the Metropolis (Secretary of State for the Home Department intervening)* [2009] UKSC 3; [2010] 1 AC 410 contain much that is valuable in relation to the applicability of article 8 in the present context – and, as I shall explain, passages from the judgments were subsequently incorporated by the Strasbourg court into its own reasoning on that point – they are of less assistance in relation to the application of article 8(2) in the circumstances of the present appeals. In the first place, the court was concerned in that case only with the disclosure of information under the then equivalent of section 113B(4) of the 1997 Act: that is to say, the additional information contained in an enhanced criminal record certificate. That issue does not arise on the facts of the present appeals. Secondly, and more importantly, the court did not approach the question of justification under article 8(2) in the way in which it would be addressed by the European court. As Lord Hope explained at para 41, there was no suggestion in that case that the relevant legislation contravened article 8: the argument focused upon whether it had been interpreted and applied in a way that was proportionate. Following the common law conception of the judicial function, the court dealt with the appeal on the basis of the arguments presented to it.

94. As I shall explain, the European court's consideration of article 8(2) in this context begins by addressing the question whether the interference with the right protected by article 8 is in accordance with the law; and it often ends there. It ended there, in particular, in a carefully considered judgment of the Strasbourg court, which I shall discuss shortly, that addressed the very point in issue in these appeals in relation to the 1997 Act.

Rotaru v Romania

95. Although the Strasbourg jurisprudence in this area goes back more than 30 years, a suitable starting point is the judgment of the Grand Chamber in *Rotaru v Romania* (2000) 8 BHRC 449, in which the court considered the storage and disclosure of a criminal record. The applicant in the case complained about the disclosure by the security services of the contents of a file containing information about him, and his inability to have inaccuracies in the information corrected. It was argued by the government that article 8 was not applicable, since the information in question, which included information about the applicant's political activities and his criminal record, related not to his private life but to his public life.

96. That contention was rejected. As in its earlier case law, the court began by emphasising the correspondence between its broad interpretation of private life and that adopted in the Council of Europe's Convention of 28 January 1981 for the Protection of Individuals with regard to Automatic Processing of Personal Data, which came into force on 1 October 1985, and of which the UK is a signatory ("the 1981 Convention"). The purpose of the 1981 Convention is "to secure … for every individual … respect for his rights and fundamental freedoms, and in particular his right to privacy, with regard to automatic processing of personal data relating to him" (article 1), such personal data being defined in article 2 as "any information relating to an identified or identifiable individual". Article 5 requires that personal data undergoing automatic processing shall be, inter alia, "stored for specified and legitimate purposes and not used in a way incompatible with those purposes", "adequate, relevant and not excessive in relation to the purposes for which they are stored", and "preserved in a form which permits identification of the data subjects for no longer than is required for the purpose for which those data are stored". Article 6 provides that special categories of data, including "personal data relating to criminal convictions", "may not be processed automatically unless domestic law provides appropriate safeguards".

97. In relation to this aspect of the case, the court stated at paras 43-44:

"43. … public information can fall within the scope of private life where it is systematically collected and stored in files held by the authorities. That is all the truer where such information concerns a person's distant past.
44. In the instant case the court notes that the [letter containing the disclosure] contained various pieces of information about the applicant's life, in particular his studies, his political activities and his criminal record, some of which had been gathered more than 50 years earlier. In the court's opinion, such information, when systematically collected and stored in a file held by agents of the state, falls within the scope of 'private life' for the purposes of article 8(1) of the Convention."

98. As to whether there had been an interference with the right protected by article 8, the court stated at para 46 that "both the storing by a public authority of information relating to an individual's private life and the use of it and the refusal to allow for an opportunity for it to be refuted amount to interference with the right to respect for private life secured in article 8(1) of the Convention".

99. In considering whether the interference was justifiable under article 8(2), the court stated at para 47 that "that paragraph, since it provides for an exception to a right guaranteed by the Convention, is to be interpreted narrowly". As in many of its earlier judgments in this area, including the Grand Chamber judgment given earlier that year in the case of *Amman v Switzerland* (2000) 30 EHRR 843, the court held that the holding and use of the information in question had not been "in accordance with the law", as required by article 8(2), because of the absence from the relevant national legislation of adequate protection against arbitrary interference. In that regard, the court based its decision upon a number of aspects of the legislation, including the absence of a definition of the kind of information that might be recorded, and the absence of limits as to the age of the information held or the length of time for which it might be kept.

MM v United Kingdom

100. This approach was followed in the case of *MM v United Kingdom* (Application No 24029/07) (unreported) given 13 November 2012, which concerned the disclosure of a caution which the applicant had received for child abduction. Disclosures had been made by the police to organisations to which the applicant had applied for employment as a family support worker. The disclosures occurred in Northern Ireland, prior to the entry into force there of the relevant provisions of the 1997 Act, and were made under common law powers. The European court however treated the complaint as encompassing the continuing threat of future disclosure under sections 113A and 113B of the 1997 Act as amended, the terms of which were for all material purposes indistinguishable from the version with which the present appeals are concerned. As the court observed, the data in question would be retained for life, and would be disclosed under the 1997 Act whenever the applicant applied for employment falling within its scope. It was therefore clear that "for as long as her data are retained and capable of being disclosed, she remains a victim of any potential violation of article 8 arising from retention or disclosure" (para 159). The judgment is therefore directly relevant to the present appeals.

101. As in *Rotaru*, the court referred to the 1981 Convention, citing articles 5 and 6. It also referred to a number of other relevant Council of Europe and EU instruments. In particular, it considered in detail Recommendation No R (87) 15 regulating the use of personal data in the police sector, adopted by the Committee of Ministers on 17 September 1987 in the context of an approach to data protection intended to adapt the principles of the 1981 Convention to the requirements of particular sectors. The Recommendation does not have the same status as the 1981 Convention, but sets out principles to serve as guidance to the governments of the member states in their domestic law and practice.

102. Principle 2 concerns the collection of data and states:

"2.1 The collection of personal data for police purposes should be limited to such as is necessary for the prevention of a real danger or the suppression of a specific criminal offence. Any exception to this provision should be the subject of specific national legislation."

The Explanatory Memorandum setting out the background to the Recommendation's adoption states that Principle 2.1 excludes an "open-ended, indiscriminate" collection of data by the police (paragraph 43).

103. Principle 5 of the Recommendation deals with communication of police data. Principle 5.2 states:

"5.2.i Communication of data to other public bodies should only be permissible if, in a particular case:
a. there exists a clear legal obligation or authorisation, or with the authorisation of the supervisory authority, or if
b. these data are indispensable to the recipient to enable him to fulfil his own lawful task and provided that the aim of the collection or processing to be carried out by the recipient is not incompatible with the original processing, and the legal obligations of the communicating body are not contrary to this.
5.2.ii Furthermore, communication to other public bodies is exceptionally permissible if, in a particular case:
…
b. the communication is necessary so as to prevent a serious and imminent danger."

Principle 5.3 makes analogous provision in relation to communication to private parties. The Explanatory Memorandum stresses that Principles 5.2 and 5.3 allow communication only in circumstances of an exceptional nature (paragraph 58).

104. Principle 7 deals with length of storage and updating of data. Principle 7.1 requires measures to be taken to delete personal data kept for police purposes if they are no longer necessary for the purposes for which they are stored. In that regard, it requires consideration to be given to a number of criteria, including rehabilitation, spent convictions and the age of the data subject. The Explanatory Memorandum states that it is essential that periodic reviews of police files are undertaken to ensure that they are purged of superfluous data (paragraph 96).

105. In its assessment of the merits of the application, the court reiterated that "both the storing of information relating to an individual's private life and the release of such information come within the scope of article 8(1)", that "even public information can fall within the scope of private life where it is systematically collected and stored in files held by the authorities", and that "this is all the more true where the information concerns a person's distant past" (para 187). In particular, data relating to the applicant's caution related to her private life, and their disclosure constituted an interference with her private life.

106. In reaching that conclusion, the court noted that the data constituted both "personal data" and "sensitive personal data" within the meaning of the Data Protection Act 1998, and also fell within a special category of data under the 1981 Convention. Further, the data formed part of the applicant's criminal record:

"In this regard the court, like Lord Hope in *R (L) v Comr of Police for the Metropolis (Secretary of State for the Home Department intervening)* [2009] UKSC 3; [2010] 1 AC 410 [at para 27], emphasises that although data contained in the criminal record are, in one sense, public information, their systematic storing in central records means

that they are available for disclosure long after the event when everyone other than the person concerned is likely to have forgotten about it, and all the more so where, as in the present case, the caution has occurred in private. Thus as the conviction or caution itself recedes into the past, it becomes a part of the person's private life which must be respected." (para 188)

107. The court rejected the Government's contention that it was material that disclosure was made to the applicant herself, on her own application:

"The court notes and agrees with the comments of Lords Hope and Neuberger in *R (L)* [at paras 43 and 73], to the effect that the fact that disclosure follows upon a request by the data subject or with her consent is no answer to concerns regarding the compatibility of disclosure with article 8 of the Convention. Individuals have no real choice if an employer in their chosen profession insists, and is entitled to do so, on disclosure." (para 189)

108. In considering whether the interference was justified under article 8(2), the court focused initially upon the question whether the interference was "in accordance with the law". In order to satisfy that test, the domestic law had to be compatible with the rule of law, and therefore "must afford adequate legal protection against arbitrariness" (para 193). In particular, following the approach adopted by the Grand Chamber in such cases as *Amman v Switzerland, Rotaru v Romania* and *Bykov v Russia* (Application No 4378/02) (unreported) given 10 March 2009, the court considered it essential in the context of the recording and communication of criminal record data, as in relation to telephone tapping, secret surveillance and covert intelligence-gathering, to have clear, detailed rules governing the scope and application of measures, as well as minimum safeguards concerning, inter alia, duration, storage, usage, access of third parties, procedures for preserving the integrity and confidentiality of data and procedures for their destruction, thus providing sufficient guarantees against the risk of abuse and arbitrariness (para 195). In that regard, the court drew attention to Principles 2.1, 5 and 7 of Recommendation No R (87) 15.

109. The court acknowledged that there might be a need for a comprehensive record of all cautions, convictions and other information of the nature disclosed under section 113B of the 1997 Act. But it observed that the indiscriminate and open-ended collection of criminal record data was unlikely to comply with the requirements of article 8 in the absence of clear and detailed statutory regulations clarifying the safeguards applicable and setting out the rules governing, inter alia, the circumstances in which data could be collected, the duration of their storage, the use to which they could be put and the circumstances in which they might be destroyed (para 199). The court referred in that connection to passages in the judgments of Lord Hope and Lord Neuberger in *R (L)* as demonstrating the wide reach of the legislation requiring disclosure and the impact of an adverse certificate upon the hopes of a person who aspires to any post which falls within the scope of disclosure requirements.

110. In relation to the possibility of future disclosure of the applicant's caution, the court stated:

"Pursuant to the legislation now in place, caution data contained in central records, including where applicable information on spent cautions, must be disclosed in the

context of a standard or enhanced criminal record check. No distinction is made based on the seriousness or the circumstances of the offence, the time which has elapsed since the offence was committed and whether the caution is spent. In short, there appears to be no scope for the exercise of any discretion in the disclosure exercise. Nor, as a consequence of the mandatory nature of the disclosure, is there any provision for the making of prior representations by the data subject to prevent the data being disclosed either generally or in a specific case. The applicable legislation does not allow for any assessment at any stage in the disclosure process of the relevance of conviction or caution data held in central records to the employment sought, or of the extent to which the data subject may be perceived as continuing to pose a risk such that the disclosure of the data to the employer is justified." (para 204)

111. The court concluded:

"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 limited 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."

112. In the present case, counsel for the Secretaries of State was critical of the reasoning of this judgment. Lord Wilson adopts some of their criticisms. I take a different view. The approach adopted by the court in *MM* appears to me to have been based on its settled case law.

113. As long ago as 1984, the court said in *Malone v United Kingdom* (1985) 7 EHRR 14, in the context of surveillance measures, that the phrase "in accordance with the law" implies that "the law must … give the individual adequate protection against arbitrary interference" (para 68). In *Kopp v Switzerland* (1999) 27 EHRR 91, para 72, it stated that since the surveillance constituted a serious interference with private life and correspondence, it must be based on a "law" that was particularly precise:

"It is essential to have clear, detailed rules on the subject, especially as the technology available for use is continually becoming more sophisticated."

These statements were reiterated in *Amman v Switzerland* 30 EHRR 843. As I have explained, that approach to the question whether the measure provides sufficient protection against arbitrary interference was applied, in the context of criminal records and other intelligence, in *Rotaru v Romania*, where the finding that the interference was not "in accordance with the law" was based upon the absence from the national law of adequate safeguards. The condemnation of Part V of the 1997 Act in *MM v United Kingdom* is based on an application of the same approach. Put shortly, 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.

114. This issue may appear to overlap with the question whether the interference is "necessary in a democratic society": a question which requires an assessment of the proportionality of the interference. These two issues are indeed inter-linked, as I shall explain, but their focus is different. Determination of whether the collection and use by the state of personal data was necessary in a particular case involves an assessment of the relevancy and sufficiency of the reasons given by the national authorities. In making that assessment, in a context where the aim pursued is likely to be the protection of national security or public safety, or the prevention of disorder or crime, the court allows a margin of appreciation to the national authorities, recognising that they are often in the best position to determine the necessity for the interference. As I have explained, the court's focus tends to be upon whether there were adequate safeguards against abuse, since the existence of such safeguards should ensure that the national authorities have addressed the issue of the necessity for the interference in a manner which is capable of satisfying the requirements of the Convention. In other words, in order for the interference to be "in accordance with the law", there must be safeguards which have the effect of enabling the proportionality of the interference to be adequately examined. Whether the interference in a given case was in fact proportionate is a separate question.

115. The criticism that the court in *MM* did not allow for any margin of appreciation is therefore misplaced. Whether a system provides adequate safeguards against arbitrary treatment, and is therefore "in accordance with the law" within the meaning of the Convention, is not a question of proportionality, and is therefore not a matter in relation to which the court allows national authorities a margin of appreciation.

116. The criticism that the court reached its conclusion in *MM* on a basis that had not been argued by the applicant reflects assumptions about the judicial role that do not hold good across the English Channel. In Strasbourg, the civilian principle jura novit curia applies: the court indeed referred to the principle in its judgment. This was by no means the first occasion on which the court had found a violation on a basis which the applicant had not raised: the court gave some other examples at para 150 of the judgment.

…….

128. The search for common standards, whether evidenced by international instruments or by national laws and practices, is a constant thread running through the case law of the European court. By anchoring developments in its jurisprudence to developments at the national or international level, the court seeks to ensure that it

keeps pace with societal developments. I shall therefore begin by considering relevant developments at the international level.

129. There is no doubt that the importance attached to the rehabilitation of offenders in a variety of international instruments can be a relevant consideration in the application of the Convention. For example, in its judgment in *MM v United Kingdom* the court referred at para 142 to Recommendation No R (84) 10 on the criminal record and rehabilitation of convicted persons, adopted by the Committee of Ministers on 21 June 1984. The document sets out measures which the governments of the member states are recommended to introduce where necessary. In particular, recommendation 1 is "to provide that the information mentioned on the criminal record will be communicated only in the form of extracts whose content will be strictly limited to the legitimate interest of the recipients". That recommendation reflects the view, expressed in the preamble to the document, that the disclosure of criminal records outside the context of criminal proceedings may jeopardise the convicted person's chances of social reintegration, and should therefore be restricted to the utmost. Other recommendations include "to provide for an automatic rehabilitation after a reasonably short period of time" (recommendation 10) and "to provide that rehabilitation implies prohibition of any reference to the convictions of a rehabilitated person except on compelling grounds provided for in national law" (recommendation 13).

130. In its judgment in *V v United Kingdom* (2000) 30 EHRR 121 the court also referred to Recommendation R (87) 20 on social reactions to juvenile delinquency, adopted by the Committee of Ministers on 17 September 1987. The document recommends the governments of member states to review, if necessary, their legislation and practice with a view:

> "10. to ensuring that the entries of decisions relating to minors in the police records are treated as confidential and only communicated to the judicial authorities or equivalent authorities and that these entries are not used after the persons concerned come of age, except on compelling grounds provided for in national law."

131. There are a number of other international instruments which are also relevant to the rehabilitation of juvenile offenders, and which the court has referred to in its case law. First, the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules), adopted by the United Nations General Assembly on 29 November 1985, contain a number of relevant provisions. Rule 21, concerned with records, provides:

> "21.1 Records of juvenile offenders shall be kept strictly confidential and closed to third parties. Access to such records shall be limited to persons directly concerned with the disposition of the case at hand or other duly authorized persons.
> 21.2 Records of juvenile offenders shall not be used in adult proceedings in subsequent cases involving the same offender."

These Rules are not binding in international law: in the Preamble, states are invited, but not required, to adopt them.

132. The United Nations Convention on the Rights of the Child, adopted by the General Assembly of the United Nations on 20 November 1989, has binding force under international law on the contracting states, including all of the member states of the Council of Europe. Article 40 provides:

> "1. States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society."

133. Finally, in this connection, the International Covenant on Civil and Political Rights 1966 provides in article 14(4), which broadly corresponds to article 6 of the European Convention, that:

> "In the case of juvenile persons, the procedure shall be such as will take account of their age, and the desirability of promoting their rehabilitation."

134. Some of these instruments are of greater significance than others in the present context, but they are consistent in their emphasis upon the importance attached to the rehabilitation of minor and juvenile offenders, and to the confidentiality of their criminal records as an aid to promoting their rehabilitation. In particular, recommendations 10 and 13 of Recommendation No R (84) 10, recommendation 10 of Recommendation R (87) 20, and rule 21 of the Beijing Rules, are directly relevant to the present context. That a person should in practice be required throughout his adult life to disclose the fact that he committed a minor offence as a juvenile, if he wishes to pursue a wide range of careers, is difficult to reconcile with these provisions, in the absence of what recommendation 10 of Recommendation R (87) 20 describes as "compelling grounds".

The laws of the member states

135. When considering what the position might be under the Convention, it is also relevant to consider whether there is or is not a consensus across the member states: as the European court has often said, where no consensus exists, the margin of appreciation afforded to states is generally a wide one. No comparative analysis was however presented by any of the parties to the appeals. Although a certain amount of information is readily available, notably in the Home Office report, "Breaking the Circle – a Report of the Review of the Rehabilitation of Offenders Act" (2002), the Report of the Irish Law Reform Commission on Spent Convictions, LRC 84-2007 (2007), and the report published by KPMG, *Disclosure of Records in Overseas Jurisdictions* (2009), it would not be appropriate to draw firm conclusions from it in the absence of submissions.

136. The reports that I have mentioned indicate that a survey would probably be of limited assistance in any event, since almost all the other member states do not have legislation equivalent to the 1974 Act, but address the issue of rehabilitation in other ways, such as provisions in their constitution or civil code which prohibit unjustified discrimination against ex-offenders. The reports focus upon the vetting of potential

employees on the basis of criminal record certificates. In that context, there appears to be a widely held view that the disclosure of information about a minor conviction of a juvenile offender, after he has become an adult, is not appropriate. That is consistent with the international instruments to which I have referred. It is relevant to note that a child of 11 would not be regarded as criminally responsible in most of the member states.

2. R on the application of P and A

Extracts from the judgment of Lord Justice McCombe

84. In my judgment, in taking the step that it did in the *T* case, the Supreme Court moved our domestic understanding of the requirement for an interference with Article 8 rights to be "in accordance with the law" a significant distance from what had previously been understood. Before that case, I think most English lawyers would have been with Mr Eadie QC, in his argument for the Secretaries of State in *T* ([2015] AC at 55F), that the 1997 Act represented "clear law" which satisfied the requirement of the first limb of Article 8.2 and that, therefore, the only question was "necessity" of the interference in accord with the second limb of that sub-article. Like the original version of the 1997 Act, we would have regarded the Act (as now amended) to be even more clear and compliant with the "legality" requirement of Article 8. However, it seems to me that we must now adopt a different approach.

85. As I understand it, the question must now be whether the present statute affords the individual adequate protection against arbitrariness, but also, in order for an interference with Article 8 rights to be "in accordance with the law" there must be adequate safeguards which have the effect of enabling the proportionality of the interference to be adequately examined". As Lord Reed put it in *T* at [114],

    "This issue may appear to overlap with the question whether the interference is "necessary in a democratic society": a question which requires an assessment of the proportionality of the interference. These two issues are indeed interlinked…"

86. We can see, first, from the present cases before us, secondly from the facts of the *Gallagher* case and, thirdly, from the further examples given by Treacy J at [40] in that case, that the present rules can give rise to some very startling consequences. Such results are, in my judgment, properly to be described as "arbitrary".

87. No doubt in many cases rules requiring indefinite disclosure of certain serious offences will be seen to be far from arbitrary, in that such offences will clearly be relevant to anyone considering a person's suitability for engagement in a sensitive post requiring an ECRC. However, when the rules are capable of producing such questionable results, on their margins, there ought (as it seems to me) to be some machinery for testing the proportionality of the interference if the scheme is to be "in accordance with the law" under the wider understanding of that concept that emerges form the *T* case, following *MM*.

88. If, as I now think, the present scheme, as represented by the 1997 Act at least, is not in accordance with the law, within the meaning of Article 8.2, then (as Lord Reed explained) the state's "margin of appreciation" falls away. The deference that a judge would always feel towards a scheme expressly sanctioned by Parliament cannot be engaged in this case. Equally, therefore, it seems to me, that questions of administrative convenience which trouble the Defendants so much can have no operative place in assessing the lawfulness of the interference with Convention rights. For my part, in any event, I am far from convinced that a review scheme would be unworkable, in some cases *ad hoc* related to a specific application for a certificate or more generally after the lapse of suitable time, with a time bar to a further application for review after an unsuccessful attempt.

89. Having reached the conclusion that the Act in its present form fails to meet ECHR requirements "as to the quality of the law", a decision as to whether the interference with rights under Article 8 is "necessary" does not strictly arise. However, I can see no reason for thinking that the convictions in issue in the present cases before us bear, for the Claimants' entire lifetimes, a rational relationship with the objects sought to be achieved by the disclosure provisions of the Act, simply because in the case of each Claimant there is more than one conviction. It seems to me that, with respect, the reasoning that appealed to Lord Reed on this point in the unamended scheme seems just as applicable here.