



**Case review - *R (on the applications of P and A) v Secretary of State for Justice* [2016] EWHC 89 (Admin)**

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Where should the balance be struck between the need to facilitate the employment of former offenders, whilst protecting the vulnerable and recognising the special requirements of certain sensitive professions, employments and activities? The legislation that has attempted to answer this question has – for the second time in two years – been struck down. In *R (on the applications of P and A) v Secretary of State for Justice* [2016] EWHC 89 (Admin), in a judgment handed down on 22 January 2016, the Divisional Court (McCombe LJ and Carr J) has held that the present scheme concerning the disclosure of certain convictions and cautions is incompatible with Article 8 of the ECHR.

In *R (T) v Chief Constable of Greater Manchester Police & ors* [2014] UKSC 35, the Supreme Court had considered the scheme then in place concerning enhanced criminal records certificates (“ECRC”) and the disclosure of convictions and cautions in the Police Act 1997 Part V. The Supreme Court had held that the unamended provisions were incompatible with Article 8. The government responded to that litigation with an amended scheme: the Police Act (Criminal Records Certificates: Relevant Matters) (Amendment) (England and Wales) Order 2013 and the Rehabilitation of Offenders Act (Exceptions) Order 1975 (Amendment) (England and Wales) Order 2013.

The Divisional Court was considering a similar challenge to that seen in the Supreme Court. The effect of the amended scheme that was before the Divisional Court is that where there are two or more convictions, they are always disclosable on a criminal records certificate or an ECRC, and where a conviction is of a specified kind or resulted in a custodial sentence, or is ‘current’ (i.e. for an adult within the last 11 years and for a minor within the last 5 years and 6 months), then it will always be disclosable. The primary feature of the revised scheme is that where there is more than one conviction, all convictions are disclosable throughout the subject’s lifetime.

For the claimants in P, the matters at stake were significant: they would be required to disclose convictions under the revised scheme which had arisen in one case in relation to minor theft offences a very long time ago, and in the other case for minor offences that had arisen in circumstances, where the subject was severely mentally ill.

The Secretary of State for Justice proceeded on the basis that the disclosure or potential disclosure of the claimants’ convictions constituted an interference with their rights under Article 8. Accordingly, argument focussed on Article 8(2), namely the legality and necessity of the revised scheme.

McCombe LJ held that, in *T*, the Supreme Court had moved the 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. At §85, he stated that, “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.” The Divisional Court found that the revised scheme is not in accordance with the law.

McCombe LJ further considered in relation to necessity that he could see no reason for thinking that the convictions in issue in the present cases bear, for the claimants’ entire lifetimes, a rational relationship with the objects sought to be achieved by the disclosure provisions of the scheme, just because each claimant had more than one conviction.

The precise form of relief to be given to the claimants is now a matter for further submissions. It remains to be seen whether, in the further revisions to the scheme that must now surely follow, it will be ‘third-time lucky’ for the government in striking the balances ‘in accordance with the law’.

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