



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF M.C. v. THE UNITED KINGDOM

(Application no. 51220/13)

JUDGMENT

Art 8 • Private life • Regime in England and Wales for disclosure of criminal record information post-2013 amendments • Applicant's conviction subject to mandatory disclosure as a result of the currency rule • New regime "in accordance with the law" • Currency rule proportionate and within State's margin of appreciation

STRASBOURG

30 March 2021

FINAL

30/06/2021

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of M.C. v. the United Kingdom,

The European Court of Human Rights (Fourth Section), sitting as a Chamber composed of:

Yonko Grozev, *President*,

Tim Eicke,

Faris Vehabović,

Iulia Antoanella Motoc,

Armen Harutyunyan,

Pere Pastor Vilanova,

Jolien Schukking, *judges*,

and Andrea Tamietti, *Section Registrar*,

Having regard to:

the application (no. 51220/13) against the United Kingdom of Great Britain and Northern Ireland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a British national, Ms M.C. (“the applicant”), on 4 August 2013;

the decision to give notice to the United Kingdom Government (“the Government”) of the applicant’s complaint concerning the disclosure of her criminal record information;

the decision not to have the applicant’s name disclosed;

the parties’ observations;

Having deliberated in private on 11 March 2021,

Delivers the following judgment, which was adopted on that date:

INTRODUCTION

1. The application concerns the past disclosure of the applicant’s criminal record information and the amended disclosure regime which entered into force after this Court’s judgment in *M.M. v. the United Kingdom*, no. 24029/07, 13 November 2012.

THE FACTS

2. The applicant was born in 1955 and lives in Solihull. She was represented by Mr S. Cragg QC, a barrister practising in London.

3. The Government were represented by their Agents, Ms Anna McLeod and, subsequently, Mr Samuel Linehan, both of the Foreign and Commonwealth Office.

4. In August 2007 the applicant was convicted of failing to stop after a road traffic accident. She was fined and her driving licence was endorsed with five penalty points.

5. Some years later she was offered a teaching job in China and asked to provide an enhanced criminal record certificate (“ECRC”). Pursuant to the

legislation then in force, all previous convictions were subject to mandatory disclosure in criminal record certificates. An ECRC issued on 9 January 2013 disclosed her conviction. The applicant claimed in her application form that she was refused the job on account of the disclosure. However, in her later submissions to the Court she explained that in December 2012 she had obtained a teaching post in China, where she remained until summer 2014.

6. On 27 January 2013, the applicant complained to the Independent Police Complaints Commission (“IPCC”) about the conduct of the police during the investigation prior to her conviction and asked the IPCC to clear her name. By letter of 7 February 2013 the Professional Standards Department of the West Midlands Police replied that as she had pleaded guilty to the offence they could not expunge the information on her record. In subsequent correspondence she contested the claim that she had pleaded guilty and asked for evidence to be provided for the claim.

7. In May 2013 the rules concerning disclosure of criminal record information were amended (see paragraphs 15-17 below). Pursuant to the new rules, the applicant’s conviction remained subject to mandatory disclosure in an ECRC until 31 August 2018. It is no longer subject to mandatory disclosure.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. THE FORMER PROVISIONS

A. Disclosure of criminal record information on ECRCs

8. Under section 113B of the Police Act 1997 (“the 1997 Act”) a person can make an application for an ECRC, provided that the application is countersigned by a “registered person” (who is the employer, where the certificate is sought in the context of relevant employment). The relevant domestic law applicable at the time of the disclosure of the applicant’s criminal record information is set out in detail in the Court’s judgment in *M.M. v. the United Kingdom*, cited above, §§ 48-57. In so far as any specific provisions described there applied only to Northern Ireland, similar provisions applied in England and Wales. In short, an ECRC issued under section 113B contained a record of all previous convictions as well as other “soft intelligence” held by the police and deemed relevant by them. The law required that a copy of the certificate be sent to the registered person.

B. Individual disclosure obligation

9. The Rehabilitation of Offenders Act 1974 (“the 1974 Act”) provides for eligible convictions to become “spent” after a specified period of time,

known as the rehabilitation period. The effect of rehabilitation is that the person is treated for all purposes in law as a person who has not committed, or been charged with, prosecuted for or convicted of, the offence in question. If asked about previous convictions, a person is to treat the question as not relating to spent convictions and may frame his answer accordingly. The rehabilitation period depends on the sentence imposed, rather than the nature of the offence.

10. However, the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 (“the 1975 Order”) provides that in certain limited circumstances generally linked to employment involving contact with children or vulnerable adults, even convictions which were spent had to be disclosed. At the time the applicant’s conviction was disclosed, where the exception applied all spent convictions had to be disclosed.

II. THE REVIEW OF THE LEGISLATION

11. In September 2009, the Government appointed an Independent Advisor for Criminality Information Management and asked her to conduct an independent review of the retention and disclosure of criminal record information held on the Police National Computer (“PNC”). In her March 2010 report, *A Balanced Approach*, she considered the disclosure of criminal record information in the employment context and, in particular, the disclosure of old or minor convictions on ECRCs. She recommended that a new filtering mechanism be introduced to prevent certain old and minor convictions from forming part of the mandatory disclosure of criminal record information. She suggested that a filtering mechanism for spent convictions could be based on three rules: the mandatory disclosure of spent convictions relating to more serious offences, a prohibition on disclosing spent convictions relating to certain types of offences (e.g. those which had since been decriminalised) and a power to disclose spent convictions depending on the circumstances. She recommended that an expert panel be set up to advise the Government on the exact nature of the filtering rules.

12. In October 2010, the Government asked the Independent Advisor to undertake a further review of the criminal records regime in England and Wales. Her first report on this review, *A Common Sense Approach: Report on Phase 1*, was published in February 2011. She recommended that a filtering mechanism be introduced to ensure that old and minor convictions were not included in criminal record certificates. In December 2011, she reported to the Government on the outcome of the discussions held by the Independent Advisory Panel for the Disclosure of Criminal Records, of which she was chair. She noted that the Panel had agreed that old and minor convictions should be filtered out and that certain principles should be applied to filtering arrangements. However, she explained that there had

been no consensus in relation to the specific implementation of these proposals. The Government indicated in response that it was continuing to keep the legislation under review.

13. On 29 January 2013, the Court of Appeal in *R (T and others) v. Secretary of State for the Home Department and another* [2013] EWCA Civ 25 found that the regime for disclosure under the 1997 Act violated the right to respect for private life guaranteed by Article 8 of the Convention. The Government appealed.

14. On 18 June 2014, the Supreme Court delivered its judgment in *R (T and another) v. Secretary of State for the Home Department and another* [2014] UKSC 35. The court held that in order for the regime to be “in accordance with the law,” there needed to be safeguards that ensured that the national authorities had addressed the issue of the necessity for the interference and that allowed the proportionality of an interference to be adequately examined. Since the relevant provisions of the 1997 Act had lacked any such safeguards, this Court had been correct to conclude in *M.M. v. the United Kingdom*, cited above, that the scheme was not in accordance with the law.

III. THE NEW RULES

A. The amendments to the 1997 Act and the 1975 Order

15. Meanwhile, in light of the Court of Appeal’s decision in *R (T and other)* and the reports and recommendations of the Independent Advisor, in March 2013 the Government brought forward proposals to amend the relevant provisions of the 1997 Act and the 1975 Order. The proposals were approved by Parliament and the amended rules came into force on 29 May 2013.

16. Under the amended provisions, a conviction will not be disclosed on an ECRC if the following conditions apply:

- (1) eleven years have elapsed since the date of conviction, or five and a half years for convictions imposed on individuals under the age of eighteen (“the currency rule”);
- (2) it is the person’s only offence (“the multiple conviction rule”);
- (3) it did not result in a custodial sentence; and
- (4) it was not for a specified offence (mainly offences of violence, sexual offences and other offences relevant to safeguarding children and vulnerable persons).

17. An adult caution will not be disclosed on an ECRC if six years have elapsed since the date of caution (or two years for cautions imposed on individuals under the age of eighteen) and it is not for one of the specified offences.

18. The amendments to the 1975 Order provided for the individual obligation to disclose a spent conviction to apply in those cases in which previous convictions have to be disclosed in an ECRC under the modified provisions of the 1997 Act.

19. The requirement to send a copy of an ECRC to the registered person (see paragraph 8 above) was subsequently repealed. The ECRC is therefore sent only to the person who has made the application.

B. Judicial consideration of the new rules

20. On 30 January 2019, the Supreme Court delivered judgment in *In re Gallagher and R (P, G & W) v. Secretary of State for the Home Department and others* [2019] UKSC 3. The cases concerned the compatibility with Article 8 of the disclosure regime in the 1997 Act and the 1975 Order, both as amended in 2013, in respect of convictions which were spent under the 1974 Act. All four individuals concerned were liable under the legislation to have their previous convictions mandatorily disclosed indefinitely. None of the cases concerned disclosure under the currency rule (see paragraph 16 above).

21. Lord Sumption, giving the lead judgment, explained at the outset that the cases raised problems of great difficulty and sensitivity since they turned on the competing interests of rehabilitating ex-offenders and protection of the public. He noted that some four million applications for criminal record certificates are made every year in England and Wales. As regards whether the legislation was in accordance with the law, Lord Sumption considered the reference to safeguards in *M.M. v. the United Kingdom*, cited above, and *R (T and another)* (see paragraph 14 above) to be directed at the need for safeguards essential to the rule of law because they protected against the abuse of imprecise rules or unfettered discretionary powers. The current rules governing disclosure of criminal record information under the 1997 Act and the 1975 Order were, he said, highly prescriptive. The categories of disclosable convictions were exactly defined, and disclosure in those categories was mandatory; within each category there was no discretion governing what was disclosable. There was no difficulty in assessing the proportionality of the measures, since their impact on those affected was wholly foreseeable. The current scheme for disclosure was therefore in accordance with the law for the purposes of Article 8 of the Convention.

22. As for proportionality, the first question to be addressed was whether the legislation could legitimately require disclosure by reference to pre-defined categories at all, as opposed to providing for a review of the circumstances of individual cases. Lord Sumption noted that this Court had recognised that such an approach could be appropriate, referring in particular to *Animal Defenders International v. the United Kingdom* [GC],

no. 48876/08, §§ 106-110, ECHR 2013 (extracts). In such cases, the task of the court was to assess the proportionality of the categorisation, and not the impact on individual cases; these would, however, be illustrative of the impact of the scheme as a whole. In Lord Sumption's view, the disclosure scheme provided "as good an example as one could find of a case where legislation by reference to pre-defined categories is justified", for four main reasons. First, it was entirely appropriate that the final decision about the relevance of a conviction to an individual's suitability for some occupations should be that of the employer. Second, the objection to disclosure by category was based on the argument that employers could not be trusted to take an objective view of the true relevance of a conviction, but the evidence to support this argument was thin. Third, in this context the value of certainty was particularly high. Fourth, there were important issues of practicality involved, having regard to the high number of applications for criminal record certificates made each year and the resources which would be required to undertake individual assessment in each case. Lord Sumption concluded:

"55. Taking these considerations together, they suggest that although it may be possible to abandon category-based disclosure in favour of a system which allowed for the examination of the facts of particular cases, there would be a cost in terms of protection of children and vulnerable adults, foreseeability of outcome by candidates, consistency of treatment, practicality of application, and delay and expense, without necessarily achieving much more for ex-offenders than the current system ..."

23. The second question was whether the boundaries in the impugned legislation had been drawn in an appropriate place. In this respect, Lord Sumption noted that the Court had, in *Animal Defenders International*, cited above, § 108, pointed out that the assessment of the defining factors in a category-based scheme was a matter for the State, and the quality of the examination of the options was likely to be important. He said:

"60. ... First the scheme is the result of substantial research and intensive consultation with a wide range of interested and expert groups and individuals. Secondly, it is apparent that while there is broad agreement on the need for a category-based system of disclosure and the basic principles which should govern it, there is no consensus about where the lines should be drawn. This is not particularly surprising, because there is no solution which could satisfy all of the main desiderata in the design of such a system. No one suggests that the courts can or should design the system themselves in proceedings for judicial review. The function of the courts is an essentially negative one, namely to identify which schemes are incompatible with the Convention. At the same time, a court can only be satisfied that a particular scheme is incompatible with the Convention if it is in a position to say what is wrong with it."

24. As regards the scheme under examination, and on the basis that disclosure by categories was justified in principle, Lord Sumption considered that the objections amounted to saying that the balance between the risk of blighting the prospects of ex-offenders and the risk of appointing

unsuitable persons to sensitive positions had been drawn in a place that put too much emphasis on the latter and not enough on the former. He continued:

“61. ... Yet a balance of this kind necessarily involves a difficult value judgment. All that a judge can say is that he or she would have drawn it in a different place. But that, with respect, is not the test. We may think that a better scheme could have been devised or that the categories could have been differently drawn, or that too much weight has been given to the risk of unsuitable appointments and not enough to the rehabilitation of offenders. A more ‘granular’ categorisation has been applied in Scotland to cases involving risks to vulnerable groups since 2007, and a system of administrative review on the application of an ex-offender has existed in Northern Ireland since 2016. There may be lessons to learn from their experience. But none of this means that the scheme lies outside the margin of judgment properly allowed to the legislator or the Secretary of State on whom the legislator has laid the task of defining the exceptions to the rehabilitation regime. In my judgment it is not possible for us to say, consistently with the proper role of a court of review, that the carefully drawn categories employed in this scheme are disproportionate.”

25. He identified, however, two exceptions to this conclusion which justified limited declarations of incompatibility as regards the relevant provisions of the 1997 Act and the 1975 Order. The first exception concerned the multiple conviction rule (see paragraph 16 above), that rationale for which was that the criminal record of a serial offender was more likely to be relevant to his suitability for a sensitive occupation because the multiplicity of convictions might indicate a criminal propensity. While he considered this an entirely legitimate objective, the rule as framed was a particularly perverse way of trying to achieve it since it applied irrespective of the nature of the offences, their similarity, the number of occasions involved or the intervals of time separating them. Its capricious impact on individuals could not be regarded as a necessary or proportionate way of disclosing to potential employers criminal records indicating a propensity to offend.

26. The second exception concerned warnings and reprimands issued to young offenders, which did not require consent and did not involve the determination of a criminal charge. Their purpose was wholly instructive, and their use as an alternative to prosecution was designed to avoid any deleterious effect on a young person’s later life. Their disclosure to a potential employer would be directly inconsistent with that purpose.

27. Lord Kerr, dissenting, considered that in order to be in accordance with the law, the operation of safeguards in the scheme had to permit a proper assessment of the proportionality of the interference with the Article 8 right. If proportionality could not be confidently judged, the measure could not be in accordance with the law. He was of the view that the disclosure scheme did not meet this fundamental requirement. He explained:

“162. ... It is not possible to judge whether the operation of [the] scheme would be proportionate in cases which fall into the categories where disclosure is mandated. In some instances, disclosure might well be proportionate; in others it might be wildly disproportionate. There is simply no way of assessing this if the scheme in England and Wales continues in its present form. Leaving aside the question whether there needs to be individual consideration of particular cases, there is no way of calculating whether *the scheme as a whole* works in a proportionate way. It is unquestionably true, as the [Government] submit, that the examples which these particular cases provide should not be taken as generally representative of the effect of the scheme. But it is equally true that one has no means of knowing that they are not. What the cases show is that there is at least the potential for widespread disproportionate outcomes in the disclosure of data if the present system continues. For that reason, it cannot be said that there are safeguards to the scheme which allow its proportionality to be adequately examined.”

28. For Lord Kerr, it was no answer to this “central flaw” to say that it was the inevitable consequence of a bright-line rule, since the Government could not show that, in general, the scheme operated in a proportionate way and that cases “at the margins” should not detract from its overall effect.

29. In terms of possible safeguards that could be introduced to allow the proportionality of the scheme to be examined, Lord Kerr referred to a provision which linked the relevance of the data to be disclosed to the nature of the employment sought. He considered that a system could be devised whereby a correlation, or lack of one, between the criminal record and the position applied for could be identified which would obviate the need for individual consideration of every case. As to Lord Sumption’s comment that the evidence available to support the argument that “employers cannot be trusted to take an objective view of the true relevance of a conviction, is distinctly thin”, Lord Kerr suggested that the evidence of the four cases involved in the appeal “must go some considerable way to support the assertion”; there was certainly no evidence to sustain the notion that the cases were in any sense untypical. In his view, it was wholly unrealistic not to recognise that many employers, faced with a choice of candidates of roughly similar potential, would automatically rule out the one with a criminal record.

30. The other possible safeguard which, in Lord Kerr’s view, might enhance the opportunity for a proper investigation of the proportionality of the interference with Article 8 rights was an individual review mechanism. While it had been suggested that this would create an impossible logistical burden for the authorities, the experience in Northern Ireland did not suggest that this was the case and there was therefore no evidence that it was not a perfectly viable option.

31. Even if the scheme could be considered in accordance with the law, Lord Kerr did not accept that the bright-line rules in the current legislation were warranted or required. He was of the view that the disclosure of the criminal records in the cases of the four claimants was plainly disproportionate.

IV. RELEVANT COUNCIL OF EUROPE AND EUROPEAN UNION TEXTS

32. Extracts from relevant Council of Europe and European Union texts are set out in *M.M. v. the United Kingdom*, cited above, §§ 122-148.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

33. The applicant complained about the past disclosure of her conviction and the fact that it remained subject to mandatory disclosure until 31 August 2018. This raises an issue under Article 8 of the Convention, which reads as follows:

“1. Everyone has the right to respect for his private ... life ...

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.”

A. Admissibility

1. *The parties' submissions*

34. The Government contended that the application was inadmissible for several reasons. First, the application had been lodged more than six months after the disclosure of the conviction on the ECRC of 9 January 2013 and was therefore out of time in this respect. Second, the applicant had failed to exhaust domestic remedies: the Supreme Court judgments in *R (T and another)* and *R (P, G & W)* (see paragraphs 14 and 20 above) demonstrated that she could have challenged both the former and the current regimes before the domestic courts as the claimants there had. Finally, the Government also contended that the application was manifestly ill-founded in so far as it concerned the complaint directed at the post-29 May 2013 regime.

35. The applicant explained that she had brought her application within six months of the response received to her complaint to the IPCC (see paragraph 6 above). She disputed that she could have challenged the legislation in court and thus secured an effective remedy: any court proceedings could at most have led to a declaration of incompatibility and could not have resulted in compensation for the excessive and disproportionate period during which the conviction was disclosable.

2. *The Court's assessment*

(a) **The complaint about the period before 29 May 2013**

36. In her application, lodged in August 2013, the applicant complained about the fact that her conviction had been disclosed and that it remained subject to mandatory disclosure on criminal record certificates. Her complaint therefore concerned the specific disclosure on 9 January 2013 and the continued risk of disclosure.

37. As regards the January 2013 disclosure, her communication to the IPCC cannot be considered an effective remedy since the IPCC had no jurisdiction over such certificates or disclosure of criminal record information more generally. Moreover, it is clear that she was not complaining about the disclosure as such, but rather about the fact of the conviction in the first place and, in line with this argument, she disputed that she had pleaded guilty (see paragraph 6 above). The applicant's communication to the IPCC is therefore not to be taken into account for the calculation of the six-month time-limit. Since her application was lodged more than six months after the January 2013 disclosure, it follows that this aspect of the complaint was lodged out of time and must be declared inadmissible pursuant to Article 35 §§ 1 and 4 of the Convention.

38. In respect of the applicant's complaint about the continuing risk of disclosure under the legislation as it stood before it was amended with effect from 29 May 2013, the Court recalls that Article 34 of the Convention entitles individuals to contend that a law violates their rights by itself, in the absence of an individual measure of implementation, if they run the risk of being directly affected by it (see, for example, *Norris v. Ireland*, 26 October 1988, § 31, Series A no. 142). The Court observes that there is no evidence that the applicant was inhibited in applying for jobs or other opportunities prior to the legislative changes as a result of the fact that her conviction was subject to mandatory disclosure (see paragraph 5 above). Moreover, by the time the applicant lodged her application to this Court in August 2013, disclosure was already regulated by the revised provisions such that she no longer ran the risk of being directly affected by the pre-29 May 2013 provisions.

39. The Court therefore concludes that at the point at which the application was lodged the applicant was no longer a victim of any alleged violation arising from the pre-29 May 2013 provisions and any complaint about these provisions must be rejected as incompatible *ratione personae* pursuant to Articles 35 §§ 3 (a) and 4.

(b) **The complaint about the period after 29 May 2013**

40. As regards her complaint about the post-29 May 2013 regime, the Court is not persuaded in the circumstances that an application to the domestic courts would have afforded the applicant an effective remedy

within the meaning of Article 35 § 1 of the Convention. While it is true that the claimants in *R (P, G & W)* obtained a declaration of incompatibility in respect of certain aspects of the amended law, the Court has not yet accepted that the practice of giving effect to the national courts' declarations of incompatibility by amendment of legislation is "so certain as to indicate that section 4 of the Human Rights Act is to be interpreted as imposing a binding obligation" on the parties (see *Burden v. the United Kingdom* [GC], no. 13378/05, § 43, ECHR 2008; and *M.M. v. the United Kingdom*, cited above, § 178). The Government have not provided the Court in the present case with up-to-date information concerning the practice of giving effect to declarations of incompatibility, so as to put the Court in a position to reconsider its previous conclusion.

41. In these circumstances, the Court finds that the complaint cannot be rejected for failure to exhaust effective remedies. It is satisfied that the complaint raises arguable issues under Article 8 of the Convention, so that it cannot be rejected as manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further considers that the complaint is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicant

42. The applicant explained that she strongly supported the use of criminal record checks for those employed in the teaching sector, as a means of protecting children from those convicted of violent or sexual offences. However, she objected to the disclosure of convictions for other types of irrelevant offences. She complained about the length of time during which a conviction must be disclosed, the lack of any link between the duty to disclose and the legitimate aims in Article 8 § 2, and the absence of any process of review for those with a case that continued disclosure was disproportionate in their particular circumstances. She relied heavily on the dissenting judgment in *R (P, G & W)* (see paragraphs 27-30 above) and maintained that the post-29 May 2013 scheme was not in accordance with the law and that the obligation to disclose her conviction until 2018 was disproportionate.

43. Although in her initial application form the applicant complained only about disclosure of the information on an ECRC, in her later observations she appeared to focus more on the individual disclosure requirement under the 1974 Act and 1975 Order. She argued that the 1974 Act did not strike the right balance between the need for public protection and the need to promote rehabilitation.

(b) The Government

44. The Government accepted that the disclosure of the applicant's criminal record information on an ECRC would constitute an interference with her right to respect for her private life. However, they argued that following the entry into force of the amended legislation on 29 May 2013, any such disclosure would be compatible with Article 8 § 2. They described the legal regime applicable to the retention of criminal record information in England under primary and secondary legislation supplemented by various policy documents. They argued that the new disclosure regime was accessible and foreseeable and that the criticisms in *M.M. v. the United Kingdom*, cited above, of the pre-29 May 2013 scheme could not be made of the revised scheme. It was carefully calibrated and differentiated to meet the concerns in *M.M. v. the United Kingdom* and was therefore in accordance with the law. Moreover, the purpose of disclosure was to inform employers as to the suitability of individuals for certain types of employment and thus protect children and vulnerable people. It therefore pursued the legitimate aims of public safety, the protection of health or morals and the protection of the rights and freedoms of others.

45. The Government argued that the revised scheme was also necessary in a democratic society. They contended that they enjoyed a wide margin of appreciation in this area. It was also noteworthy that the scheme was the product of recent legislative choice made by a democratically-elected Government. It was, moreover, desirable that the scheme be readily understood by members of the public and employers; the use of bright-line rules promoted legal certainty and avoided arbitrariness. The criteria appropriately differentiated between different cases on the basis of relevant factors. It would be neither practical nor proportionate to require a judgment to be exercised in relation to each application for an ECRC, on a case-by-case basis, since this would involve considerable resources. Statistics showed that the amended legislation had substantially reduced the disclosure of criminal record information. In the applicant's case, her criminal record information had been no longer subject to mandatory disclosure since 2018. The currency rule itself (see paragraph 16 above) was a nuanced rule which properly differentiated between convictions and cautions and between those who had been convicted as adults and those who were under eighteen at the date of conviction.

2. The Court's assessment

46. As noted above, the Government accepted that the disclosure of the applicant's criminal record information on an ECRC would constitute an interference with Article 8 (see paragraph 44 above). The parties moreover did not dispute that the obligation to disclose under the 1997 Act and the 1975 Order pursued a legitimate aim. The Court agrees that the measures

are in the interests of public safety, the protection of health or morals and the protection of the rights and freedoms of others. The two issues it is asked to address is whether the provisions are in accordance with the law and, if so, whether they are necessary in a democratic society.

(a) Whether the measures were in accordance with the law

47. The first question for the Court is, therefore, whether the amended provisions satisfy the requirement of legality in Article 8 § 2 of the Convention. The requirement that an interference must be in accordance with the law means that the impugned measure must have some basis in domestic law and be compatible with the rule of law. The law must thus be adequately accessible and foreseeable, that is, formulated with sufficient precision to enable the individual – if need be with appropriate advice – to regulate his conduct. For domestic law to meet these requirements, it must afford adequate legal protection against arbitrariness and accordingly indicate with sufficient clarity the scope of discretion conferred on the competent authorities and the manner of its exercise (see *M.M. v. the United Kingdom*, cited above, § 193, and the authorities cited there). In *M.M. v. the United Kingdom*, concerning the retention and disclosure regime in Northern Ireland, the Court highlighted the absence of a clear legislative framework for the collection and storage of data, 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, the absence of any mechanism for independent review of a decision to retain or disclose data and the limited filtering arrangements in respect of disclosures. It found that the cumulative effect of these shortcomings was that there were insufficient safeguards in the system to enable it to be regarded as in accordance with the law (cited above, §§ 206-207).

48. The applicant in the present case took no issue with the retention of her criminal record data. It suffices for the Court to note that the provisions regulating retention of such data are not the same in England as they were at the applicable time in Northern Ireland in the case of *M.M. v. the United Kingdom* (see paragraph 44 above) and it cannot be assumed that the concerns expressed about that aspect of the regime would apply with equal force to the retention regime which applied in the present case. In any event, bearing in mind that complaints about retention in this context flow from the fact that, if retained, disclosure may follow, the Court is satisfied that shortcomings in retention provisions may be addressed by reinforcing the safeguards in the disclosure regime. For the reasons given by the majority in the Supreme Court in *R (P, G & W)* (see paragraph 21 above), it is satisfied that the post-29 May 2013 regime satisfies the legality requirement. In particular, the modified legislation introduces a nuanced regime for disclosure of criminal record information which distinguishes between

different types of offences in different ways and provides certainty as to what previous convictions will be disclosed at any given time.

(b) Whether the measures were necessary in a democratic society

49. The Court reiterates that a State can, consistently with the Convention, adopt general measures which apply to pre-defined situations regardless of the individual facts of each case even if this might result in individual hard cases (see *Animal Defenders International v. the United Kingdom* [GC], no. 48876/08, §§ 106-107, ECHR 2013 (extracts) and the authorities cited there). Such general measures may be in the form of a single, absolute prohibition (as in *Animal Defenders International* itself) or may, as in the present case, be in the form of a criterion which, if met, carries particular consequences. The central issue in both kinds of cases is not whether less restrictive rules should have been adopted but whether, in adopting the general measure in question and striking the balance it did, the State acted within the margin of appreciation afforded to it (see *Animal Defenders International*, cited above, § 110).

50. The Court observes that the proportionality of the post-29 May 2013 regime for disclosure was considered at length by the Supreme Court in *R (P, G & W)* (see paragraphs 22-26 above), with reference to *Animal Defenders International*. The court did not expressly address the proportionality of the currency rule (see paragraph 16 above) itself, since none of the claimants in the case was affected by that rule. However, it did consider in some detail the question whether legislation by reference to pre-defined categories, in the specific context of disclosure of criminal record information, was justified, and concluded that it was. It also considered how to approach the examination of the proportionality of the precise boundaries drawn.

51. Drawing from the principles outlined in *Animal Defenders International*, cited above, §§ 108-109, and in the Supreme Court in *R (P, G & W)* (see paragraphs 22-26 above), the Court will approach its task to assessing the proportionality of the relevant general measure in the present case with the following considerations in mind.

52. First, it is of importance whether a case-by-case examination would give rise to a risk of significant uncertainty, litigation, expense, delay, discrimination or arbitrariness. Second, the Court will take into account the legislative choices underlying the measure including, in particular, the quality of the parliamentary and judicial review of the necessity of that measure. Third, in assessing whether the particular general measure adopted fell within the margin of appreciation, the Court will have regard to whether the measure is a nuanced one which seeks to cater for concerns by distinguishing between relevant different categories on appropriate grounds and whose impact may lessen with time. Finally, the application of the general measure at issue to the facts of the case will be illustrative of its

impact in practice, and is in this way material to its proportionality. But the more convincing the justification for the general measure is, the less importance the Court will attach to its impact in the particular case.

53. The Court agrees with the Supreme Court that, in this context, the need for certainty is particularly important (see paragraph 22 above). There is an obvious interest in ensuring that those applying for employment in sensitive areas are able to know in advance which convictions will be disclosed in an ECRC. This is all the more important given the interplay between the individual disclosure obligation arising from the 1974 Act and the 1975 Order and the disclosure obligation in an ECRC under the 1997 Act. General measures in this field are also likely to help to avoid arbitrary outcomes which could occur were disclosure to be decided on a case-by-case basis, necessarily leaving some discretion to individual decision-makers. It is also relevant that the scheme caters for a very large number of inquiries (see paragraph 21 above). The Court therefore accepts, as the Supreme Court pointed out, that determining disclosure obligations on a case-by-case basis would likely entail a need for considerable additional resources, financial and logistical.

54. The Court observes that the 2013 amendments to the 1997 Act and 1975 Order were introduced following a review process which had taken place from 2009 to 2011 and which agreed on the need to filter out old and minor convictions (see paragraphs 11-12 above). The Supreme Court described the new provisions as being “the result of substantial research and intensive consultation with a wide range of interested and expert groups and individuals” (see paragraph 23 above). It is true that the Government have not provided evidence in the present case of any detailed pre-legislative or parliamentary discussion of the currency rule or the fixing of the eleven-year period which applied in the applicant’s case. But it is evident that the rule is intended to identify old convictions and that the period fixed represents the Government’s determination, accepted by the legislature, of what is an old conviction imposed on an adult offender. This assessment does not seem, in itself, unreasonable and is difficult for this Court to second-guess. As the Supreme Court pointed out, balancing the risk of blighting the prospects of ex-offenders and the risk of appointing unsuitable people to sensitive positions involves a difficult value judgment; the fact that a judge might have drawn the line in a different place from the legislature does not in itself render the scheme disproportionate (see paragraph 24 above).

55. Turning to the content of the impugned measure, the applicant’s conviction was subject to mandatory disclosure as a result of the currency rule (see paragraph 16 above), which requires disclosure of all convictions and cautions for a defined, finite period of time. The period for disclosure under the legislation varies depending whether the case concerns a conviction or a caution – reflecting the perceived seriousness of the

offending – and whether the individual in question was under or over the age of eighteen on the date of conviction. It can thus be seen that the currency rule is not a blunt instrument but is intended to distinguish between ex-offenders on grounds which are in themselves relevant to whether disclosure should be made. It is also significant that its application is limited in time, which inevitably reduces its impact on those affected by it.

56. Finally, as to the impact of the general measure on the applicant, the Court is not persuaded that the conviction in question is particularly trivial or minor such that its disclosure in the employment context would evidently be disproportionate. It is also noteworthy that the applicant was able to take up her teaching post following the disclosure in January 2013 (see paragraph 5 above). There is, accordingly, no evidence that the measure has had a plainly disproportionate impact in the applicant's case.

57. In view of the foregoing, the Court finds that in adopting the general measure in question and striking the balance it did, the State acted within the margin of appreciation afforded to it and there has been no violation of Article 8 of the Convention.

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

58. Relying on Article 7, the applicant complained in her application form that she had been punished twice since she had paid a fine following her conviction in 2007 and had subsequently lost a job opportunity because of the disclosure of the conviction. She also complained under Article 14 that the police had discriminated against her on the grounds of her ethnicity.

59. In the light of all the material in its possession and in so far as the matters complained of are within its competence, the Court finds no appearance of a violation of the rights and freedoms set out in the Convention or its Protocols arising from these complaints. It follows that they are manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the complaint concerning the continued risk of disclosure following the entry into force on 29 May 2013 of the amended legislative provisions governing disclosure of criminal record information admissible and the remainder of the application inadmissible;
2. *Holds* that there has been no violation of Article 8 of the Convention.

M.C. v. THE UNITED KINGDOM JUDGMENT

Done in English, and notified in writing on 30 March 2021, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Andrea Tamietti
Registrar

Yonko Grozev
President