FACULTY OF ADVOCATES

Comments

by the Faculty of Advocates

in response to consultation

on the Police Act 1997 and the Protection of Vulnerable Groups (Scotland) Act 2007 Remedial Order 2015

The Faculty has prepared a written response to the Scottish Government consultation on the Order, following the giving of evidence by the Convener of the Faculty Law Reform Committee to the Delegated Powers and Law Reform Committee of the Scottish Parliament on 3 November 2015. We have framed our response by adopting the questions posed by the Committee, which are reproduced below. The Faculty does not take a position on the issues of social and legal policy which arise in relation to this legislation. Its comments are limited to the legal issues which arise, primarily in relation to Article 8 of the European Convention on Human Rights, with which the previous scheme, as it operated in England and Wales, was found by the Supreme Court not to comply. R (on the application of T and another) v Secretary of State for the Home Department and another [2014] UKSC 35. This case is referred to in the answers below as R.

1. What are the Article 8 issues arising in relation to the remedial order with particular reference to the UKSC judgement?

We identify the issue raised by this question as whether the problem identified by the Supreme Court has been resolved by the remedial order. Our answer to this is a qualified yes. The Supreme Court found the disclosure regime to be incompatible with Article 8 because of the blanket disclosure of all convictions, generated solely by the context of the request for information. The remedial order changes the position: from now on, there will

be three categories of conviction-related information for the purposes of disclosure. The top tier will be convictions whose existence will always be disclosed. These will be convictions which are not yet spent, together with any which, although spent, are listed on the Schedule 8A list. The middle tier will be convictions which, although spent, feature on a second list, the Schedule 8B list; these will be disclosed for a fixed period. The final tier will be convictions whose existence will not be disclosed from the point at which they become spent.

It can therefore be seen that the particular scheme presented to the Supreme Court no longer exists. It is, however, possible that an Article 8 challenge will be made to the new regime, and that the effect of that regime in the particular case brought could be found by the Court to breach Article 8.

2. In general terms, what are the tests against which a court will assess the compatibility of an interference with Article 8 rights

For the statutory disclosure of spent convictions to be compatible with Article 8, the spent convictions should not be disclosed unless the disclosure is:

(a) in accordance with the law (the requirement of legality) and

(b) necessary (the requirement of necessity).

The onus of establishing that the requirements of legality and necessity are met is on the public authority.

In order to meet the requirement of legality, the statutory disclosure regime must afford adequate legal protection against arbitrariness and there must be safeguards which have the effect of enabling the proportionality of the interference to be adequately examined – Lord Reed, JSC (at paragraphs 108 and 114 in the case of R).

In respect of the requirement of necessity, Lord Wilson JSC (at paragraph 39 in the 2014 UKSC case of R) identified four questions:

1. Whether the objective behind the interference was sufficiently important to justify limiting the Article 8 rights of the individual?

2. Whether the measures were rationally connected to the objective?

3. Whether they went no further than was necessary to accomplish it?

4. Whether they struck a fair balance between the right of the individual and the interests of the community?

It is unlikely that the first two questions will be problematic in any future challenge. The objective – public protection – is sufficiently important to justify interference. The connection between the protection of the public and the disclosure of information relating to convictions is also unlikely to be disputed. Any challenge is more likely to be based on the matters covered by the third and fourth issues.

3. Issues about the relevance of the spent conviction to the purpose for which the disclosure occurs

The relevance of the spent conviction to the purpose for which the disclosure occurs is central to determining whether the disclosure is necessary. If the spent conviction is clearly relevant, it seems likely that the necessity test will be met. Conversely, where the spent conviction is clearly not relevant, it seems unlikely that the necessity test will be met. So far, so relatively straightforward. The issue becomes more complicated when, on the available information, the relevance of the spent conviction is unclear.

The right of challenge to a sheriff of the disclosure of the spent conviction does amount to a legal protection against arbitrariness and has the effect of enabling the proportionality of the interference to be adequately examined. In practice, however, the procedure of making an application to a sheriff might not prevent infringement of article 8 rights. A potential employer or training organisation may find out about a conviction because the employer or organisation is required to give evidence or because they become aware of an unusual delay in the processing of the original disclosure request.

4. Issues about the impact of general rules on marginal cases

We recognise that the general rules, although now more discriminating than under the previous regime, will still be capable of generating 'hard cases'. In principle, however, we consider that this is a situation in which it is possible to defend the use of what are described as 'bright line' rules. In the absence of any right of challenge, there would be a real risk that the general rules would be regarded as arbitrary. However, the remedial order does provide for a right of challenge to a sheriff, and the risk of a finding of arbitrariness has therefore been reduced.

5. Whether the ability of an employer to disregard conviction information is relevant to the compatibility of the scheme

The ability of an employer to disregard conviction information is irrelevant to the compatibility of the scheme. Strictly speaking, an employer is unlikely completely to disregard disclosed information. The employer, having considered the disclosure, might decide that it is not relevant or to attach no significance to it. However, the employer may reconsider the disclosed information later. In any event, it is the disclosure itself, rather than its impact on the individual, which infringes Article 8. It is the spent conviction which falls to be regarded as part of a person's private life and it is the disclosure of the spent conviction which potentially jeopardises the individual's entry into a chosen field of endeavour.

6. Issues around the process of application to the sheriff

In principle, there is no issue with the process of application to a sheriff in that this allows an opportunity for an individual to seek an independent review. However, practical issues may impact on the operation of the procedure e.g. would the applicant's name be published on the list of court business, how long would it take for an application to be determined, in what circumstances would legal aid be made available and, if it is, how long would it take for an application for legal aid to be determined.

The Remedial Order provides that (i) the decision of the sheriff on an application for an order for a new criminal record certificate or enhanced criminal record certificate (section 116ZB98) of the Police Act 1997) and (ii) the review of the sheriff for an order requiring the removal of vetting information from the scheme record (section 52A of the Protection of Vulnerable Groups (Scotland) Act 2007) will be final. For practical reasons, it is probably not possible to confer any further rights of appeal.

7. Whether the fact that a decision by one sheriff in one case will not change the rules for the next person to request disclosure for the same purpose has a bearing on the proportionality of the interference with Article 8 rights

While a decision by one sheriff is not binding on another sheriff, it is important that there is consistency in decision making. Furthermore, it would be both helpful and informative to sheriffs and individuals if anonymised decisions were made available online. Access to decisions in other similar cases may assist individuals in deciding whether or not to apply for a review. Furthermore, the decisions could be scrutinised with a view to determining whether the general rules required further modification.

More generally, it would be possible to achieve greater consistency in decision-making if there were to be a process within Disclosure Scotland, triggered by a request for review of the need for disclosure of a particular conviction or convictions. Decisions on such applications could then be anonymised and made available online. We appreciate that the organisation administers a large volume of applications, however, and we are not in a position to conclude that this would be a practicable possibility.

8. Whether a prospective employer being made aware of the spent conviction through the court process has a bearing on the proportionality of the interference with the Article 8 rights

If the awareness of the prospective employer resulted from a revelation consequent on the court process (of the nature of accidental or at least unintended disclosure) the proportionality of any interference would not be affected, but the question of whether the State was responsible could raise difficult questions of causation.

9. Whether the lack of any process for review aside from through the court process has any bearing on proportionality

As indicated earlier, no issue arises directly with the lack of a process of review aside from through the court. Application to a sheriff provides an opportunity for an individual to seek an independent review. However, it is foreseeable that practical issues such as the pressure of general court business causing delay in the processing of a review application might result in a complaint that employment or training prospects have been jeopardised.

10. Whether the decisions in NI and England and Wales need to be taken into account in relation to this scheme

A sheriff will need to be take into account legally binding decisions. Decisions of the UK Supreme Court are legally binding. Although decisions from courts in NI and England and Wales are not binding, their reasoning may be persuasive and, for that reason, they should be considered.

We would make two further comments.

First, it is our understanding that the period of 15 years, which is used in relation to Schedule 8B, was selected because the longest period before a conviction becomes spent under the 1974 Act is ten years and the intention was to have such convictions 'disclosable' for a further time after the end of that period. There is a difficulty, however, in that the analogous period in England and Wales has now been reduced to seven years, as a result of amendment of section 5 of the Rehabilitation of Offenders Act 1974. This cross-border differential could contribute to an argument on proportionality, especially in relation to the third of Lord Wilson's four questions outlined above. At a practical level, it could create odd results where, for example, two applicants for the same job in Edinburgh each had a conviction for the same offence 12 years ago, but one lives in England and one in Scotland.

Secondly, in the list of offences convictions for which are always to be disclosed, Schedule 8A, there is a reference to assault to severe injury but no reference to assault to the danger of life. This seems surprising: an assault with the latter aggravation is likely to be an offence of at least equivalent seriousness as assault to severe injury.