

R (on the application of P) v Secretary of State for the Home Department: Creating a criminal record scheme with bright-line rules that respect the right to privacy

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Abstract

This comment considers the Court of Appeal's May 2017 ruling in *R (on the application of P) v Secretary of State for the Home Department*.¹ As commentators and campaigners predicted, the Court of Appeal ruled that Parliament's 2013 amendments to the criminal record scheme did not go far enough. The scheme contains bright-line rules that operate in an "arbitrary" manner and in breach of Article 8 of the European Convention on Human Rights. In addition to this specific ruling, the case contains a general point of significance relating to the state's requirements under Article 8. Sir Brian Leveson, in line with Lord Reed's reasoning in *R (on the application of (T)) v Chief Constable of Greater Manchester*,² stated that the requirement to be "in accordance with the law" under Article 8 means that a legal scheme has to be more than simply clear and accessible. It also has to contain safeguards which enable "the proportionality of the interference in general to be examined."³ It will be interesting to monitor whether this approach to the state's duties under Article 8 will influence future judicial assessments of legal schemes that engage the right to privacy.

1. Introduction

Those who are familiar with the criminal record scheme in England and Wales will know that it has generated numerous legal challenges⁴ and critical analysis.⁵ Both the domestic courts and the European Court of Human Rights (ECtHR) have ruled that Parliament has not yet struck the right balance between the need to keep the public safe and ex-offenders' right to privacy. In May 2017 the Court of Appeal in *R (on the application of P) v Secretary of State for the Home Department (R(P) v Secretary of State)*⁶ confirmed what many had predicted:⁷ that Parliament's 2013 amendments to the criminal record scheme were too limited in scope. Despite the introduction of filtering rules to restrict the disclosure of old and minor convictions, the Court of

¹ [2017] EWCA Civ 321, [2017] 2 Cr App R 12.

² [2013] EWCA Civ 25, [2013] 1 WLR 2515.

³ *R(P) v Secretary of State* [2017] EWCA Civ 321, [2017] 2 Cr App R 12 [23].

⁴ See, e.g., *R (L) v Comr of Police for the Metropolis* [2009] UKSC 3, [2010] 1 AC 410; *MM v United Kingdom* (24029/07), Times, January 16, 2013; *Regina (T) v Chief Constable of Greater Manchester Police* [2014] UKSC 35, [2015] AC 49.

⁵ The critical analysis of the scheme spans decades. See, e.g., The Gardiner Committee, *Living it Down: the Problem of Old Convictions: the report of a committee set up by JUSTICE, the Howard League for Penal Reform and the National Association for the Care and Resettlement of Offenders* (1972); Chris Baldwin, "Necessary Intrusion or Criminalising the Innocent? An Exploration of Modern Criminal Vetting," *The Journal of Criminal Law* (Apr. 2012), 76:2, 140-163; Unlock, "Core Issues," <http://www.unlock.org.uk/policy-issues/key-issues-were-focusing-on/>.

⁶ [2017] EWCA Civ 321, [2017] 2 Cr App R 12.

⁷ See, e.g., Elena Larrauri Pijoan, "Criminal Record Disclosure and the Right to Privacy," *Crim. L.R.*, Issue 10 (2014), 723-737; Jamie Grace, "'Too Well-Travelled', Not Well-Formed? The Reform of 'Criminality Information Sharing' in England and Wales" (2013) 86 *Pol J* 29; Unlock, "Letter to the Secondary Legislation Scrutiny Committee" (Apr. 2013), <http://www.parliament.uk/documents/lords-committees/Secondary-Legislation-Scrutiny-Committee/Unlock-Draft-Rehab-Offenders.pdf>.

Appeal ruled that the scheme remains “indiscriminate,”⁸ producing “startling consequences”⁹ that breach Article 8 of the European Convention on Human Rights (ECHR).¹⁰ So it looks like Parliament will be forced to go back to the drawing board – again.

For the eleven million people in the UK with a criminal record,¹¹ the question of whether they can put their criminal pasts behind them can have profound consequences. A 2016 YouGov survey commissioned by the Department of Work and Pensions found that that 50% of employers would not consider employing an offender or ex-offender.¹² It is no surprise that Lord Neuberger described a criminal record as “something close to a killer blow to the hopes of a person who aspires to any post which falls within the scope [of the criminal record scheme],”¹³ or that commentators have referred to the collateral damage of having a criminal record as an “invisible punishment.”¹⁴

All ex-offenders probably wish they had the right to erase entirely their criminal past. However, as the Court of Appeal identified, the right for ex-offenders to put their past behind them “concerns the interface of two important principles of social policy”: 1) the rehabilitation of ex-offenders; and 2) the requirement that the public is kept safe.¹⁵ In order to achieve the second goal, the state systematically records, retains and sometimes discloses an individual’s criminal history.

When managing and administering such a complex scheme, it is inevitable that the state will attempt to rely on some bright-line rules. The Government has been grappling for many years with the best way to implement such rules. In 2009 it appointed Ms Sunita Mason as Independent Advisor for Criminality Information Management and asked her to:

examine whether the criminal records regime strikes the right balance between respecting civil liberties and protecting the public. [The review] is expected to make proposals to scale back the use of systems involving criminal records to common sense levels.¹⁶

⁸ *R(P) v Secretary of State* [44].

⁹ *Ibid* [45].

¹⁰ Article 8 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 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 freedom of others.”

¹¹ Business in the Community, “Who are Ex-Offenders?,”

https://www.bitc.org.uk/sites/default/files/who_are_ex-offenders_-_employer_factsheet.pdf.

¹² YouGov / DWP Survey Results (2016),

https://d25d2506sfb94s.cloudfront.net/cumulus_uploads/document/42yrwvixdo/YG-Archive-160126-DWPwaves.pdf.

¹³ *R (on the application of L) v Commissioner of Police of the Metropolis* [2009] UKSC 3; [2010] 1 AC 410 [75].

¹⁴ Terry Thomas & Bill Heberton, “Dilemmas and consequences of prior criminal record: a criminological perspective from England and Wales,” *Criminal Justice Studies*, 26:2 (2013), pp. 228-242, at p. 238.

¹⁵ *R(P) v Secretary of State* [1].

¹⁶ Gov.UK, “Criminal Records Review: Terms of Reference” (Oct. 2010), available at: <https://www.gov.uk/government/publications/criminal-records-review-terms-of-reference>.

Ms Mason produced two in-depth reports on the issue with recommendations that included improving systems that enable individuals to access, challenge and correct their criminal records.¹⁷

In 2015, the Supreme Court gave some general guidance on the lawfulness of bright-line rules. Baroness Hale reviewed the jurisprudence of the ECtHR and concluded that Strasbourg had not been “altogether clear on this question.”¹⁸ The Supreme Court held that bright-line rules could be justified in a particular context. However, “the particular bright line chosen has itself to be rationally connected to the aim and a proportionate way of achieving it.”¹⁹ The Court also observed that exclusionary bright-line rules were less likely to be lawful than inclusionary rules because the former “allows for no discretion to consider the unusual cases falling the wrong side of the line but equally deserving.”²⁰ However, it concluded that a wholly individualised system was not necessary:

Hitherto the evidence and discussion in this case has tended to focus on whether there should be a bright line rule or a wholly individualised system. There are obvious intermediate options, such as a more properly tailored bright line rule, with or without the possibility of making exceptions for particularly strong cases which fall outside it. There are plenty of precedents for such an approach including in immigration control.²¹

In *R(P) v Secretary of State* the Court of Appeal found that the bright-line rules introduced by the 2013 amendments to the criminal record scheme were unlawful because they were not, as yet, “properly tailored.”

2. The Current Criminal Record Scheme in England and Wales

The criminal record scheme in England and Wales is complex, with layers of amendments spread across numerous pieces of legislation, guidelines and policies. It is also a scheme that affects a large number of people. In 2015, the Disclosure and Barring Service (DBS) processed 4.2 million applications.²²

As campaigners in this area are all too aware, the UK has a history of being risk-averse²³ and all-encompassing with regard to criminal record retention and disclosure.

¹⁷ Sunita Mason, *A Balanced Approach* (Mar. 2010), available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/97894/common-sense-approach.pdf; Sunita Mason, *A Common Sense Approach* (Nov. 2011), available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/97893/criminal-records-review-phase2.pdf.

¹⁸ *R (Tigere) v Secretary of State for Business, Innovation and Skills* [2015] UKSC 57, [2015] 1 WLR 3820 [36].

¹⁹ *Ibid* [37].

²⁰ *Ibid* [37].

²¹ *Ibid* [37].

²² Law Commission, *Criminal Records Disclosure: Non-Filterable Offences* (Jan. 2017), p. 2 at para. 1.9, available at: https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2017/01/lc371_criminal_records_disclosure.pdf.

²³ One reason for this risk-averse approach is because the criminal record scheme was influenced by the case of Ian Huntley. Huntley murdered two schoolgirls who attended the school where he was a caretaker. There had been previous underage sex complaints made against Huntley that were not discovered by his employer. The 2004 Bichard inquiry that followed these murders led to the

It retains and discloses a far wider range of convictions and cautions than other European countries.²⁴ This “generous approach” to the exercise of police power to retain personal data has been roundly criticised by the ECtHR.²⁵

Provided below is a broad outline of the criminal record scheme as it currently operates:

2.1 Retention of criminal records

Any individual convicted of a recordable offence will have a record of that offence placed on the Police National Computer (PNC). Records will also be created for individuals who are cautioned, reprimanded,²⁶ warned or arrested for recordable offences. These records are retained until the individual is 100. The police also record “soft intelligence” on the Police National Database, which includes information such as details of a criminal investigation that did not lead to conviction.

2.2 “Spent” convictions

If an individual has received a term of imprisonment or detention of over four years then they must always disclose their criminal record when applying for jobs. Other ex-offenders will not necessarily have to disclose their previous convictions or cautions. This is because, under the Rehabilitation of Offenders Act 1974 (“the 1974 Act”), convictions and cautions can become “spent” after a specified rehabilitation period, meaning they do not have to be disclosed.²⁷ However, even these spent records have sometimes to be disclosed by ex-offenders. Under the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 (“the 1975 Order”), individuals must disclose spent convictions and cautions when employers ask them questions relating, for example, to the safeguarding of children and vulnerable adults.

2.3 Disclosure of Criminal Records

As well as relying on disclosure by ex-offenders, employers can request a criminal record check conducted by the state. Under Part V of the Police Act 1997 (“the 1997 Act”), the DBS, acting on behalf of the Secretary of State, can conduct criminal background checks on individuals and review the information held on the PNC. Of relevance to *R (P) v Secretary of State* are two particular types of certificates that can be issued by the DBS: Criminal Record Certificates (CRC) and Enhanced Criminal Record Certificates (ECRC). These can be issued when an individual applies for specific positions relating again, for example, to the safeguarding of children and vulnerable adults.

establishment of the CRB (now DBS). For one example of the way the media pushes politicians to become more risk-averse see Corinna Ferguson, “CRB: Setting the Record Straight,” Liberty (30 Jan. 2013), available at: <https://www.liberty-human-rights.org.uk/news/blog/crb-setting-record-straight>.

²⁴ See, e.g., Christopher Stacey, “Rehabilitation & Desistance vs Disclosure. Criminal Records: Lessons from Europe,” *Unlock* (Apr. 2015); Elena Larrauri Pijoan, “Criminal Record Disclosure and the Right to Privacy,” *Crim. L.R.*, Issue 10 (2014), pp. 726-728; Law Commission, “Appendix B: Disclosure of Criminal Records Information in other Jurisdictions,” *Criminal Records Disclosure: Non-Filterable Offences* (Jan. 2017), available at: https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jxsou24uy7q/uploads/2017/01/lc371_criminal_records_disclosure.pdf.

²⁵ *MM v United Kingdom* (24029/07), *Times*, January 16, 2013 [170].

²⁶ Reprimands and warnings for youths were abolished in 2013 (section 135(1) Legal Aid Sentencing and Punishment of Offenders Act 2012) and replaced with youth cautions (sections 66ZA and 66ZB Crime and Disorder Act 1998, inserted by section 135 (2) Legal Aid Sentencing and Punishment of Offenders Act 2012).

²⁷ See Article 5 of the 1974 Act for the rehabilitation periods for particular sentences and Schedule 2 of the 1974 Act for the provisions relating to when a caution can be spent.

The only significant difference between a CRC and an ECRC is that an ECRC must include any “soft intelligence” that the police force “reasonably believes to be relevant” to the enquiry made and “ought to be included.”²⁸ If an applicant believes either a CRC or an ECRC is inaccurate then she or he can apply to the DBS for a new certificate. In the case of an ECRC, the applicant also has a right of challenge to a chief officer of police on the grounds that the information included is not relevant and should not have been included.²⁹

2.4 2013 Amendments

Prior to 2013, the criminal record scheme required a CRC and an ECRC to disclose all convictions and cautions, whether current or spent, whatever the nature of the offence. This scheme was found to be unlawful and arbitrary by the Court of Appeal in *R (on the application of (T)) v Chief Constable of Greater Manchester*,³⁰ a finding that was confirmed by the Supreme Court (“*T v CCGM*”).³¹ This decision, following an earlier decision by the ECtHR which had also found the criminal record scheme in England and Wales to be unlawful,³² finally prompted the Government to amend the relevant legislation.³³ The revised scheme had been introduced before the Supreme Court considered the case, but no opinion was expressed upon it.

The Government attempted to remedy the arbitrariness of the disclosure scheme identified by the Supreme Court in *T v CCGM* by introducing a filtering system.³⁴ The amendments, the Government claimed, were “proportionate. They ensure that public protection is not compromised, while avoiding unnecessary intrusion into people’s lives.”³⁵ Under the amended scheme spent cautions and convictions are “filtered” after a specified period of time and are not disclosed on CRCs and ECRCs. However, this filtering process still involves the imposition of bright-line rules; spent convictions and cautions cannot be “filtered” if:

²⁸ Police Act 1997, section 113B(4). See also Gov.UK, “DBS Disclosure Representations Process,” available at: <https://www.gov.uk/guidance/disclosure-and-barring-service-representations-process>. The inclusion of non-conviction information in ECRCs (sometimes referred to as “soft intelligence”) was the subject of the Supreme Court decision in *R (L) v Comr of Police for the Metropolis* [2009] UKSC 3, [2010] 1 AC 410.

²⁹ Police Act 1997, section 117A.

³⁰ [2013] EWCA Civ 25, [2013] 1 WLR 2515.

³¹ *R (on the application of T) v Chief Constable of Greater Manchester* [2014] UKSC 35, [2015] AC 49. 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*. The Supreme Court, however, ruled that the Court of Appeal was wrong to make that declaration because the 1975 Order was subordinate legislation and it was possible for the 1974 Act to be interpreted in a manner compatible with Article 8.

³² *MM v United Kingdom* (24029/07), The Times, January 16, 2013, [2012] ECHR 1906.

³³ The 2013 amendments were not solely based on the Court of Appeal’s decision in *T v CCGM*. As mentioned earlier in this comment, there had previously been extensive ongoing consultations about the criminal record scheme and the Government had appointed Ms Sunita Mason as the Independent Advisor for Criminality Information Management.

³⁴ The amendments were introduced by the Police Act 1997 (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.

³⁵ Jeremy Wright MP, Second Delegated Legislation Committee, “Draft Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 (Amendment) (England and Wales) Order 2013” (20 May 2013), available at: <https://publications.parliament.uk/pa/cm201314/cmgeneral/deleg2/130520/130520s01.htm>.

- a) they are for a “listed offence,” of which there are over 1,000 including all serious violent and sexual offences³⁶ (“the serious offence rule”);
- b) an individual has more than one conviction (“the multiple conviction rule”).

All four claimants in *R (P) v Secretary of State* were caught by these bright-line rules introduced by the 2013 amendments and so were unable to put their criminal past behind them. They asked the Court of Appeal to assess the lawfulness of the rules.

3. The claimants

The four claimants in the case were:

- 1) P, who committed two minor shoplifting offences in 1999 when she was suffering from undiagnosed schizophrenia. As a result of the schizophrenia and the fact that she was homeless, P failed to appear in court and was consequently convicted of the second shoplifting offence and also for failing to appear at court. She received a caution for the first offence. P now wished to work as a teaching assistant and was required to obtain a criminal record certificate. Her two convictions were mandatorily disclosed under the multiple conviction rule. She argued that the disclosure of her criminal past meant she was unable to secure paid employment.
- 2) G, who when he was eleven to thirteen years old, had consensual intercourse with two boys aged eight to ten years old. When he was still thirteen years old, G was issued with two reprimands for offences of sexual activity with a child. In 2011, when G was eighteen years old, he worked at a local library and was required to obtain an ECRC. The ECRC would have mandatorily disclosed the reprimands under the serious offence rule so G withdrew his application. In 2014, he asked the Chief Constable to expunge the reprimands. This request was refused.
- 3) W, who in 1982 when he was sixteen years old, was convicted of ABH. He received a conditional discharge. At forty-seven he wished to become a teacher but, under the serious offence rule, this conviction was mandatorily disclosed.
- 4) Krol who was cautioned in 2007 for ABH after hitting her three-year-old daughter in public. She subsequently applied for jobs but the caution was disclosed. The Metropolitan Police Commissioner refused Krol’s requests to expunge the caution and it was this refusal that Krol challenged in her case. She did not challenge the scheme as a whole. It is worth noting that later allegations of violence were made against Krol and claims that she had given a false name to the police. The child she had hit was ultimately made the subject of a care order.

³⁶ A list of offences that will never be filterable is available here: Gov.UK, <https://www.gov.uk/government/publications/dbs-list-of-offences-that-will-never-be-filtered-from-a-criminal-record-check>.

4. The Court of Appeal's decision

The fact that there had been an interference with the Article 8 rights of all these claimants was not in dispute. There is no longer any doubt in British courts about the application of Article 8 to the systematic retention and disclosure of criminal record information.³⁷ The courts have observed that a caution, which is administered in private, is immediately part of a person's private life.³⁸ A conviction, which is administered in public, becomes part of a person's private life as it fades into the past.³⁹ Article 8 has, in addition, been interpreted to include an individual's right to form relationships, including those at work.⁴⁰

Despite this interference with the claimants' right to a private life, it is possible for the state to justify this interference under the provisions of Article 8(2) ECHR.

Justification under Article 8(2) requires the measures that interfere with the right to be both "in accordance with the law" (the legality test) and "necessary in a democratic society" (the necessity test). In order to satisfy the second test the measures must pursue a legitimate aim such as crime prevention and the protection of the public, be rationally connected to the legitimate aim and be proportionate.

The legality test has traditionally been interpreted to require three safeguards: 1) that there is a specific rule or regime that authorises the interference; 2) that the citizen has adequate access to the law in question;⁴¹ and 3) that the law is formulated with sufficient precision to enable the citizen to foresee when the law will or might be applied.⁴² However, Lord Reed in the majority decision in *T v CCGM* stated that the legality test also required the state to put in place sufficient safeguards so that the proportionality of the scheme in general could be challenged. Courts should not allow the state a margin of appreciation when considering this point (unlike when they consider the necessity test), preventing the state from justifying any interference with Article 8 rights on the grounds of, for example, administrative necessity.⁴³

4.1 Revised criminal record scheme not "in accordance with the law"

As noted above, the traditional understanding of "in accordance with the law" in domestic courts was that this "required only clear and publicly accessible rules of law, invulnerable to arbitrariness."⁴⁴ In other words, as Mr Eadie QC put it for the Government in *R(P) v Secretary of State*, it was enough for the Government to show that the criminal record scheme was governed by "clear law."⁴⁵ Leveson J disagreed and adopted the approach taken by Lord Reed in the case of *T v CCGM*. In order to be "in accordance with the law," the legal scheme had to be more than clear and

³⁷ That said, it was as recently as 2010 that the Court of Appeal doubted whether the retention of records of minor convictions engaged Article 8. See *Chief Constable of Humberside Police v Information Comr* [2009] EWCA Civ 1079.

³⁸ *R (L) v Comr of Police of the Metropolis* [2009] UKSC 3, [2010] 1 AC 410 [27] (Lord Hope).

³⁹ *R (on the application of T) v Chief Constable of Greater Manchester* [2014] UKSC 35, [2015] AC 49 [18] (Lord Wilson).

⁴⁰ *Ibid* [138] (Lord Reed).

⁴¹ *The Sunday Times v United Kingdom* (1979) 2 EHRR 245.

⁴² *Malone v United Kingdom* (1984) 7 EHRR 14

⁴³ *R (on the application of T) v Chief Constable of Greater Manchester* [2014] UKSC 35, [2015] AC 49 [114-115] (Lord Reed).

⁴⁴ *R(P) v Secretary of State* [2017] EWCA Civ 321, [2017] 2 Cr App R 12 [22].

⁴⁵ *R (on the application of P) v Secretary of State for Justice* [2016] EWHC 89 (Admin), [2016] 1 WLR 2009 [84] (McCombe LJ).

accessible. The scheme also had to contain “safeguards which had the effect of enabling the proportionality of the interference in general to be examined.”⁴⁶

Lord Reed in the case of *T v CCGM* held that there were insufficient safeguards in the pre-2013 criminal record scheme. The scheme, Lord Reed said, was not “in accordance with the law”

because of the cumulative effect of the failure to draw any distinction 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, and the absence of any mechanism for independent review of a decision to disclose data under section 113A [of the 1997 Police Act].⁴⁷

Not surprisingly, there was dispute amongst the parties in *R(P) v Secretary of State* as to what exactly this quoted extract from Lord Reed meant. The Government argued that none of the features listed were determinative. The 2013 amendments had introduced *some* of the distinctions mentioned (for example, the serious offence rule looked at the nature of the offence) and so the scheme was now lawful.⁴⁸ It was, the Government said, “open to Parliament to establish a scheme without individual review, and that the provision of a right of challenge is not a prerequisite of compatibility with Article 8.”⁴⁹ The claimants, however, argued that a mechanism for individual review was necessary in order for the scheme to be lawful.

Policy makers, campaigners and ex-offenders likely wanted clear guidance from the Court of Appeal about the necessity of an individual review mechanism. They will be disappointed. Leveson P’s conclusions were nuanced. He stated that:

- Bright-line rules are permissible.
- There is “no one particular safeguard that converts what is otherwise arbitrary into a scheme that is in accordance with the law.”⁵⁰
- “[T]he right of individual review is not a prerequisite in every case.”⁵¹
- The less the bright-line rules discriminated on the basis of the nature of the offence committed, the disposal and the amount of time that had passed since the offending behaviour, the more likely an independent review would be required.⁵²

After providing broad guidance on what was required for an interference with Article 8 to be “in accordance with the law,” Leveson P turned to the specific bright-line rules introduced by the 2013 amendments which interfered with the claimants’ rights. He found that both the multiple conviction rule and the serious offence rule were not “in accordance with the law.”

⁴⁶ *R(P) v Secretary of State* [2017] EWCA Civ 321, [2017] 2 Cr App R 12 [23].

⁴⁷ *Ibid.*

⁴⁸ *Ibid* [33].

⁴⁹ *Ibid* [35].

⁵⁰ *Ibid* [40].

⁵¹ *Ibid.*

⁵² *Ibid* [41].

He began by acknowledging that Parliament had developed these rules and that they were based on policy recommendations made by an independent expert. However,

strictly speaking (see Lord Reed in T at [115]) there is no margin of appreciation when it comes to determining whether a system provides adequate safeguards against arbitrary treatment.

The policy considerations underpinning the 2013 amendments could therefore not be used to justify a system that failed in broad terms to protect against arbitrary treatment.

Leveson P turned first to the multiple conviction rule. He held that this rule was “indiscriminate in that it applies without consideration of *any* of the features identified by Lord Reed.”⁵³ He noted that the rule was intended to capture those who had a pattern of offending. That said, “[t]he difficulty with the bright line ... is that it is not a necessary inference that two convictions do represent a pattern of offending behaviour.”⁵⁴ In P’s case, there was clearly no pattern of offending and the fact that the bright-line rule failed to draw any distinctions (such as the fact that the offending was linked to her ill health and was extremely limited in nature) meant that there was a disproportionate and unlawful interference in her private life.⁵⁵

With regard to the serious offence rule, Leveson P noted that it is not totally indiscriminate as it draws a distinction between serious offences and those not listed as serious. However, the bright-line is drawn with reference only to the nature of the offence. This lack of discrimination led to “startling consequences for the claimants in G and W.”⁵⁶ In G’s case, Leveson P noted that it was “particularly noteworthy ... that the rule provides no opportunity for the age of the individual at the time of the offence to be taken into account.”⁵⁷ The rule did not have sufficient safeguards to prevent it operating in an arbitrary manner and was therefore unlawful.

4.3 “Necessary in a democratic society”

The conclusion that neither the multiple conviction rule nor the serious offence rule were “in accordance with the law” was sufficient to ensure the success of the generic challenge to the scheme. However, Leveson P also concluded that the scheme was not “necessary in a democratic society” because the current system of disclosure was not “proportionate and linked to the protection of the public.”⁵⁸

When assessing the test of necessity, and in contrast to the test of legality, courts are obliged to show deference to Parliament (in other words, to give them a “margin of appreciation”). Leveson P was keen to emphasise that it was not the role of the judiciary to “fashion a solution”⁵⁹ and judges should not undertake a “granular analysis” of social policy.⁶⁰ He criticised Blake J who had undertaken a detailed

⁵³ *Ibid* [44].

⁵⁴ *Ibid* [78].

⁵⁵ *Ibid* [79].

⁵⁶ *Ibid* [45].

⁵⁷ *Ibid* [90].

⁵⁸ *Ibid* [66].

⁵⁹ *Ibid*.

⁶⁰ *Ibid* [55].

social policy analysis in the lower court.⁶¹ Blake J had, for example, criticised the low age of criminal responsibility in the UK, the length of rehabilitation periods and the filtering decisions in relation to young persons and children. These are, Leveson P said, “all matters of social policy for Parliament.”⁶²

Despite avoiding detailed policy recommendations, Leveson P suggested some possible areas for reform. He acknowledged the difficulty of identifying filters and the exact parameters of bright-line rules but stated that:

it would not necessarily be difficult to fashion a system which did not depend on individual review, but which would allow material which would not otherwise be included in a CRC (because of the filter) to be included in a ECRC, and, thus, subject to possible challenge through the relevant chief officer of police, should the applicant wish to challenge its relevance.⁶³

He also said that it was “entirely plausible” to devise a system that differentiated between the offending of children, young persons and adults.⁶⁴ Out-of-court disposals could be removed from the CRC after a certain period of time (different lengths depending on the age of the offender). The information could, however, still be included on an ECRC “which can be subject to challenge and, in the event of an adverse decision, appealed to the Magistrates’ Court.”⁶⁵

Ultimately, it was for the legislature and not the courts to decide where the lines should be drawn and the filters inserted. If, however, the scheme was not further amended Leveson P predicted that “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.”⁶⁶

4.4 Lawfulness of Police Commissioners’ refusal to expunge cautions

Leveson P also briefly considered the current process for expunging cautions, reprimands and warnings. He noted that Parliament had made the bright-line rules in this area less draconian so that there was now a “degree of elasticity to the previously more rigid operation of the police deletion policy in relation to out of court disposals.”⁶⁷ He concluded that the system was lawful and that the relevant Chief Constables, both in the case of G and Krol, had been right to refuse to expunge the reprimands and caution. In the case of Krol, for example, her subsequent actions (such as giving a false name and the fact that her child went into care) justified the retention of police information.

4.5 Remedy

Leveson P declared that the multiple conviction rule and serious offence rules could not be read or given effect in a way that was compatible with P, G and W’s rights. These declarations were claimant-specific. He ruled that the “vice” was “at the

⁶¹ *Ibid.*

⁶² *Ibid.*

⁶³ *Ibid* [64].

⁶⁴ *Ibid* [65].

⁶⁵ *Ibid.*

⁶⁶ *Ibid* [66].

⁶⁷ *Ibid* [71].

margins” rather than central to the nature of the order.⁶⁸ None of the legal rules themselves were therefore declared *ultra vires*.

5. What next for the criminal record scheme in England and Wales?

Lord Carlile recently observed that there is “cross-party support for being very radical about” the need to reform the criminal record scheme.⁶⁹ The Court of Appeal in *R(P) v Secretary of State* touched on a number of critical issues that are ripe for reform, including the operation of filtering rules and the impact of youth offending on an adult’s subsequent employment career.

It is difficult to predict how Parliament will approach its next effort to reform the criminal record scheme. However, one particular area that policy makers are currently focussing on is the treatment of under-eighteens within the criminal record scheme. Leveson P touched on the particularly egregious effect of long-term disclosure of youth offences when he looked at the case of G.⁷⁰ A number of bodies have recently considered this issue. Lord Carlile conducted an inquiry into the youth justice system and issued a report in June 2014 that called, amongst other things, for “children who have offended [to] be given a ‘clean sheet’ at eighteen, meaning that previous offences would be expunged from their record rather than only filtered” (though not if the offences were serious violent or sexual offences).⁷¹ The Standing Committee for Youth Justice⁷² published a report in March 2016 which found that “England and Wales top the international league tables for its punitive childhood criminal records system.”⁷³ The Justice Committee also recently began an inquiry into youth criminal records which was cut short due to the calling of the 2017 General Election.⁷⁴

There are also active efforts underway to reform the periods of rehabilitation required before convictions and sentences become “spent.” This is the purpose of a private member’s bill introduced by Lord Ramsbotham, which received its first reading in the

⁶⁸ *Ibid* [122]. In part, Leveson P did not want to declare the whole order *ultra vires* because, as Lord Wilson pointed out in *T v CCGM*, if this path was taken then there would be no way of making an application for a CRC or ECRC. The effect would be disproportionate.

⁶⁹ House of Lords, “Rehabilitation of Offenders (Amendment) Bill (Second Reading)” (27 Jan. 2017), available at: [https://hansard.parliament.uk/Lords/2017-01-27/debates/D00EED4F-8F41-40D3-8F96-B0B33BC9E433/RehabilitationOfOffenders\(Amendment\)Bill\(HL\)](https://hansard.parliament.uk/Lords/2017-01-27/debates/D00EED4F-8F41-40D3-8F96-B0B33BC9E433/RehabilitationOfOffenders(Amendment)Bill(HL))

⁷⁰ *R(P) v Secretary of State* [2017] EWCA Civ 321, [2017] 2 Cr App R 12 [93].

⁷¹ Lord Carlile, “Independent Parliamentarians’ Inquiry into the Operation and Effectiveness of the Youth Court” (June 2014), available at

<http://www.icpr.org.uk/media/37698/YOUTH%20COURT%20REPORT%20-%20final%20version%20DK.pdf>. A “clean slate” would only be available: “if a specified period time had elapsed in which there had been no further convictions. This would not be available for homicide,

serial sexual offences and other violent crimes” (p. 56).

⁷² The Standing Committee for Youth Justice is a membership body representing over fifty organisations, campaigning for a better youth justice system.

⁷³ The Standing Committee for Youth Justice (18 Apr. 2016), available at:

<http://scyj.org.uk/2016/04/new-report-shows-that-england-and-wales-top-the-international-league-tables-for-its-punitive-childhood-criminal-records-system/>.

⁷⁴ Parliament.UK, “Disclosure of youth criminal records inquiry,”

available at: <https://www.parliament.uk/business/committees/committees-a-z/commons-select/justice-committee/inquiries/parliament-2015/disclosure-of-youth-criminal-records-16-17/>. For some of the issues discussed during the committee hearings, see: “Informal note of seminar on disclosure of youth criminal records, 13 December 2016,” available at:

<https://publications.parliament.uk/pa/cm201617/cmselect/cmjust/1143/114305.htm>.

House of Lords on 26 May 2016, and its second reading on 27 January 2017.⁷⁵ After Parliament was prorogued following the 2017 General Election, this Bill made no further progress. However, Lord Ramsbotham has already introduced a similar Bill which received its first reading on 29 June 2017.⁷⁶

Finally, recent reforms adopted by Scotland and Northern Ireland, which were outlined by Leveson P in *R(P) v Secretary of State*,⁷⁷ suggest the potential direction of future reforms in England and Wales. In Northern Ireland there is now an independent review scheme that governs the disclosure of most spent records.⁷⁸ In Scotland there is judicial oversight of the disclosure of convictions that fall outside the automated “protected convictions” scheme – though, even with this safeguard, the Scottish scheme is insufficiently calibrated and has been successfully challenged on Article 8 grounds.⁷⁹

Debates around the criminal record scheme in England and Wales therefore remain heated and very much alive. In July 2016 the Home Office asked the Law Commission to review the “filtering” amendments introduced in 2013. The Law Commission’s conclusion in February 2017 was unequivocal: a wider review of the scheme was urgently required.⁸⁰ The first obvious step, therefore, would be to request the Law Commission to conduct such a review.

Permission to appeal in the case of *R(P) v Secretary of State* has been granted. Further guidance will therefore be provided to Parliament on the lawfulness of the criminal record scheme and whether it is, for example, necessary to provide an independent review mechanism. In addition, the ECtHR has agreed to hear the case of Mr Catt, a 91-year-old political protestor whose activities were secretly recorded by the police.⁸¹ The Supreme Court distinguished between information gathered for policing purposes where there was no disclosure to third parties (as in the case of *Catt*) and criminal records. However, the ECtHR might regard this as an artificial distinction and provide more general guidance to the UK about its approach to personal data retention. Any such guidance should also inform the Government’s future reviews of the criminal record scheme.

6. Conclusion

Lord Sumption has noted how:

The rapid expansion over the past century of man’s technical capacity for recording, preserving and collating information has transformed many aspects

⁷⁵ The Rehabilitation of Offenders (Amendment) Bill (HL). For details, see:

<http://researchbriefings.parliament.uk/ResearchBriefing/Summary/LIF-2017-0005#fullreport>.

⁷⁶ Parliament.UK, Criminal Records Bill [HL] 2017-19, available at:

<http://services.parliament.uk/bills/2017-19/criminalrecords.html>.

⁷⁷ [2017] EWCA Civ 321, [2017] 2 Cr App R 12 [27-32].

⁷⁸ This review scheme was introduced following the Northern Irish Court of Appeal’s disapproval of the multiple-offence rule in *Re Gallagher* [2016] NICA 42.

⁷⁹ *P(AP) v Scottish Ministers* [2017] CSOH 33, 2017 SLT 271.

⁸⁰ Law Commission, *Criminal Records Disclosure: Non-Filterable Offences* (31 Jan. 2017), para 5.101, available at: https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jxsou24uy7q/uploads/2017/01/lc371_criminal_records_disclosure.pdf.

⁸¹ *R (on the application of Catt) v Association of Chief Police Officers* [2015] UKSC 9, [2015] AC 1065.

of our lives. One of its more significant consequences has been to shift the balance between individual autonomy and public power decisively in favour of the latter.⁸²

The Court of Appeal in *R(P) v Secretary of State* recognised that bright-line rules which are broad in scope and with few discriminatory features only serve to strengthen state power to the detriment of the protection of Article 8 rights. Parliament has a plethora of suggestions and options for reforming the criminal record scheme, many of which are set out in the Court of Appeal's judgement. It now just needs the political will – and skill – to develop sufficiently calibrated bright-line rules that protect the general public whilst safeguarding individuals' Article 8 rights.

⁸² *R (on the application of Catt) v Association of Chief Police Officers* [2015] UKSC 9, [2015] AC 1065 [2].