**APPEAL NO: C1/2012/0520**

**IN THE COURT OF APPEAL**

**ON APPEAL FROM THE ADMINISTRATIVE COURT**

**(Kenneth Parker J)**

B E T W E E N :-

**THE QUEEN (on the application of T)**

Appellant

**-and-**

**(1) THE CHIEF CONSTABLE OF GREATER MANCHESTER POLICE**

**(2) THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondents

**and**

**THE SECRETARY OF STATE FOR JUSTICE**

Interested Party

**and**

**(1) LIBERTY**

**(2) EQUALITY AND HUMAN RIGHTS COMMISSION**

Interveners

**SUBMISSIONS ON BEHALF OF**

**THE EQUALITY AND HUMAN RIGHTS COMMISSION**

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**14th November 2012**

1. **OVERVIEW**
   1. These written submissions are filed and served on behalf of the Equality and Human Rights Commission (‘the Commission’). By Application Notice sealed on 13th September 2012 the Commission applied to intervene in this appeal before the Court of Appeal, *R (T) v. The Chief Constable of the Greater Manchester Police and the Secretary of State for the Home Department* (‘SSHD’), C1/2012/0520 (hereafter ‘the *T* case’). That application was granted by Lord Justice Davis in an Order dated 8th October 2012 and sealed on 12th October 2012. The Commission is the Second Intervener, Liberty having already been granted permission to intervene on 25th May 2012 (Order of Lord Justice Stanley Burnton).
   2. The Commission is the statutory non-departmental body for England, Wales and (in respect of some of its functions) Scotland, charged with monitoring the implementation of, and compliance with, equality and human rights law. It has a unique statutory role in promoting human rights norms and equality of opportunity, and it has a specific statutory power to intervene in legal proceedings relevant to its functions. It has a strong interest, and established expertise, in informational privacy issues arising under Article 8 of the European Convention on Human Rights (‘ECHR’).
   3. It is understood that there are now three joined cases listed to be heard together before the Court of Appeal: the *T* case; a second appeal, *‘JB’*; and a third case, for *‘AW’* (oral application to be followed by the full judicial review if permission is granted by the Court of Appeal). As is the case for the First Intervener, Liberty, the Commission is also intervening in the *T* case only. However, there are clearly overlapping issues arising in the three cases, and indeed the SSHD and Secretary of State for Justice (‘SSJ’) have now filed a skeleton argument which addresses the *T* and *JB* appeals together. The Commission has not had sight of the full papers in the *JB* or *AW* cases, although it has now secured a copy of the Witness Statement of Mr. John Woodcock from the *JB* case, given the heavy reliance placed upon it in the SSHD and SSJ’s Skeleton Argument (see in particular para. 31). The Commission is continuing to seek access to certain further documents, and may seek to make further brief written submissions in advance of the hearing, if so advised, when any additional documents have been considered.
   4. Lord Justice Davis granted the Commission permission to intervene by way of written submissions (para. 1 of his Order). The Commission does not seek permission to make oral submissions at the hearing, but is happy to attend through Counsel and address any questions raised by the Court of Appeal if that would be of assistance.
   5. The facts of this case are undoubtedly stark. In essence, it concerns whether a 21-year-old student who wants to be a sports teacher has to continue to disclose to educators and prospective employers the fact that when he was 11 he was warned by the police in connection with the theft of two bicycles. He and his friends say that they found the two bicycles abandoned. The Appellant’s description of the incident as being *“at the lowest end of an already low spectrum”* is undoubtedly right given the circumstances (Appellant’s Bundle, p. 12c, para. 4). As Mr. Justice Kenneth Parker noted at the outset of his judgment in the Administrative Court (Appellant’s Bundle, p. 17, para. 2), since the warning issued a decade ago the Appellant *“has not been subject to any further criminal proceedings of any kind and indeed his conduct appears to have been exemplary.”* The Appellant had understood that his warnings were spent, and he only learned to the contrary in 2008 (aged 17) when he applied for a part-time job at his local football club. An ECRC was obtained which disclosed the two warnings but following correspondence the police agreed to *“step down”* the warnings (Appellant’s Bundle, p. 12c, para. 5).
   6. This appeal concerns two legal issues:
2. Whether the provisions of s. 113B of the Police Act 1997 (‘the 1997 Act’) governing Criminal Records Bureau (‘CRB’) checks and Enhanced Criminal Records Certificates (‘ECRCs’) are compatible with Article 8 of the European Convention on Human Rights (‘ECHR’); and
3. Whether the provisions of the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 (SI 1975/1023) (‘the 1975 Order’), which removes certain protections which would otherwise apply to spent convictions and cautions, are Article 8 compliant. The impact of the Order is to exempt the Appellant from the benefit of the Rehabilitation of Offenders Act 1974 (‘ROA 1974’) because his chosen career is with children.
   1. As regards issue (i), the Appellant seeks a declaration of incompatibility of provisions of the 1997 Act (Appellant’s Bundle, p. 12p, para. 37). At first instance Mr. Justice Kenneth Parker held that he would have found the relevant parts of the 1997 Act to be incompatible with Article 8 but considered himself *“constrained by binding authority”* to find otherwise, namely the decision of the Supreme Court in *R (L) v Commissioner of Police for the Metropolis* [2009] UKSC 3, [2010] 1 AC 410 (‘the *L* case’) (para. 47 of his judgment: Appellant’s Bundle, p. 40). The Appellant puts his case concerning the 1997 Act on two alternative bases: either that the Learned Judge was wrong to consider himself bound by the *L* case; or alternatively that there were obiter statements in *L* which he should follow.
   2. As regards issue (ii), the 1975 Order, the Appellant submits that the Learned Judge was wrong to conclude that where a State could not disclose information, a private employer could nevertheless ask and expect an answer. The Appellant seeks a declaration that the Order is *ultra vires* (Appellant’s Bundle, p. 12p, para. 37).

* 1. The Commission is mindful of the need for interveners to add value, and not to make submissions which merely duplicate those already made by other parties. The Commission is in broad agreement with the submissions made to date by both the Appellant and Liberty concerning both aspects of the appeal, and their approach to both Article 8(1) and justification under Article 8(2). The Commission also supports the criticisms of the SSHD/ SSJ Skeleton summarised in the Appellant’s Supplementary Skeleton Argument received on 8th November 2012. These written submissions do not repeat matters already addressed in detail by the Appellant. However, given the statutory role of the Commission (see Part 2 of these submissions, below) the Commission’s support of the Appellant’s position is indicative of the broader human rights and equality implications which arise as a result of this appeal concerning the Appellant’s own particular circumstances.
  2. The Commission is of the view that this appeal raises significant wider concerns, reaching beyond T’s particular circumstances. Kenneth Parker J acknowledged the importance of these proceedings in his judgment, describing the issues arising as being *“of general importance that fully [deserve] to be considered by a higher court”* (para. 47: Appellant’s Bundle, p. 40), phrasing echoed in his Order granting permission to appeal (p. 15 of the Bundle). In particular, the Commission notes:
     1. This appeal raises important issues concerning blanket policies of mandatory State disclosure of adverse historical information, warnings, cautions and convictions concerning individuals, without individually tailored, proportionate decision-making, taking account of their individual circumstances.
     2. Although the *T* case concerns a non-conviction disposal (a warning), as does the *JB* case (a caution), the same legislative provisions govern disclosure of convictions. The SSHD and SSJ in their Skeleton Argument acknowledge that *“the same legal arguments are relevant to the compatibility of that requirement,”* and they make clear from the outset that their submissions *“are framed to as to apply to disclosure of both convictions and cautions”* (including warnings and reprimands) (para. 6 of the Skeleton Argument dated 10th October 2012).
     3. Similarly, although the facts of the *T* and *JB* cases concern ECRCs under s. 113B of the 1997 Act, the Commission agrees with the SSHD and SSJ that the challenges apply equally to Criminal Record Certificates issued under s. 113A (Skeleton, para. 15). The substantive difference between ss. 113A and 113B is that CRCs contain only prescribed details of convictions and non-conviction disposals (cautions/ warnings/ reprimands), whereas ECRCs may also contain police intelligence information. These appeals do not concern that point of difference (neither T nor JB are challenging police intelligence information; their appeals concern the automatic disclosure of their non-conviction disposals in ECRCs).
     4. This appeal also has potentially far wider ramifications for Article 8 ECHR cases generally, outside this particular context, and indeed for other qualified ECHR rights, given the submissions made by both the SSHD and SSJ concerning the utility of blanket, general policies. These submissions were made at first instance (which are summarised at para. 17 of the judgment of Kenneth Parker J: Appellant’s Bundle, p. 28) and are repeated in the SSHD and SSJ Skeleton for the Court of Appeal (see in particular paras. 44 and 45). These submissions were to the effect that legislation which creates clear *“bright lines”* which are easy to understand and apply, even where their application causes *“harsh”* or *“anomalous”* effects in some cases, should be upheld as proportionate. This approach would allow for a finding of proportionality under Article 8(2) in an individual case, based on general considerations, and despite apparent disproportionality for the affected individual.

1.11 These submissions are structured as follows:

* Part 1 – Overview;
* Part 2 – The Equality and Human Rights Commission;
* Part 3 – The Legislation Under Challenge;
* Part 4 – Incompatibility of the 1997 Act with Article 8;
* Part 5 – Incompatibility of the 1975 Order with Article 8.

1. **THE EQUALITY AND HUMAN RIGHTS COMMISSION**
   1. The Equality and Human Rights Commission is a statutory body established pursuant to the Equality Act 2006 (‘the EA 2006’). It statutory remit indicates its interest in the present proceedings:
      1. First, the Commission is under a general duty, contained in s. 3 of the EA 2006, to conduct its functions with a view to encouraging and supporting the development of a society in which (among other goals) human rights and equality are respected and protected;
      2. Second, pursuant to s. 9 of the EA 2006 the Commission has various duties in relation to the promotion of human rights, including in particular those rights protected under the Human Rights Act 1998 (‘the HRA’).
   2. The Commission’s successful application to intervene in these proceedings was made pursuant to s. 30, EA 2006. This provision confers upon the Commission a power to either institute or intervene in legal proceedings, whether for judicial review or otherwise, if *“it appears to the Commission that the proceedings are relevant to a matter in connection with which the Commission has a function.”* The Commission considers that this appeal relates to its functions under ss. 3 and 9, and raises general issues of public importance (see para. 1.10 above).
   3. The Commission has strong expertise in informational privacy issues arising under Article 8 ECHR. Recently, for example, it intervened in the Supreme Court in *R (GC and C) v. Commissioner of Police for the Metropolis* [2011] UKSC 21, concerning Association of Chief Police Officers (‘ACPO’) guidelines on retention of DNA samples and fingerprints, and in the Administrative Court in *R (RMC and FJ) v. Commissioner of Police for the Metropolis* [2012] EWHC 1681 (Admin), concerning the retention of custody photographs of the claimants pursuant to the Police and Criminal Evidence Act 1984 (‘PACE’), s. 64A. The Commission has also commissioned independent research[[1]](#footnote-1) on ‘information privacy’ and human rights, to explore issues surrounding the concept of information privacy and develop the Commission’s expertise and understanding in this area of work. In Summer 2011 a detailed report was published, *Protecting Information Privacy* (Equality and Human Rights Commission Research Report 69).
2. **THE LEGISLATION UNDER CHALLENGE** 
   1. The Commission has had sight of the summary of the two relevant legislative schemes (the 1997 Act and the 1974 Order) provided by the SSHD and SSJ in their Skeleton, at paragraphs 7 – 22, with which it agrees, save for in relation to two points. First, the reference in footnote 2 to s. 80 should instead read s. 82. Second, when describing the meaning of *“central records”* in para. 9 it is suggested that the Police National Computer (‘PNC’) contains details only of ‘recordable offences’ and excludes ‘minor offences,’ but this is not accepted (see below at para. 3.6).
   2. The wording of s. 113B(4) provided in para. 7 of the SSHD/ SSJ Skeleton is of course the current version, in force from 10th September 2012 only, pursuant to the amendment of s. 113B by s. 82, Protection of Freedoms Act 2012. This was in accordance with the recommendations of Mrs. Sunita Mason. The Commission agrees with the Appellant’s summary of the effect of that recent change in para. 5 of his Supplementary Skeleton Argument. It concerns police intelligence information and does not alter the issue in this appeal, namely the disclosure of non-conviction disposals in ECRCs.
   3. An unusual feature of s. 113B of the 1997 Act is that, although much of the language used appears to indicate the exercise of discretion, as regards the disclosure of conviction and non-conviction disposals it is in fact a mandatory and blanket scheme. For example, s. 113B(3)(a) refers to *“every relevant matter,”* yet the meaning of this phrase is then fixed by s. 113A(6), to automatically include all convictions (whether spent or not) and all cautions (whether spent or not); and the reference to ‘cautions’ includes warnings and reprimands (s. 65(9), Crime and Disorder Act 1998 and s. 17(2), Interpretation Act 1978). This amounts to an automatic, blanket rule which deems all conviction and non-conviction disposals to be ‘relevant’ for the purposes of an ECRC, regardless of the particular circumstances of the individual involved; and it is mandatory for the ECRC to be issued when the application has been made and the required fee paid (s. 113B(1) – *“the Secretary of State must...”*). The SSHD and SSJ describe this mandatory, blanket scheme as *“a rule-based system”* (para. 44 of their Skeleton), which is essentially a more attractive way of phrasing the same point.
   4. The SSHD and SSJ submit in their Skeleton Argument that the Learned Judge at first instance fell into error, in that he suggested there are *“no longer any filter arrangements at all”* concerning disclosure (para. 33 of the judgment). They submit that *“the most trivial offences... are not recorded and will not be disclosed”* (para. 64(1) of their Skeleton). This does not, however, stand up to scrutiny.
   5. It is correct that ECRCs do not generally contain details of non-recordable offences. This is because s. 113B(3)(a) requires ECRCs to contain details of *“every relevant matter relating to the applicant which is recorded in central records,”* and *“central records”* are in turn defined in s. 113A(6) as *“such records of convictions and cautions held for the use of police forces generally as may be prescribed”.* The prescribed record in question is the PNC: Police Act 1997 (Criminal Records) Regulations 2002, SI 2002/233, Reg. 9. The PNC contains details of all recordable offences. It does not generally contain details of non-recordable offences, where the details are held by another body, such as, for example, *“non-recordable motoring offences, such as speeding, held by the DVLA”* (Sunita Mason, Phase 2, p. 15). However, as Mrs. Mason points out at p. 16:

*“There are also occasions when a non-recordable offence is recorded on the PNC, for example when it is associated with a conviction for a recordable offence, such as being convicted of driving without insurance at the same time as being convicted of drink driving.”*

* 1. The SSHD and SSJ Skeleton on a number of occasions equates non-recordable offences with minor or *“the most trivial”* offences (paras. 9 and 64), and by implication recordable offences are necessarily considered more serious. The Commission does not accept this as a general characterisation. Recordable offences are those which are imprisonable,

*“plus a sub-set of non-imprisonable offences that have been designated as recordable under regulations (i.e. statutory instruments under policing legislation). This additional set of specified offences has grown over time and is now substantial”* (Sunita Mason, Phase 2, at p. 16).

3.7 Mrs. Mason notes that the dividing line between recordable and non-recordable offences is not based upon public protection. She provides contrasting examples of certain non-recordable offences, and certain recordable offences. The non-recordable offences she lists include driving without insurance (p. 16), reproducing British currency notes (p. 16), *“[stealing] personal data and [selling] this for profit”* (p. 17, referring to the Data Protection Act 1998, s. 55), and causing unnecessary suffering to animals (p. 18, referring to the Animal Welfare Act 2006, s. 4). In contrast, the recordable offences she lists include taking a pedal cycle without consent (Theft Act 1968, s. 12).

3.8 The scheme concerning disclosure of information from central records was not previously being operated in this blanket, automatic way – hence the Appellant in 2008 securing agreement from the police to ‘step down’ the warnings. This step down procedure is understood to have halted as a result of the October 2009 ruling of the Court of Appeal in *Chief Constable of Humberside v. Information Commissioner* [2010] 1 WLR 1136.

3.9 Another feature of the statutory scheme which is of note is that the SSHD is empowered to amend the statutory definition of *“every relevant matter”* and *“central records”* by Order laid before Parliament under the affirmative resolution procedure (s. 113A(7) and (8)).

**4. INCOMPATIBILITY OF THE 1997 ACT WITH ARTICLE 8**

4.1 In summary, the Commission submits that:

(a) Article 8(1): The requirement in s. 113B of the 1997 Act that all convictions and non-conviction disposals be automatically disclosed on an ECRC necessarily constitutes an interference with Article 8(1) ECHR;

(b) Article 8(2): The blanket, general, indiscriminate nature of this requirement is not ‘necessary in a democratic society’ as required by Article 8(2), as it fails to satisfy the strict requirements of proportionality and is not the least restrictive means of achieving the legitimate objective of protecting vulnerable adults and children;

(c) The Supreme Court’s ruling in *L*: The Commission agrees with the Appellant that the *L* case does not prevent the Court of Appeal finding that this aspect of the 1997 Act violates Article 8.

***Article 8(1)***

4.2 The scheme under the 1997 Act involves the automatic, blanket disclosure of all convictions or non-conviction disposals recorded on the PNC, regardless of whether they have any relevance whatsoever to public protection, the circumstances of the conduct or the disposal itself, the passage of time, the age of the individual, seriousness, whether they are spent or unspent, or any other factors. The SSHD and SSJ summarise the operation of this scheme in their Skeleton, at para. 16:

*“The CRB’s processes are primarily automated – involving the interrogation by the CRB’s computer system of the PNC, the Independent Safeguarding Authority’s database and a database of local police information. But where a potential match is generated, a manual check of the identity of the applicant as against the record matched is carried out (by the CRB, the ISA or the local police force in question). Once identity is confirmed, CRB processes do not assess the relevance of information or otherwise seek to distinguish between records held on the PNC.”*

4.3 At first instance even the applicability of Article 8(1) was disputed by the First and Second Respondents. They disputed whether there was any interference with the Appellant’s right to private life. This position is maintained in their Skeleton Arguments before the Court of Appeal. The Commission submits that the ECRC scheme under the 1997 Act plainly constitutes an interference with Article 8(1).

4.4 The European Court of Human Rights (‘ECtHR’) has consistently held that it is neither possible nor necessary to attempt an exhaustive definition of the notion of ‘private life’ in Article 8(1), but the concept should be construed broadly: *Niemitz v. Germany* (1993) 16 EHRR 97, para. 29; *Halford v. UK* (1997) 24 EHRR 52; *S and Marper v. UK* (2008) 48 EHRR 1169, para. 66 (Grand Chamber). In *S and Marper* the Grand Chamber stated (at para. 66):

*“The Court recalls that the concept of “private life” is a broad term not susceptible to exhaustive definition. It covers the physical and psychological integrity of a person**... It can therefore embrace multiple aspects of the person's physical and social identity... Beyond a person's name, his or her private and family life may include other means of personal identification and of linking to a family... Article 8 protects in addition a right to personal development, and the right to establish and develop relationships with other human beings and the outside world...”*

4.5 The ECtHR case law on Article 8 has identified a range of different aspects of private life which attract protection, four of which are in play in the present appeal, in the Commission’s submission (see below at para. 4.8 et seq). However, the underpinning focus in each of these aspects of private life reflects the analysis of Professor Raymond Wacks,

*“At the heart of the concern to protect “privacy” lies a conception of the individual and his or her relationship with society.”[[2]](#footnote-2)*

4.6 Lord Hoffmann in para. 51 of *Campbell v. MGN Ltd*. [2004] 2 AC 457 emphasised that, *“the law now focuses upon the protection of human autonomy and dignity – ‘the right to control the dissemination of information about one’s private life and the right to the esteem and respect of other people’.”* Both Sir Anthony Clarke MR, giving the judgment of the Court in *Murray v. Big Pictures (UK) Ltd.* [2008] EWCA Civ 446, para. 31, and Laws LJ in *Wood v. Commissioner of Police for the Metropolis* [2010] 1 WLR 123, paras. 20 – 21, derived considerable assistance from Lord Hoffmann’s description. Laws LJ describes the heart of Article 8(1) as follows (paras. 20 – 22):

*“The phrase ‘physical and psychological integrity’ of a person... is with respect helpful. So is the person's ‘physical and social identity’... These expressions reflect what seems to me to be the central value protected by the right. I would describe it as the personal autonomy of every individual...*

*The notion of the personal autonomy of every individual marches with the presumption of liberty enjoyed in a free polit**y: a presumption which consists in the principle that every interference with the freedom of the individual stands in need of objective justification. Applied to the myriad instances recognised in the Article 8 jurisprudence, this presumption means that, subject to [qualifications], an individual's personal autonomy makes him – should make him – master of all those facts about his own identity, such as his name, health, sexuality, ethnicity, his own image, of which the cases speak; and also of the "zone of interaction"... between himself and others. He is the presumed owner of these aspects of his own self; his control of them can only be loosened, abrogated, if the State shows an objective justification for doing so.*

*This cluster of values, summarised as the personal autonomy of every individual and taking concrete form as a presumption against interference with the individual's liberty, is a defining characteristic of a free society. We therefore need to preserve it even in little cases...”*

4.7 In independent research recently undertaken for the Commission, the authors referred to a number of conceptions of privacy, including the notion of ‘informational self-determination’ (closely linked to Lord Hoffmann and Laws LJ’s analysis above) and the concept of privacy as ‘an aspect of personhood,’ closely linked to dignity and personal autonomy.[[3]](#footnote-3) They also drew upon broad themes, in case law and literature, concerning the value of privacy:

*“Just as there is no agreed definition of privacy, there are also many different but overlapping ways in which privacy can be understood and justified. Privacy can, for example, be seen as a good in itself – as essential to our development as individuals, and bound up with ideas of dignity, liberty, and ‘personhood’. In addition to promoting these values, privacy can also be justified on more instrumental grounds. Without a degree of privacy, it can become very difficult for individuals to maintain a distinction between their personal and public lives, or to exercise other important social and political rights, such as rights to freedom of religion, freedom of association, and freedom of expression.”*[[4]](#footnote-4)

4.8 In the Commission’s submission, in the circumstances of this case and under the 1997 Act ECRC scheme generally, there is plainly an interference with four different, but overlapping, aspects of the right to private life. All four aspects are underpinned by the recognition of the importance of informational self-determination and personal autonomy referred to in the Commission’s research and the domestic and Strasbourg courts.

4.9 First, regardless of any disclosure, the retention and storing of the information in question in itself constitutes a *prima facie* interference with Article 8(1) rights: *Leander v. Sweden* (1987) 9 EHRR 433, para. 48. The subsequent use of the stored information has no bearing on that finding: *Amann v. Switzerland* (2000) 30 EHRR 843, para. 69 (GC). This was reiterated in the Grand Chamber’s judgment in *S and Marper v. UK* (2008) 48 EHRR 1169, para. 121:

*“... the mere retention and storing of personal data by public authorities, however obtained, are to be regarded as having direct impact on the private life interest of an individual concerned, irrespective of whether subsequent use is made of the data.”*

4.10 In *R (GC) v. Commissioner of Police for the Metropolis* [2011] UKSC 21, [2011] 1 WLR 1230 the

Supreme Court applied the ECtHR’s decision in *S and Marper* and held the indefinite retention of

the claimants’ data (fingerprints and DNA samples) interfered with their rights under Article 8(1),

and that interference was unjustified. The Supreme Court in *GC* left open the question of whether

the retention of photographs of arrested persons not subsequently convicted of the offences for

which they were arrested violated their Article 8 rights, but a violation was subsequently found in

*RMC*.

4.11 In *S and Marper* the ECtHR declined to distinguish between the three different types of data under consideration (DNA profiles, cellular samples and fingerprints) in determining whether there had been a *prima facie* interference with Article 8(1) rights. It did however note that all three forms are ‘personal data’ under both the Council of Europe Convention of 1981 for the protection of individuals with regard to automatic processing of personal data (‘the Data Protection Convention’) and the Data Protection Act 1998 (‘DPA’) (para. 68 of the judgment). It cited in detail both the Data Protection Convention (para. 41) and Recommendation No. R (87) 15: *Regulating the use of personal data in the police sector* (adopted 17th September 1987) (para. 42).

4.12 Given the importance which the Grand Chamber attached to the data in *S and Marper* being ‘personal data’ in considering the applicability of Article 8(1), it is clear that the data with which this appeal is concerned must also fall within Article 8(1). This is because it is afforded an even greater degree of protection, as it constitutes ‘sensitive personal data’ (s. 2(g) and (h), DPA: *“information as to... the commission or alleged commission by him of any offence”* and *“information as to... any proceedings for any offence committed or alleged to have been committed by him, the disposal of such proceedings of the sentence of any court in such proceedings*”). Article 6 of the Data Protection Convention also refers to ‘special categories of data,’ including *“personal data relating to criminal convictions.”* Information falling with the special categories in Article 6, *“may not be processed automatically unless domestic law provides appropriate safeguards.”*

4.13 Second, the release or disclosure of sensitive information about the individual that is stored on public records, despite the individual wishing to keep it private, also amounts to a breach of Article 8(1): see e.g. *R v. Chief Constable of North Wales Police, ex parte A*B [1999] QB 396 per Lord Bingham at 414, Buxton J at 416, Lord Woolf at 429; *L*, per Lord Hope at paras. 25, 27; *Leander v. Sweden* (1987) 9 EHRR 433, para. *48; Rotaru v. Romania (2000) 8* BHRC 449, para. 43; *Segerstedt-Wiberg v. Sweden*, App. No. 62332/00, 6th June 2006, para. 72. This approach was adopted by Kenneth Parker J in the present case, and the Commission respectfully agrees with his reasoning in this regard.

4.14 This aspect of privacy concerns T’s right to informational self-determination – to be *“master of all those facts about his own identity... of which the cases speak”* (per Laws LJ in Wood, para. 21).

4.15 Liberty submit that Article 8(1) necessarily applies given that cautions/ reprimands/ warnings are administered in private and treated as immediately spent under the ROA (para. 31 of their written submissions). The SSHD and SSJ dispute the submission that, because a caution is administered *“behind closed doors”* it falls within Article 8(1) (para. 35 of their Skeleton). However Liberty’s submission in this regard, and the phrase itself, was directly drawn from Lord Hope’s analysis at para. 27 of *L*. In that passage he was explaining why Article 8(1) applies to information about convictions, despite them being public. He derived assistance in reaching that conclusion from the fact that he considered other non-conviction information disclosed in an ECRC to relate to *“things that happen behind closed doors,”* giving the specific example of a caution having been administered in private.

4.16 The SSHD and SSJ now respond in para. 35 by submitting that any individual who has agreed to accept a caution/ warning will have been informed that it will form part of their criminal record and will be disclosed on criminal records checks, and thus *“it is difficult to see how they could have any ‘reasonable expectation of privacy’ which is breached when a caution is disclosed in that way.”* The bare question of whether T had a reasonable expectation of privacy when the warnings were administered in 2002 is too simplistic and misleading in the context of this case, as the cumulative effect of the processes involves long-term and possibly permanent State control over a sensitive aspect of his past, which may permanently hamper his ability to secure employment. The question of a ‘reasonable expectation of privacy’ was not applied or referred to by the Grand Chamber in *S and Marper*. Further, the discussion in *Wood* (at paras. 22 and 24) concerned case law in relation to the taking of a photograph, rather than its retention/ storage/ subsequent use, a very different context (*Von Hannover/ Campbell/ Murray v. Big Pictures*).

4.17 If, contrary to these submissions, the Court does consider that the question is whether T could be said to have had a reasonable expectation of privacy, it is submitted that he did. The SSHD and SSJ suggest there was no reasonable expectation based on the presumption that he at the age of 11 would have been informed that the warnings would be disclosed on criminal records checks. This is not a basis for permitting any disclosure under any CRB scheme in future, regardless of how it operates. In considering whether T had a reasonable expectation of privacy assistance may be derived from Article 5 of the Data Protection Convention (particularly Article 5(e). Article 5 provides that:

***“Article 5 – Quality of data***

*Personal data undergoing automatic processing shall be:*

*a. obtained and processed fairly and lawfully;*

*b. stored for specified and legitimate purposes and not used in a way incompatible with those purposes;*

*c. adequate, relevant and not excessive in relation to the purposes for which they are stored;*

*....*

*e. preserved in a form which permits identification of the data subjects for no longer than is required for the purpose for which those data are stored.”*

Assistance may also be derived from the fact that the warnings are spent, as submitted by Liberty.

4.18 Third, Article 8(1) ensures the right to have one’s good name and reputation protected: see e.g. *Turek v. Slovakia* (2006) 44 EHRR 861, para. 109; *L*, per Lord Hope at para. 24. Whilst the case law primarily concerns disclosure of inaccurate information, and the right to make representations prior to disclosure, this aspect of Article 8(1) may also apply when the information is true but very outdated and irrelevant to the purpose of the disclosure.

4.19 Fourth, the potential impact upon T’s employment prospects lies within the scope of Article 8(1) – both his ability to secure work in his chosen field, and his interaction with his employer in the event that, despite the disclosure of his warnings, he secures work. This plainly impacts upon his ‘zone of interaction’ with others (*Von Hannover*, para. 50, and *Wood*, para. 21), given the highly sensitive nature of the information involved and the potential stigma associated with having been involved in criminal behaviour.

4.20 Exclusion of an individual from employment in his or her chosen field clearly lies within the scope of Article 8(1), given its impact upon his or her ability to develop relationships with others (see e.g. *L* at para. 24, citing *Sidabras v. Lithuania* (2004) 42 EHRR 104, para. 48). Automatic disclosure of adverse past information to a prospective employer, whilst not amounting to an automatic exclusion, differs only in terms of degree – it still involves the release of information which impacts upon the individual’s ability to develop relationships with others. It provides the prospective employer with historical adverse information about the individual, which may be very outdated, have no relevance to the individual’s current circumstances or the role in question, and despite the fact that there may be no particular reason for it to be disclosed (beyond the general application of a blanket rule). Even if the individual secures the job, despite the employer learning of this information, the employer is then aware of the historical adverse information. The distinction of degree between an automatic exclusion from employment and the situation which arises here is a matter for consideration under Article 8(2), it is submitted, rather than a reason why Article 8(1) does not even apply.

4.21 The First Respondent in paras. 26 – 28 of his Skeleton does not accept that Article 8(1) applies to T’s case. At para. 26 he submits that:

*“For Article 8 to apply in this case, the disclosure must actually interfere with the Appellant’s public life. It is submitted that in the context of this case the disclosure must actually have a significant impact upon the Appellant’s ability to obtain employment.”*

4.22 The Commission respectfully submits that this is simply not the appropriate test to apply in determining whether or not Article 8(1) is applicable. It has no basis in the applicable case law from the ECtHR or the domestic courts. It fails to even address the first three aspects of Article 8(1) summarised above, and deals solely with the fourth aspect, the question of impact upon T’s employment prospects. There is no answer within the First Respondent’s submissions to the other aspects of Article 8(1).

4.23 As regards the employment aspect, the Commission submits that:

(i) The First Respondent wrongly conflates Article 8(2) issues, concerning the proportionality of an interference, with the question of whether there has been an interference under Article 8(1) in the first instance. An interference with Article 8(1) caused by disclosure of adverse historical information in an ECRC may be slight or grave, depending upon the circumstances of the case;

(ii) The First Respondent’s proposed test of ‘significant impact’ upon T’s ability to obtain employment is an impossible one to apply, as the blanket scheme which is challenged will continue to apply to all relevant jobs in future, and the question of whether disclosure of his warning from 2002 will have a significant impact upon his ability to secure any such jobs is speculative;

(iii) The First Respondent does not address the question of whether, even if a job is secured, disclosure of irrelevant adverse historical information regarding T to prospective employers may nevertheless impact upon his ability to establish and develop relationships with his employer(s), and thus upon his zone of interaction with others – now clearly established as a fundamental aspect of Article 8.

4.24 The SSHD and SSJ sensibly accept, at para. 33 of their Skeleton, that the relevant provisions of the 1997 Act are *“capable of interfering with the right to respect for private life in Article 8(1) in certain cases,”* but they again suggest that T has not in fact been hampered by the scheme (para. 34: *“no recent application for employment, able to complete college course”*). Again, this does not address any of the first three relevant aspects of Article 8(1), referred to above; and it fails to adequately address the employment aspect, given the ongoing application of the scheme to T; the likelihood that it will hamper his prospects in terms of future job applications; and the impact of disclosure of this information upon his interaction with employers even in the event that he secures work.

***Article 8(2)***

4.25 As Article 8 is a qualified right, in determining whether an interference with Article 8(1) rights is justified under Article 8(2) a tripartite test is to be applied:

(1) Is the interference prescribed by law?

(2)Does it pursue a legitimate aim?

1. Is the interference, in all the circumstances*, “necessary in a democratic society”?* This incorporates the requirements that the restriction fulfils a *“pressing social need”*; is proportionate; and the measure adopted is the *“least restrictive means”* of achieving the legitimate objective pursued (i.e. if there is an alternative, less intrusive way of achieving the same aim then that alternative measure should be used).

4.26 The Commission accepts that the first and second limbs of this test are satisfied. The interference is prescribed by law; and disclosure under the legislative scheme serves to promote an important goal of public policy, namely, safeguarding children and vulnerable adults. It is noted that the bulk of the submissions made by the First Respondent concerning Article 8(2) relate to the first two limbs of Article 8(2) (Skeleton, paras. 29 – 42).

4.27 However the Commission submits that the third requirement is plainly not satisfied in the present appeal. The Respondents have failed to discharge the burden placed upon them, to justify the interference and demonstrate that it is necessary in a democratic society – an express requirement of Article 8(2). In particular, the Commission submits that the s. 113B ECRC scheme is a wholly disproportionate response to the legitimate aim in question, and it is not the least restrictive means of achieving that aim.

4.28 The Commission recognises the importance of retaining identification of those charged with or convicted of offences, and disclosing it in certain circumstances. However in the Commission’s view there is no justification for disclosing the information that is the focus of this case due to the application of a blanket policy, regardless of the individual circumstances. It is essential that such powers are used appropriately and proportionatelyand exercised fairly and in a Convention compliant manner.

4.29 The Strasbourg court has regularly criticised, in a wide variety of contexts, the application of blanket, general rules, and the Commission agrees with the Appellant that the Convention generally abhors a blanket rule. This includes when Parliament has mandated such blanket rules. For example, in *Hirst v. UK (No. 2)* (2006) 42 EHRR 41 the Grand Chamber held that the blanket ban on serving prisoners voting in House of Commons elections (s. 3, Representation of the People Act 1983) was incompatible with Article 3 of Protocol 1. The general, blanket nature of the ban was a *“blunt instrument”* which *“strips the Convention right to vote to a significant category of persons and does so in a way that is indiscriminate”* (para. 82). This was despite the Court granting the UK a wide margin of appreciation.

4.30 As is referred to above, at paras. 3.4 – 3.7 of these submissions, the SSHD and SSJ place reliance in their Skeleton upon the fact that non-recordable offences are not disclosed pursuant to s. 113B. The Commission respectfully submits that this is not a persuasive answer to the submissions concerning the indiscriminate nature of the scheme, given that:

4.30.1 A scheme may be blanket, generalised and indiscriminate without being of universal application. In *Hirst v. UK (No. 2),* for example, the impugned scheme did not apply to all prisoners (a distinction was drawn between convicted and remand prisoners, for example), but the Grand Chamber nevertheless found it to be indiscriminate and unjustified;

4.30.2 As highlighted by Mrs. Mason in her Phase 2 report, pp. 15 – 18, the distinction between recordable and non-recordable offences is not linked to public protection, nor does it equate to gravity of the offences. She expressed concern that the system is resulting in a *“growing list of offences that are treated as recordable... under regulations”* and that *“the process does not appear to be governed by any set criteria. It is hard to see any consistent justification for why the list contains the offences it does”* (p. 18). She highlighted anomalies in the included and excluded offences; and also the anomaly created by the fact that a minor penalty for a theoretically imprisonable offence is recorded on the PNC, whereas a large fine for an offence that is not imprisonable is not. She concluded that urgent reform was needed, and the SSHD and SSJ now confirm that her recommendations have not been rejected and are still under review.

4.31 As regards whether or not the blanket scheme is ‘necessary in a democratic society,’ a range of answers are suggested by the First and Second Respondents and the SSJ in their submissions.

4.31.1 The First Respondent addresses this in paras. 42, 43, and 44 of his Skeleton. He points to the *“value and efficacy”* of the existing system (para. 43), but much of the purported ‘value’ relates only to the fact that an ECRC which contains details of a past conviction or non-conviction disposal will be *“accurate,” “reliable”* or *“official”* (see e.g. paras. 43(m) and 44). It is wholly unclear why providing accurate information is automatically considered inherently valuable by the First Respondent. At para. 44, for example, the First Respondent states that without the 1997 Act, *“employers would potentially be left without any reliable ‘official’ record of an applicant’s background.”* However, first, neither the Appellant nor the Commission challenges the need for there to be some form of scheme relating to disclosure of conviction and non-conviction information; rather, they challenge the specifics of the existing scheme. Second, the First Respondent presumes there is automatic value to employers being provided with such information in all cases, without explaining why such a presumption has been made.

4.31.2 At para. 43(e) and (h) the First Respondent refers to the scheme as providing a ‘vital safeguard’ or ‘vital protection,’ without explaining why this scheme - in its present blanket form, without any filtering process – is essential to provide such protection. The Commission submits that it is unsustainable to argue that with certain jobs or roles, *all* previous convictions and cautions are *always* relevant, and thus provide a vital safeguard. In a particular case disclosure of, for example, a warning given for a relatively trivial offence committed many years ago by a child who has not subsequently re-offended would be likely to have no, or at least no more than negligible, relevance to the decision whether, say, that person (now an adult) could, even on the highest standards of protection, be safely employed to work with children. Nor is there any evidence of the safeguarding aspect of the scheme being undermined when the ‘step down’ system was in operation.

4.31.3 The SSHD and SSJ Skeleton focuses upon the *“significant practical questions”* or *“quite difficult practical questions”* (per Mr. Woodcock, paras. 21 – 27 of his Witness Statement in *JB*) which would arise, were the present automatic, blanket scheme to be replaced with one which incorporates a filtering mechanism (see in particular para. 31 of the Skeleton). However this is a problem of the State’s own making. The Commission submits that these practical difficulties have now arisen as a result of the introduction of a blanket, automatic scheme, and the SSHD cannot now rely upon the practical difficulties involved in dismantling that scheme to prove that the scheme itself is proportionate.

4.31.4 The previous existence of the ‘step down’ scheme also undermines the SSHD and SSJ’s submissions concerning the logistical difficulties involved in introducing a form of filter. Given the focus in their Skeleton upon the cost to the police that it is said would result from the Appellant succeeding in this appeal, it is surprising that there has been no evidence produced concerning the comparative cost to forces when they were previously operating a step down system, and subsequently.

4.31.5 In addition to focusing upon resources and practicalities in para. 31, at para. 44 the SSHD and SSJ stress the *“merit of simplicity and ease of administration” involved in a “rule-based system,”* or automatic, blanket scheme. They refer to the advantages of *“bright line rules,”* even if they lead to harsh effects in individual cases. The Commission does not accept this analysis, as set out above. Further, the paragraph of Lord Bingham’s judgment in the *Animal Defenders* case cited in para. 44 of the SSHD and SSJ’s Skeleton is wholly out-of-context. Para. 33 of Lord Bingham’s judgment appeared in a section concerning whether the challenged ban on political advertising was indeed the least restrictive means of achieving the legitimate objective in that case. It began with the following clear statement, in para. 31:

*“Since, in principle, no restriction may be wider than is necessary to promote the legitimate object which it exists to serve, it is necessary to ask whether any restriction on political advertising less absolute than that laid down in sections 319 and 321 would suffice to meet the mischief in question...”*

In contrast, in the present case the SSHD and SSJ suggest that *“bright line rules”* have, in themselves, been approved by the courts, regardless of the consequences for *“cases at the margins*”. Read in context, Lord Bingham’s comments at para. 33 of *Animal Defenders* do not support this claim.

4.31.6 The SSHD and SSJ Skeleton makes clear that the possibility of introducing a filter mechanism is being explored (para. 32) and that there is no suggestion such a scheme could not be made to work (para. 62). In these circumstances, it is difficult to see how they can sustain a submission that the current, blanket scheme is the ‘least restrictive means’ available to them, and thus a ‘necessary’ restriction upon the Article 8(1) rights of T and others.

4.32 The Commission’s view is that a blanket, general and indiscriminate policy of disclosure cannot be justified under Article 8(2). A blanket policy is the antithesis of proportionate. It takes no account of whether the conviction or non-conviction disposal is spent or unspent, the seriousness of the offence, the passage of time, the age of the person at the time, or any other factor. There is no filtering mechanism in place under the 1997 Act which allows for consideration of whether the information is in fact relevant in the individual case – as the definition of ‘any relevant matter’ is statutorily fixed. The Commission’s view is that disclosure could be proportionate in a particular case only if it were relevant to the decision for which disclosure was required. As the Commission submitted in the recent *RMC* case, an indiscriminate regime is inimical to proportionate governance.

4.33 The Commission also notes that the SSHD and SSJ submissions concerning the value of bright lines, despite harsh effects in individual cases, closely echoes the language adopted by Lord Justice Kennedy in the Divisional Court in *Hirst*, cited at para. 16 of the Grand Chamber’s judgment (which unequivocally rejected the domestic court’s approach):

*“... I return to what was said by the European Court in paragraph 52 of its judgment in Mathieu-Mohin. Of course as far as an individual prisoner is concerned disenfranchisement does impair the very essence of his right to vote, but that is too simplistic an approach, because what Article 3 of the First Protocol is really concerned with is the wider question of universal franchise, and ‘the free expression of the opinion of the people in the choice of the legislature’. If an individual is to be disenfranchised that must be in the pursuit of a legitimate aim. In the case of a convicted prisoner serving his sentence the aim may not be easy to articulate. Clearly there is an element of punishment, and also an element of electoral law...*

*The European Court also requires that the means employed to restrict the implied Convention rights to vote are not disproportionate, and that is the point at which, as it seems to me, it is appropriate for this court to defer to the legislature. It is easy to be critical of a law which operates against a wide spectrum (e.g. in relation to its effect on post-tariff discretionary life prisoners, and those detained under some provision of the Mental Health Act 1983)... I would accept that the tailoring process seldom admits of perfection, so the courts must afford some leeway to the legislator. As [counsel for the Secretary of State] submits, there is a broad spectrum of approaches among democratic societies, and the United Kingdom falls into the middle of the spectrum. In course of time this position may move, either by way of further fine tuning, as was recently done in relation to remand prisoners and others, or more radically, but its position in the spectrum is plainly a matter for Parliament not for the courts. That applies even to the ‘hard cases’ of post-tariff discretionary life sentence prisoners... They have all been convicted and if, for example, Parliament were to have said that all those sentenced to life imprisonment lose the franchise for life the apparent anomaly of their position would disappear. ...”*

4.34 Further, of the four *“safeguards”* listed by the First Respondent in para. 45 of his Skeleton, three are no such thing. He lists four apparent safeguards:

(a) the Data Protection Act 1998 (‘DPA’), which does not assist T or any other individual who wishes to prevent historical adverse information from being disclosed to a prospective employer through the ECRC scheme. Insofar as the information in question in this appeal is concerned, this is not a discretionary scheme, and the DPA cannot assist. In any event, the insufficiency of the DPA as a safeguard in this context is clear from the decision in *Chief Constable of Humberside v. Information Commissioner* [2010] 1 WLR 1136. The Court of Appeal considered whether the DPA principles (principles 3 and 5) required that old and minor convictions be deleted from the PNC. The Court held that so long as the police rationally and reasonably believed that the convictions served general police purposes, the retention could not be questioned, and the Information Commissioner was not entitled to independently assess the proportionality of the retention;

(b) *“the individual can ascertain what information is held by the police... [and] challenge the accuracy of the information”.* Again, this is of no assistance in relation to historical adverse information, which is true but of no longer of any relevance to a current or future job application;

(c) *“It is a criminal offence for an individual to disclose the information in a CRC otherwise than as authorised by the Act.”* Again, this is not a safeguard in respect of the interference arising from disclosure in the first place (although it does concern the potential of onward disclosure);

(d) *“The 1997 Act does not prevent the applicant from making representations to an employer.”* This is the distinction between an automatic exclusion from employment, and the present case, addressed above by the Commission.

4.35 The Commission is particularly concerned that under the legal framework, as interpreted by the Administrative Court, there is no mechanism at all for reviewing whether the information relating to a warning given in the circumstances outlined continues to serve any useful purpose in terms of the relevant public policy. The result is that disclosure of such information would, therefore, simply interfere with Article 8 rights without advancing any legitimate public interest – save for the purported public interest in certainty and ‘bright lines’ referred to in para. 17 of the judgment, and para. 44 of the SSHD and SSJ’s Skeleton. In the absence of any review mechanism that would enable information, no longer relevant, to be withheld, and that would prevent the unjustified interference with Article 8 rights in an individual case, the legislation cannot be proportionate.

4.36 The application of the law as it currently stands in particular cases such as this causes grave concern to the Commission. A system that allows no exceptions imposes a very heavy cost in terms of effect on the fundamental rights protected by Article 8 ECHR. The Commission is not persuaded that the actual and purported benefits that a system which admits no exceptions brings to, admittedly important, competing interests is justified as a matter of proportionality when the serious detrimental effects of such a system, particularly on child offenders, are weighed in the balance.

4.37 As regards T’s case, it is important to bear in mind that he was a child when the warning was given, aged 11. The courts have regularly considered the different principles at play when they are considering those convicted of offences as children - recognising the more restricted level of responsibility which a child can bear for their actions, in contrast to adults; and recognising that, due to their youth, there is room for substantial room for changes in maturity and development. Whilst these cases have no direct application in the present context, when considering the proportionality of the challenged scheme, and its application to T, assistance may be derived from the courts’ recognition of the special position of child offenders.

4.38 Section 44(1) of the Children and Young Persons Act 1933 requires every court dealing with any juvenile offender to have regard to his or her welfare (‘the welfare principle’). Baroness Hale referred to the importance of this provision in *R (Smith) v. SSHD* [2006] 1 AC 159 (para. 25):

*“…. an important aim, some would think the most important aim, of any sentence imposed should be to promote the process of maturation, the development of a sense of responsibility, and the growth of a healthy adult personality and identity. That is no doubt why the Children and Young Persons Act 1933, in section 44(1), required, and still requires, every court dealing with any juvenile offender to have regard to his or her welfare. It is important to the welfare of any young person that his need to develop into fully functioning, law abiding and responsible member of society is properly met. But that is also important for the community as a whole, for the community will pay the price, either of indefinite detention or of further offending, if it is not done.”*

4.39 The courts have accepted that the welfare principle requires a different approach to be adopted in relation to the setting of tariffs for children sentenced to detention at Her Majesty’s Pleasure, and adults (*R v. SSHD, ex parte Venables* [1998] AC 407, finding that the welfare principle required the Secretary of State to keep the children’s detention under continuous review). In *Smith* Lord Bingham strongly rejected the contention that this duty of continuous review was spent once the child reached 18 (that case concerned a girl aged 17 at the time of the murder, and c. 30 at the time the case came before the Lords) (pp. 167 – 168, para. 12, emphasis added):

*“Mr Pannick submits that there is no inherent requirement of continuing review where the detainee is no longer a child or young person. He points out that the respondent was aged 27 when the Lord Chief Justice set her minimum term in November 2001, and informs the House that none of the HMP detainees sentenced before 30 November 2000 and still in custody is now under the age of 18. He points out, correctly, that the welfare principle laid down in section 44 of the 1933 Act, as amended by section 72(4) of and Schedule 6 to the Children and Young Persons Act 1969, applies only to children and young persons. Thus in the respondent's case any duty of continuing review is, in effect, spent. This is not a submission which I can accept.* ***The requirement to impose a sentence of HMP detention is based not on the age of the offender when sentenced but on the age of the offender when the murder was committed, and it reflects the humane principle that an offender deemed by statute to be not fully mature when committing his crime should not be punished as if he were. As he grows into maturity a more reliable judgment may be made, perhaps of what punishment he deserves and certainly of what period of detention will best promote his rehabilitation.*** *It would in many cases subvert the object of this unique sentence if the duty of continuing review were held to terminate when the child or young person comes legally of age.”*

4.40 This ‘humane principle’ is, it is submitted, underpinned by the requirement in Article 3(1) of the UN Convention on the Rights of the Child (‘UNCRC’) that the best interests of the child shall be ‘a primary consideration’ in all decision-making by the State (including judicial decision-making); and Article 40 UNCRC. Article 40 recognises the importance of rehabilitation for children. Every child alleged as, accused of, or recognised as having infringed the penal law is to be treated in a manner consistent with the promotion of the child’s sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child’s reintegration and the child's assuming a constructive role in society. In relation to long spent non-conviction disposals, as in the present case, an analogous humane principle supports the notion that the individual can at some point have a clean slate, without a trivial matter from his childhood remaining permanently subject to automatic disclosure.

4.41 The UNCRC is taken into account by the European Court of Human Rights when assessing the parameters of the ECHR, particularly Article 8. The President of the Court has described this as a now well-established principle:

*“In the Strasbourg case-law, the principle of giving priority to safeguarding the best interests of the child is firmly established. The European Court has invoked it in different contexts over the years, beginning with the re-uniting of children taken into social care with their parents (e.g. Hokkanen v. Finland, 23 September 1994, Series A no. 299-A, and Nuutinen v. Finland, no. 32842/96, ECHR 2000-VIII).”[[5]](#footnote-5)*

4.42 The Grand Chamber in *Neulinger v. Switzerland* (2010) 28 BHRC 706, in drawing upon the UNCRC in interpreting Article 8 ECHR, emphasised the requirement for the ECHR to be interpreted in harmony with the general principles of international law (at para. 131).

4.43 The UNCRC thus, by virtue of s. 2(1) of the HRA, has a place in the interpretation of Convention rights by the courts in this jurisdiction: *R (P & Q) v. SSHD* [2001] EWHC Admin 357, [2001] 2 FLR 383, para. 33 (per Lord Woolf CJ); and [2001] EWCA Civ 1151, [2001] 2 FLR 1122, paras. 85 – 87 (per Lord Phillips PSC); *R v. SSHD, ex parte Venables* [1998] AC 407 at 530C (per Lord Hope)*; R (SR) v. Nottingham Magistrates’ Court* [2001] EWHC Admin 802, paras. 65-67; *LD (Zimbabwe) v. SSHD* [2010] UKUT 278, para. 28; *R (MXL) v. SSHD* [2010] EWHC 2397, para. 83; *ZH (Tanzania) v. SSHD* [2011] 2 AC 166, paras. 21–25. Failure to adhere to the UNCRC’s principles will violate the ECHR.

4.44 In *R (Howard League for Penal Reform) v. SSHD* [2002] EWHC 2497, [2003] 1 FLR 484 (a case concerning the applicability of the Children Act 1989 to children in custody) Munby J stated that the UNCRC (and another then non-binding international law instrument, the Charter of Fundamental Rights of the European Union[[6]](#footnote-6)) can (para. 51),

*“properly be consulted insofar as they proclaim, reaffirm or elucidate the content of those human rights that are generally recognised throughout the European family of nations, in particular the nature and scope of those fundamental rights that are guaranteed by the European Convention.”*

Similarly, in *R (MXL) v SSHD* (a case concerning the immigration detention of a woman with two young children), Blake J stated at para. 83:

*“Once Article 8 is engaged, the exercise of judgment in a case falling within its ambit must comply with the principles identified by Strasbourg. In a case where the interests of children are affected this means that other principles of international law binding on contracting states should be complied with.”[[7]](#footnote-7)*

4.45 The Supreme Court has in three recent decisions emphasised the importance of the best interests principle, and its enforceability in the domestic courts: *ZH (Tanzania) v. SSHD* [2011] 2 AC 166; *R (HH and PH) v. Deputy Prosecutor of the Italian Republic, Genoa; F-K v. Polish Judicial Authority* [2012] UKSC 25; *BH and KAS/ H v. The Lord Advocate and Another (Scotland)* [2012] UKSC 24.

4.46 Further, the Grand Chamber in *S and Marper* cited Article 40 UNCRC, and the Canadian case of *R v. RC* [2005] 3 SCR 99 (see para. 54 of the judgment).In *R v. RC* the Supreme Court of Canada considered the issue of retaining a juvenile first-time offender’s DNA sample on the national data bank. The court upheld the decision by a trial judge who had found, in the light of the principles and objects of youth criminal justice legislation, that the impact of the DNA retention would be grossly disproportionate. In his opinion, Fish J. observed:

*“Of more concern, however, is the impact of an order on an individual's informational privacy interests. In R. v. Plant, [1993] 3 S.C.R. 281, at p. 293, the Court found that s. 8 of the Charter protected the 'biographical core of personal information which individuals in a free and democratic society would wish to maintain and control from dissemination to the state'. An individual's DNA contains the 'highest level of personal and private information': S.A.B., at para. 48. Unlike a fingerprint, it is capable of revealing the most intimate details of a person's biological makeup. ... The taking and retention of a DNA sample is not a trivial matter and, absent a compelling public interest, would inherently constitute a grave intrusion on the subject's right to personal and informational privacy.”*

4.47 The Commission submits that, when considering the proportionality of the blanket scheme, and its application to T (whose warnings in 2002 were his first and only ones), this background may assist. Both Respondents and the Interested Party are subject to the provisions of the UNCRC, and it also applies to the Court when considering this appeal.

4.48 Finally, the Commission submits that there is also a further possible cost of the present system. If the child, and his or her parents, understand, as they should, that the acceptance of a caution creates a criminal record that will always remain with the child, and potentially affect future prospects, there may be a perverse incentive to contest the charge, a result that is also in tension with the current public policy of exposing children to the criminal justice system only if necessary. On the other hand, a system that allowed a caution to be expunged after an appropriate period of non-offending might be thought to create an efficient and sensible incentive to avoid such re-offending.

*The L Case*

4.49 The Commission supports the two-pronged approach adopted by the Appellant, i.e. his submissions either that the Learned Judge was wrong to consider himself bound by the *L* case; or alternatively that there were obiter statements in *L* which he should follow. The Learned Judge’s basis for his conclusion is essentially an obiter presumption by Lord Neuberger, and it did not bind Kenneth Parker J, nor does it bind this Court. It also pre-dates the *F* case, which was unanimous.

**5. THE 1975 ORDER**

5.1 Although this is an obiter finding only, the Commission agrees with the Appellant’s submissions concerning the flaws in the Learned Judge’s reasoning, and the relief he seeks. The Commission considers that Article 8(1) is applicable, and there is no justification under 8(2), for the reasons set out above in relation to the scheme of the 1997 Act. It would be remarkable were there to be strict restrictions required pursuant to Article 8 on the use of data by the State but the individual could still be required to answer related questions put to him by a private employer.

For the above reasons, the Commission supports this appeal.

**CAOILFHIONN GALLAGHER**

**Doughty Street Chambers**

**14th November 2012**

1. This research was undertaken by Professor Charles Raab, University of Edinburgh, and Associate Professor Benjamin Goold, University of British Columbia. [↑](#footnote-ref-1)
2. Raymond Wacks, *Personal Information, Privacy and the Law* (Clarendon Press, London, 1993), p. 7. [↑](#footnote-ref-2)
3. Raab and Goold, *Protecting Individual Privacy* (Equality and Human Rights Commission Research Report 69, 2011), pp. 15-18. [↑](#footnote-ref-3)
4. Raab and Goold, *Protecting Individual Privacy* (Equality and Human Rights Commission Research Report 69, 2011), p. 15. [↑](#footnote-ref-4)
5. Sir Nicholas Bratza, ‘The Best Interests of the Child in the Recent Case-Law of the European Court of Human Rights,’ Franco-British-Irish Colloque on family law (Dublin), 14th May 2011, p. 2. [↑](#footnote-ref-5)
6. Proclaimed at Nice, December 2000. [↑](#footnote-ref-6)
7. [2010] EWHC 2397, para. 83. [↑](#footnote-ref-7)