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IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM THE HIGH COURT OF JUSTICE

KING'S BENCH DIVISION (JUDICIAL REVIEW)

Between:

DEPARTMENT FOR JUSTICE

Appellant:

-and-

JR123

Respondent:

Before: McCloskey LJ, Horner LJ and Scoffield J

Mr Tony McGleenan KC and Mr Philip McAteer, of counsel, instructed by the Departmental Solicitor's Office) for the Appellant
Mr Hugh Southey KC and Mr Steven McQuitty, of counsel, instructed by the NI Human Rights Commission) for the Respondent

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McCLOSKEY LJ (*delivering the judgment of the court*)

Anonymity

The respondent having been granted anonymity and being described by the cipher "JR123", there shall be no publication of anything which might result in their identification.

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Introduction

[1] By the first of his two orders the trial judge, Colton J, declared that Article 6(1) of the Rehabilitation of Offenders (NI) Order 1978 is incompatible with article 8 ECHR "by reason of a failure to provide a mechanism by which the [respondent] can apply to have his conviction considered to be spent, irrespective of the passage of time and his personal circumstances." This order was made against the Department for Justice ("*DOJ*"), which appeals to this court. By the second of his orders the judge dismissed the respondent's application for an award of damages, in the following terms:

> "The court is not satisfied that an award of damages is necessary to afford just satisfaction to the [respondent]. That has already been achieved by the declaration granted by the court …. [which] adequately deals with the infringement of the [respondent's] human rights in the factual context of this case."

The respondent cross appeals against this order.

Factual Matrix

[2] The following material facts are either uncontested or incontestable. The respondent, when aged 21 years, was convicted of arson, and possessing a petrol bomb in suspicious circumstances, arising out of an attack by petrol bomb on a private residence. He was sentenced to concurrent terms of imprisonment of five years and four years respectively. At the same time he admitted to having committed the offences of burglary and theft on a previous date, generating two further concurrent sentences of 12 months' imprisonment. He was released from prison in 1982, some 40 years ago and is now aged 64.

[3] The effect of the operative statutory scheme (*infra*) is that his two headline convictions are incapable of becoming "spent." He asserts that this has had

prejudicial consequences for him. In particular, he has encountered difficulty in securing employment from time to time. He has also experienced difficulties in securing insurance for a small business which he has established and for other purposes.

[4] The respondent contends that he is a fully rehabilitated citizen. He has been in a stable relationship for some 17 years. He attends his local church and engages in charitable activities. He is a skilled tradesman, having obtained multiple qualifications following his release from prison. He has also secured awards for two trading inventions. He professes shame and regret for his criminal conduct.

The Impugned Statutory Provision

[5] The Rehabilitation of Offenders (NI) Order 1978 (the "1978 Order") establishes a scheme whereby certain types of criminal convictions can become "spent." Convictions of this kind do not have to be disclosed by the offender (to, for example, a prospective employer) and cannot be disclosed by any other agency (for example, and in particular, Access NI), subject to certain exceptions.

[6] The concept of "rehabilitated person" lies at the heart of the 1978 Order. The impact of securing this status is considerable, as Article 5(1) makes clear:

> "… a person who has become a rehabilitated person for the purposes of this Order in respect of a conviction shall be treated for all purposes in law as a person who has not committed or been charged with or prosecuted for or convicted of or sentenced for the offence or offences which were the subject of that conviction …."

However, as regards sentences of imprisonment exceeding 30 months, the status of rehabilitated person cannot be achieved by the offender. This is so by virtue of Article 6(1):

> "The sentences excluded from rehabilitation under this Order are –
>
> …
>
> (b) A sentence of imprisonment or corrective training for a term exceeding 30 months."

[7] In summary, the effect of the statutory scheme is that convicted offenders must disclose their convictions either for specified periods, of varying duration, or for the remainder of their lives. This duty is, with limited exceptions, extinguished when the appropriate period expires. It continues to apply to specified types of employment, such as working with children or vulnerable adults, working in private

security companies, various policing and kindred posts and applying for taxi licences. While the duty continues its practical impact occurs in the realms of employment, education, training, volunteering, insurance, housing, and access to financial products.

The Story of the Legislation

[8] The introduction of the 1978 Order was preceded by the adoption in England and Wales of the Rehabilitation of Offenders Act 1974 (the "1974 Act"). This in turn was preceded by the publication of "Living it Down", a government report composed by a committee comprising representatives of the Ministry of Justice ("MOJ"), the National Association for the Care and Resettlement of Offenders ("NACRO") and The Howard League for Penal Reform (the "Howard League"). This report recommended that the maximum term of sentenced imprisonment for the purpose of securing the status of rehabilitated person should be 24 months. The House of Lords proposed the longer period of 30 months. This was adopted in the 1974 Act and the 1978 Order was later made in materially similar terms.

[9] The legislation in both jurisdictions operated without amendment until 2001, when the Home Secretary initiated a fundamental review of the 1974 Act. While public consultation and debate followed, no alteration of the legislation resulted. Next in 2010 the MOJ published the Green Paper "Breaking the Cycle: Effective Punishment, Rehabilitation and Sentencing of Offenders." Following consultation and further debate the 1974 Act was amended with effect from 10 March 2014 via the Legal Aid, Sentencing and Punishment Act 2012 (the "2012 Act"). These amendments *inter alia* increased the 30 months term of imprisonment for the purpose of excluding a conviction from becoming spent to one of four years.

[10] In July 2019 MOJ published proposals for further reform. These included a proposal to incorporate sentences of imprisonment exceeding four years in the statutory scheme, excepting sentences for very serious offences and life imprisonment. On 28 April 2022 the Police, Crime, Sentencing and Courts Act 2022 (the "2022 Act") received Royal Assent. This, inter alia, effected further amendments of the 1974 Act. Pursuant to these amendments certain custodial sentences exceeding four years imprisonment now fall within the statutory scheme. In addition, with regard to prison sentences of less than four years, the qualifying period for securing the status of rehabilitated person was reduced.

[11] The relevant provision of the 2022 Act is section 193. It has not yet been commenced. The current MOJ aspiration is to commence this provision in October 2023. This will apply to England & Wales only.

[12] Pausing, if the amendments of the rehabilitation statutory schemes in England and Wales and Scotland were introduced in Northern Ireland this would not avail the respondent (a) as his sentence of five years' imprisonment in respect of

the arson offence exceeds the statutory ceiling of four years and (b) they contain no review mechanism.

[13] Turning to the jurisdiction of Northern Ireland, the story continues in the following way. Pursuant to the Devolution of Justice to Northern Ireland (Northern Ireland Act 1998 amendment of Schedule 3) Order 2010, DOJ became the responsible public authority and the Northern Ireland Assembly ("NIA") became the responsible legislative agency. Prior to this date the rehabilitation of offenders statutory regimes in the two jurisdictions had been substantially the same. The reforms introduced in the sister jurisdiction in 2014 (*supra*) did not extend to Northern Ireland. However, they provided the impetus for a debate on whether the legislation in this jurisdiction should follow suit.

[14] During the period 2014 to 2016 there were relevant Ministerial submissions, coupled with certain formal questions and answers in the forum of the Northern Ireland Assembly ("NIA"). Between 2017 and January 2020 NIA was in suspension. Following its re-establishment the Minister of Justice approved the initiation of a review of the statutory rehabilitation scheme. Following some delays associated with the Covid-19 pandemic, in September 2020 a White Paper was published. Next a formal publication consultation exercise began on 8 January 2021, continuing for a period of three months. Some 77 responses were received. All of the steps taken up to this stage had the approval of the Minister of Justice and involved the NIA Justice Committee. Since then, however, progress has been faltering.

[15] In January 2022 a summary of all consultation responses received, with the Minister's approval, was published on the DOJ website. The following month DOJ officials provided a briefing to the Justice Committee. Some additional information was requested and provided promptly. The Committee in effect resolved that the extant statutory scheme should be amended. The mechanism for this was to be Statutory Rule. On 25 February 2022 the appropriate instrument, being a draft of The Rehabilitation of Offenders (Amendment) Order (NI) 2022, was submitted to the NIA Business Office. The timetable devised was that the draft instrument would be debated by the NIA on 21 March 2022, when the Minister's motion for adoption would be made. Certain technical issues having been identified, this did not proceed in the event. A revised draft was prepared subsequently.

[16] NIA has been in a state of suspension once again since mid-2022. As a result no further progress has been made.

[17] The draft statutory rule reflects the policy adopted by DOJ and the Minister of Justice at the beginning of the review exercise. It provides that every convicted offender punished by periods of imprisonment of up to ten years will be capable of becoming a rehabilitated person upon the expiry of the relevant qualifying period. In the event of the draft statutory rule becoming law the respondent will immediately become a rehabilitated person as his convictions will automatically become "spent."

[18] As regards Scotland, there was parity between that jurisdiction and Northern Ireland until 30 November 2020. With effect from the latter date the Scottish statutory scheme was amended, broadly reflecting the alterations made to the 1974 Act in England and Wales in 2012/2014. The "ceiling" of 48 months imprisonment was thus maintained. The relevant legislation is the Management of Offenders (Scotland) Act 2019. This specifically empowers Scottish Ministers to initiate a review of the 48 months ceiling. There has been no review to date and there is no indication of any planned review.

Policy Considerations

[19] From the affidavits sworn on behalf of DOJ and the associated materials one can identify the following as the main policy considerations in play:

(a) A statutory rehabilitation scheme must strike a balance among the interests of the individual seeking to put their past behind them, the needs of employers (or others with a legitimate interest in assessing an individual's risk to others), the protection of certain members of the public and the requirement to maintain public confidence in the criminal justice system.

(b) A former offender who finds employment is less likely to reoffend thereby benefiting himself, his family, and the wider community.

(c) The main purpose of the statutory scheme is to help former offenders gain employment and encourage them to live in accordance with the law.

(d) The extant statutory scheme is considered to strike an appropriate balance between protecting the public from further harm and equipping offenders to resettle in the community in a positive way. DOJ is "... acutely conscious of the importance of managing the risk of further harm from reoffending, with the level of risk assessed against the seriousness of the offence, as indicated by the length of sentence imposed."

(e) The extant statutory scheme reflects *inter alia* the desirability of the exclusion of the more serious offences, measured by the length of custodial sentences. It is averred:

> "To allow previous convictions to be disregarded without exception would pose an unacceptable risk to public safety. An important consideration here is the importance of maintaining the public's acceptance of the legitimacy of the law and confidence in the justice system. Without this support, the justice system could not operate effectively, and public safety would be fatally compromised."

(f) All convictions, including those "spent", must always be declared by candidates for certain types of employment. These include posts involving contact with children or vulnerable people; working in financial institutions; appointments in the realm of health and medicine and posts in law enforcement. All of the so-called "excepted" employments and professions are specified in the Rehabilitation of Offenders (Exceptions) Order (NI) 1979 (the "1979 Order").

(g) It is further averred:

> "The Department is committed to supporting the effective rehabilitation of offenders but recognises that more serious offences attract particular public concern regarding safety and represent a more serious risk to the public where reoffending occurs. For that reason the Department, in common with Justice Departments in neighbouring jurisdictions, [considers that] some very serious offences must remain incapable of becoming spent, reflecting the risk to the public and the strong public antipathy to such offences becoming spent."

(h) The next ensuing averment is this:

> "Whether a conviction is spent or not does not however in itself necessarily promote or produce the likelihood of the rehabilitation of offenders. What an unspent conviction does is to alert a prospective employer of [sic] the offending background of the individual, which could influence their assessment of the type of position which would be suitable for them ….
>
> It is only the employer who can make an objective assessment of the relevance of a conviction to an individual's suitability for a position and, particularly for the more serious cases, it is important that they can make an informed assessment."

(i) The appointment of an independent assessor to consider the relevance of an individual's conviction in relation to specified potential employment is not considered a realistic or practical device. Any rehabilitation of offenders regime should be simple and workable. The appointment of an independent assessor would "… create a barrier to employment and could discourage employers from recruiting former offenders."

(j) The two central purposes of the statutory rehabilitation regime have at all times been (a) allowing individuals who have ceased offending to move on with their lives, work and fully participate in society (with the qualifications/exceptions noted) and (b) seeking to remove barriers to employment, which is a significant factor in encouraging rehabilitation and reducing reoffending.

(k) There are two further averments of note. First:

> "By seeking to increase the range of sentences that can become spent, whilst simultaneously reducing the period of time that must elapse before sentences can become spent, the Department's intended reforms will benefit individuals. The hope is, in conjunction with the Department's efforts elsewhere, to better rehabilitate ex-offenders and reduce reoffending rates, which is assisted by meaningful employment.

(l) Followed by:

> "Lines require to be drawn within the regime for the reasons first articulated in the 1972 report, to provide certainty and in order to be workable. The same reasons apply now as then as to why length of sentence is considered a good basis for distinguishing between offenders. The fact that the Department is reviewing where the precise lines should be drawn should not be held against it and does not mean that the lines have not been drawn lawfully to date and remain lawfully drawn at the current time."

[20] The policy considerations summarised above fall to be considered in conjunction with certain raw data. The statutory context to which these data belong, namely the 1978 Order, is that the qualifying periods for acquiring the status of rehabilitated person are the following:

(i) Fines: five years.

(ii) A sentence of imprisonment of six months or less: seven years.

(iii) Imprisonment of between six and 30 months: ten years.

As already noted, a person in receipt of a sentence of imprisonment exceeding 30 months cannot become a rehabilitated person, hence their convictions will never become "spent."

[21] Against the foregoing statutory background, in 2019 of 16,750 sentencing disposals imposed by the courts of this jurisdiction, with the breakdown was the following:

(i) Fines: 13,532.

(ii) Imprisonment of less than six months: 2,615.

(iii) Imprisonment terms of over six months and up to 30 months: 538.

(iv) Imprisonment terms exceeding 30 months, including life imprisonment disposals: 65.

[22] The total number of disposals in 2019 was 25,000 approximately. Of these, fines represented 54.1%; imprisonment was imposed in 12.9% of all convictions; and in almost 98% of cases belonging to the latter category the term was less than 30 months with the result that the offender could become a rehabilitated person under the extant statutory scheme. The discrete category to which the respondent's case belongs, therefore, represents only 2.1% of all custodial sentences imposed in that statistical period. There is no evidence of any more recent statistical period.

At First Instance

[23] The case made by the respondent from the outset can be reduced to a single sentence. He contended that Article 6(1) of the 1978 Order was incompatible with his right to respect for private life guaranteed by article 8 ECHR and justiciable under the scheme of the Human Rights Act 1998 by reason of the lack of a review mechanism in the impugned statutory measure thereby entitling him to appropriate relief, in particular a declaration of incompatibility.

[24] Colton J, in a thoughtful judgment, found the respondent's case persuasive. The following are the central tenets of his reasoning and conclusions:

(i) The right to respect for the respondent's private life guaranteed by article 8 (ECHR) via the Human Rights Act 1998 applies to the subject matter of his challenge.

(ii) The impact of the impugned statutory provision on the respondent has interfered significantly with this right.

(iii) The interference is in accordance with the law and pursues a legitimate aim.

(iv) The interference is disproportionate.

[25] In making the fourth of these discrete conclusions the judge applied the three tests devised in *De Freitas* (para [34] infra). The judge considered that the impugned statutory provision is compliant with the first and second tests. However, in the judge's view it failed the third test, for the following reason, at para [100]:

> "The objectives of protecting the public and ensuring confidence in the justice system can be achieved by the imposition of lesser restrictions which would facilitate the opportunity for the applicant to apply to have his conviction deemed to be spent."

The judge expressed his key conclusion with admirable clarity at [2021] NIQB 97, para [102]:

> "Accordingly, the court is persuaded that it is appropriate to make a declaration to the effect that Article 6(1) of the Rehabilitation of Offenders (NI) Order 1978 is incompatible with Article 8 of the ECHR by reason of a failure to provide a mechanism by which the applicant can apply to have his conviction considered to be spent, irrespective of the passage of time and his personal circumstances."

As these passages make clear the judge's conclusion regarding proportionality is not based upon a judicial condemnation of the legislative selection of the ceiling of 30 months imprisonment specified in Art 6 of the 1978 Order. The judge did not decide the issue of proportionality on the basis that this ceiling is too low. Rather, for him the disproportionality lay in the absolute exclusionary effect of Article 6(1) of the 1978 Order. In the judge's words, the impugned statutory provision is disproportionate because it:

> "…. subjects the applicant to a life-long disclosure requirement and where his convictions can never be spent."

[26] With regard to the issue of review mechanism the judge stated at para [97]:

> "The evidence of the effect of the 2012 Order or Schedule [8A] of the Police Act 1997 suggests that in a small jurisdiction such as Northern Ireland it has been demonstrated that it has the capacity to establish systems of administrative review that would enable an individual to demonstrate that his or her personal circumstances do not justify them being subject to the scheme in question. The review mechanisms established suggest that there is

> no reason why such mechanisms are not practicable in this jurisdiction."

Continuing at para [98]:

> "It seems to the court that that it would be both practicable and proportionate to devise a system of administrative review which would enable persons such as the applicant to apply to have their conviction deemed to be spent. The court considers that there must be some circumstances in which an appropriate tribunal could reliably conclude that an individual's conviction should be deemed to be spent. That system of review would involve consideration of such matters as the circumstances of the conviction, the length of sentence, the period of time since the conviction was imposed, the conduct of the individual since the conviction and his current personal circumstances."

[27] Colton J explicitly recognised that the declaration of incompatibility would not insulate the respondent (and other like sentenced offenders) from the disclosure of his previous convictions in the context of sensitive occupations in accordance with the vetting procedures under the Police Act 1997: see para [95].

The Parties' Competing Contentions

[28] DOJ's challenge to the decision and order of Colton J draws heavily on two decisions of the UK Supreme Court. These formed the centrepiece of the argument of Mr McGleenan KC and Mr McAteer. The first is *R (P) v Secretary of State for the Home Department* [2020] AC 185 which, it is argued, supports the proportionality of the "pre-defined categories" or "bright lines" in the impugned statutory provision and its Art 8 compatibility. The second is *Attorney General for Northern Ireland's Reference (Safe Access Zones) (Northern Ireland) Bill* [2022] UKSC 32 which, it is contended, establishes that the test to be applied in determining the Convention compatibility of legislation is whether it causes an unjustified interference with Convention rights in all or almost all cases. We shall describe these two decisions as *Re P* and *Safe Access Zones*.

[29] The riposte on behalf of the respondent focusses particularly on the decision of the Supreme Court in *R (JF) v Secretary of State for the Home Department* [2011] 1 AC 311 ("JF") and that of the ECtHR in *Gaughran v United Kingdom* [App No 45245/15]. Broadly, the respondent supports the approach and reasoning of the trial judge in all material respects.

The Proportionality Principles

[30] The key question for this court is whether the judge's condemnation of Article 6 of the 1978 Order as interfering disproportionately with the right to respect for private life guaranteed by article 8 ECHR under the Human Rights Act, thereby warranting a declaration of incompatibility, is sustainable in law. This will entail consideration of the correct judicial approach to issues of proportionality as established by the governing principles.

[31] The concept of the margin of appreciation, an integral part of the doctrine of proportionality, provides an appropriate starting point. One of the most familiar pronouncements of the ECtHR is found in *James v United Kingdom* [1986] 8 EHRR 123 at para 46:

> "Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is 'in the public interest.' Under the system of protection established by the Convention, it is thus for the national authorities to make the initial assessment both of the existence of a problem of public concern warranting measures of deprivation of property and of the remedial action to be taken (see, mutatis mutandis, the Handyside judgment of 7 December 1976, Series A no. 24, p. 22, para. 48). Here, as in other fields to which the safeguards of the Convention extend, the national authorities accordingly enjoy a certain margin of appreciation."

[32] Following the enactment of the Human Rights Act the UK Supreme Court expressed itself in comparable terms, in *R (L) v Commissioner of Police of the Metropolis* [2009] UKSC 3 at para [74]:

> "When deciding whether the balance is appropriate, it is for the court to form its own judgement, but in doing so it should accord proper deference to the fact that the legislation represents the view of the democratically elected legislature as to where the balance should be struck."

As this passage demonstrates, striking the balance and making choices by public authorities are other established themes of the juridical equation under scrutiny.

[33] In some of its earliest pronouncements on the scheme of the ECHR following the introduction of the Human Rights Act, the House of Lords (Judicial Committee) emphasised the concept of the State's margin of appreciation or "discretionary area of judgment":

> "Judicial recognition and assertion of the human rights defined in the Convention is not a substitute for the processes of democratic government but a complement to them. While a national court does not accord the margin of appreciation recognised by the European court as a supra-national court, it will give weight to the decisions of a representative legislature and a democratic government within the discretionary area of judgment accorded to those bodies: see *Lester & Pannick, Human Rights Law and Practice* (1999), pp 73-76. The Convention is concerned with rights and freedoms which are of real importance in a modern democracy governed by the rule of law. It does not, as is sometimes mistakenly thought, offer relief from 'The heart-ache and the thousand natural shocks that flesh is heir to.'"

[*Brown v Stott* [2003] 1 AC 681, per Lord Bingham at p 703c/d.]

To like effect is the analysis of Lord Hope in *R(DPP) v Kebeline* [2000] 2 AC 326 at p 380h/381d:

> "This doctrine is an integral part of the supervisory jurisdiction which is exercised over state conduct by the international court. By conceding a margin of appreciation to each national system, the court has recognised that the Convention, as a living system, does not need to be applied uniformly by all states but may vary in its application according to local needs and conditions. This technique is not available to the national courts when they are considering Convention issues arising within their own countries. But in the hands of the national courts also the Convention [2000] 2 A.C. 326 Page 381 should be seen as an expression of fundamental principles rather than as a set of mere rules. The questions which the courts will have to decide in the application of these principles will involve questions of balance between competing interests and issues of proportionality.
>
> In this area difficult choices may have to be made by the executive or the legislature between the rights of the individual and the needs of society. In some circumstances it will be appropriate for the courts to recognise that there is an area of judgment within which the judiciary will defer, on democratic grounds, to the considered opinion of the elected body or person whose act or decision is said to be incompatible with the

> Convention. This point is well made at p. 74, para. 3.21 of Human Rights Law and Practice (1999), of which Lord Lester of Herne Hill and Mr. Pannick are the general editors, where the area in which these choices may arise is conveniently and appropriately described as the "discretionary area of judgment." It will be easier for such an area of judgment to be recognised where the Convention itself requires a balance to be struck, much less so where the right is stated in terms which are unqualified. It will be easier for it to be recognised where the issues involve questions of social or economic policy, much less so where the rights are of high constitutional importance or are of a kind where the courts are especially well placed to assess the need for protection."

[34] The ECHR doctrine of proportionality was considered by the Privy Council in *De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69 at p 80:

> "[In] *Retrofit (Pvt.) Ltd. v. Posts and Telecommunications Corporation*, [1996] 4 L.R.C. 489, a corresponding analysis was formulated by Gubbay CJ., drawing both on South African and on Canadian jurisprudence, and amalgamating the third and fourth of the criteria. In the former of the two cases at page 75 he saw the quality of reasonableness in the expression "reasonably justifiable in a democratic society" as depending upon the question whether the provision which is under challenge 'arbitrarily or excessively invades the enjoyment of the guaranteed right according to the standards of a society that has a proper respect for the rights and freedoms of the individual.' In determining whether a limitation is arbitrary or excessive he said that the court would ask itself:
>
> > 'whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective.'
>
> Their Lordships accept and adopt this threefold analysis of the relevant criteria."

[35] With the passage of time the formulation of the doctrine of proportionality at the highest judicial level has become progressively nuanced and specific. This is apparent in *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532 (in particular per Lord Steyn at p 547e); *R (Razgar) v Secretary of State for the Home Department* [2004] UKHL 27 at para [20]; *R v Shayler* [2003] 1 AC 247, per Lord Hope at paras [57]–[59]; *Huang v Secretary of State for the Home Department* [2007] 2 AC 169 (per Lord Bingham at para [19]; and *R (Quila) v Secretary of State for the Home Department* [2012] 1 AC 621 at para [45].

[36] Summarising, the *De Freitas* framework has undergone evolution and adaptation in the subsequent jurisprudence of the Supreme Court. Notably, it did not merit a mention in the most recent dissertation of the Supreme Court on this topic (*Re P*, *infra*). The jurisprudential evolution was highlighted by Lord Sumption, in a judgment with which the majority of the Supreme Court concurred, in *Bank Mellat v Her Majesty's Treasury (No 2)* [2014] AC 700, at para 20. Having traced most of the case references noted in the immediately preceding paragraph, with the preface that *De Freitas*:

> "… although it was a milestone in the development of the law …. is now more important for the way in which it has been adapted and applied in the subsequent case law …"

Lord Sumption propounded that the effect of this cluster of decisions:

> "… can be sufficiently summarised for present purposes by saying that the question (ie proportionality) depends on an exacting analysis of the factual case advanced in defence of the measure, in order to determine (i) whether its objective is sufficiently important to justify the limitation of a fundamental right; (ii) whether it is rationally connected to the objective; (iii) whether a less intrusive measure could have been used; and (iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community."

Lord Sumption continued:

> "These four requirements are logically separate, but in practice they inevitably overlap because the same facts are likely to be relevant to more than one of them."

Continuing, Lord Sumption then turned his attention to the third of the four requirements and in particular the argument that a measure would be

disproportionate if any more limited measure was capable of achieving the objective. He agreed with Maurice Kay LJ:

> "… that this debate is sterile in the normal case where the effectiveness of the measure and the degree of interference are not absolute values but questions of degree, inversely related to each other. The question is whether a less intrusive measure could have been used without unacceptably compromising the objective."

[37] Lord Sumption next referred with approval to the exposition of the doctrine of proportionality contained in the dissenting judgment of Lord Reed, at paras [68]–[76]. The following passage, at para [71] is of particular note:

> "An assessment of proportionality inevitably involves a value judgement at the stage at which a balance has to be struck between the importance of the objective pursued and the value of the right intruded upon. The principle however does not entitle the courts simply to substitute their own assessment for that of the decision maker. As I have already noted, the intensity of review under EU law and the Convention varies according to the nature of the right at stake and the context in which the interference occurs. These are not however the only relevant factors. One important factor in relation to the Convention is that the Strasbourg Court recognises that it may be less well placed than a national court to decide whether an appropriate balance has been struck in the particular national context. For that reason, in the Convention case law the principle of proportionality is indissolubly linked to the concept of the margin of appreciation."

Having next highlighted that, faithful to the common law tradition, domestic UK courts (specifically the Supreme Court) had developed a more structured approach to the question of proportionality, Lord Reed added at paras [74] and [76] that the fourth of the criteria (or tests) formulated by Lord Sumption in essence involves the question of whether the impact of the Convention rights infringement under consideration is disproportionate to the likely benefit of the impugned measure. This test, as further explained at para [76], is distinct from the question of whether a particular objective is in principle sufficiently important to justify limiting a particular right (the first of the four tests).

[38] It is necessary to acknowledge a later passage of significance in *Bank Mellat (No 2)* para 20, where the majority elaborate on the meaning of this test:

> "The question is whether a less intrusive measure could have been used without unacceptably compromising the objective."

In the same passage the majority aligned themselves with the doctrinal approach contained in the minority judgement of Lord Reed. In one passage of the latter judgment at para 72, reference is made to the three *De Freitas* criteria in the following terms:

> "The three criteria have however an affinity to those formulated by the Strasbourg Court in cases concerned with the requirement under Articles 8 to 11 that an interference with the protected right should be necessary in a democratic society …. **provided the third limb of the test is understood as permitting the primary decision maker an area within which its judgement will be respected**."
> [Our emphasis.]

[39] Another feature of the jurisprudence of the Supreme Court and the ECtHR regarding the doctrine of proportionality has been its consideration of so-called "pre-defined categories" or "bright line rules." This can be traced to *Carson v Secretary of State for Work and Pensions* [2005] UKHL 37, where certain aspects of the statutory qualifying rules relating to pension entitlement were challenged by two people who were unable to satisfy them. Lord Hoffman, in one of the two main speeches delivered and in a passage from which no other member of the majority dissented, noted at para [41] the argument based on arbitrariness, dismissing it in these terms:

> "A line must be drawn somewhere. All that is necessary is that it should reflect a difference between the substantial majority of the people on either side of the line. If one wants to analyse the question pedantically, a person one day under 25 is in an analogous, indeed virtually identical, situation to a person aged 25 but there is an objective justification for such discrimination, namely the need for legal certainty and a workable rule."

Lord Rodger of Earlsferry, to like effect, stated at para 91:

> "… in my opinion the courts below were entirely correct in their approach to the appropriate intensity of scrutiny. Demarcation lines of this sort have to be reasonably bright lines and the task of drawing them is … particularly a legislative task and an unavoidable one."

[40] This theme resurfaced in *R (Tigere) v Secretary of State for Business, Innovation and Skills* [2015] UKSC 57, where the challenge concerned the Convention compatibility of the statutory scheme governing qualification for a higher education loan. The claimant was a person who did not satisfy one particular aspect of the qualifying criteria, namely having the legal status of "settlement" in the United Kingdom. The majority of the Supreme Court, in substance, held in its finding of disproportionality that a bright line rule which "… more closely fitted the legitimate aims of the measure" could have been chosen: see per Baroness Hale at para [38].

[41] There is a powerful joint dissenting judgment of Lord Sumption and Lord Reed. At para [86]ff their Lordships addressed the topic of "Proportionality and Bright Line Rules." It is appropriate to reproduce paras [88]–[91] in their entirety:

> "[88] Those who criticise rules of general application commonly refer to them as 'blanket rules' as if that were self-evidently bad. However, all rules of general application to some prescribed category are 'blanket rules' as applied to that category. The question is whether the categorisation is justifiable. If, as we think clear, it is legitimate to discriminate between those who do and those who do not have a sufficient connection with the United Kingdom, it may be not only justifiable but necessary to make the distinction by reference to a rule of general application, notwithstanding that this will leave little or no room for the consideration of individual cases. In a case involving the distribution of state benefits, there are generally two main reasons for this.
>
> [89] One is a purely practical one. In some contexts, including this one, the circumstances in which people may have a claim on the resources of the state are too varied to be accommodated by a set of rules. There is therefore no realistic half-way house between selecting on the basis of general rules and categories, and doing so on the basis of a case-by-case discretion. The case law of the Strasbourg court is sensitive to considerations of practicality, especially in a case where the convention confers no right to financial support and the question turns simply on the justification for discrimination. In Carson v UK [2016] 1 All ER 191 at 221 (2010) 29 BHRC 22, which concerned discrimination in the provision of pensions according to the pensioner's country of residence, the Grand Chamber observed (para 62):

> 'as with all complaints of alleged discrimination in a welfare or pensions system, it is concerned with the compatibility with art 14 of the system, not with the individual facts or circumstances of the particular applicants or of others who are or might be affected by the legislation. Much is made in the applicants' submissions and in those of the third-party intervener of the extreme financial hardship which may result from the policy … However, the court is not in a position to make an assessment of the effects, if any, on the many thousands in the same position as the applicants and nor should it try to do so. Any welfare system, to be workable, may have to use broad categorisations to distinguish between different groups in need … the court's role is to determine the question of principle, namely whether the legislation as such unlawfully discriminates between persons who are in an analogous situation.'

This important statement of principle has since been applied by the European Court of Human Rights to an allegation of discrimination in the distribution of other welfare benefits such as social housing: Bah v UK (2011) 31 BHRC 609 (para 49). And by this court to an allegation of discrimination in the formulation of rules governing the benefit cap: R (on the application of SG (previously JS)) v Secretary of State for Work and Pensions [2015] UKSC 16, (at [15] per Lord Reed).

[90] The second reason for proceeding by way of general rules is the principle of legality. There is no single principle for determining when the principle of legality justifies resort to rules of general application and when discretionary exceptions are required. But the case law of the Strasbourg court has always recognised that the certainty associated with rules of general application is in many cases an advantage and may be a decisive one. It serves 'to promote legal certainty and to avoid the problems of arbitrariness and inconsistency inherent in weighing, on a case by case basis': Evans v UK (2007) 22 BHRC 190 (para 89). The Court of Justice of the European Union has for many years adopted the same approach to discrimination cases, and has more than once held that

where a residence test is appropriate as a test of eligibility for state financial benefits, it must be clear and its application must be capable of being predicted by those affected: Collins v Secretary of State for Work and Pensions (Case C-138/02) EU:C:2004:172, [2004] All ER (EC) 1005, (para 72), Förster v Hoofddirectie van de Informatie Beheer Groep (Case C-158/07) [2009] All ER (EC) 399, [2008] ECR I-8507 (para 56). As Advocate General Geelhoed acknowledged in considering these very regulations in Bidar [2005] All ER (EC) 687, (para 61):

> 'Obviously a member state must for reasons of legal certainty and transparency lay down formal criteria for determining eligibility for maintenance assistance and to ensure that such assistance is provided to persons proving to have a genuine connection with the national educational system and national society. In that respect, and as the court recognised in Collins, a residence requirement must, in principle, be accepted as being an appropriate way to establish that connection.'

[91] The advantages of a clear rule in a case like this are significant. It can be applied accurately and consistently, and without the element of arbitrariness inherent in the discretionary decision of individual cases. By simplifying administration it enables speedy decisions to be made and a larger proportion of the available resources to be applied to supporting students. Young people considering applying to universities need to know whether they will get a student loan or not. The Student Loan Company, which administers the scheme, needs to process a very large number of applications for loans in the relatively short interval between the acceptance of a student by a university and the start of the academic year."

[42] At para [97] the minority drew attention to the inclusionary and exclusionary characteristics of every bright line rule ie "… by defining those who are eligible, it necessarily excludes those who fall outside the definition." Thus, to create a discretion for exceptional cases would defeat the purpose of the rule. The minority developed this reasoning at para [98]:

> "The answer to such arguments is that in a case where a line has to be drawn at some point in a continuous spectrum, proportionality cannot be tested by reference to

outlying cases. The Secretary of State estimates that the exclusion of persons with discretionary or limited leave to remain from eligibility for student loans affects about 2,400 people. The appellant suggests that the number is only about 534. Both acknowledge the imprecision of their figures, but on any view it is a small proportion of the cohort of some 1.45m applying for loans annually. In *R (on the application of Carson) v Secretary of State for Work and Pensions, R (on the application of Reynolds) v Secretary of State for Work and Pensions* [2005] UKHL 37, [2005] 4 All ER 545, (at [41]) Lord Hoffmann (with whom Lord Nicholls, Lord Rodger and Lord Carswell agreed), put the point very clearly in answer to the argument that that the payment of jobseekers' allowances at a lower rate to those under 25 years of age was unjustified, because there was no substantial difference between those just over and just under that age:

> 'Mr Gill emphasised that the twenty-fifth birthday was a very arbitrary line. There could be no relevant difference between a person the day before and the day after his or her birthday. That is true, but a line must be drawn somewhere. All that is necessary is that it should reflect a difference between the substantial majority of the people on either side of the line. If one wants to analyse the question pedantically, a person one day under 25 is in an analogous, indeed virtually identical, situation to a person aged 25 but there is an objective justification for such discrimination, namely the need for legal certainty and a workable rule.'"

[43] At this juncture it is necessary to consider a seminal decision of the ECtHR. In *Animal Defenders v United Kingdom* [2013] 57 ECHR 21 the Grand Chamber of the ECtHR stated at paras [106]–[110]:

> "106. Whether or not the interference was so pleaded in the above-cited VgT case, the present parties accepted that political advertising could be regulated by a general measure and they disagreed only on the breadth of the general measure chosen. It is recalled 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 (Ždanoka v. Latvia [GC], no. 58278/00, §§ 112-115, ECHR 2006-IV). Contrary to the applicant's submission, a general measure is to be distinguished from a prior restraint imposed on an individual act of expression (Observer and Guardian v. the United Kingdom, 26 November 1991, § 60, Series A no. 216).

107. The necessity for a general measure has been examined by the court in a variety of contexts such as economic and social policy (James and Others v. the United Kingdom, 21 February 1986, Series A no. 98; Mellacher and Others v. Austria, 19 December 1989, Series A no. 169; and Hatton and Others v. the United Kingdom [GC], no. 36022/97, § 123, ECHR 2003-VIII) and welfare and pensions (Stec and Others v. the United Kingdom [GC], no. 65731/01, ECHR 2006-VI; Runkee and White v. the United Kingdom, nos. 42949/98 and 53134/99, 10 May 2007; and Carson and Others v. the United Kingdom [GC], no. 42184/05, ECHR 2010). It has also been examined in the context of electoral laws (Ždanoka v. Latvia [GC], cited above); prisoner voting (Hirst v. the United Kingdom (no. 2) [GC], no. 74025/01, ECHR 2005-IX; and Scoppola v. Italy (no. 3) [GC], no. 126/05, 22 May 2012); artificial insemination for prisoners (Dickson v. the United Kingdom [GC], no. 44362/04, §§ 79-85, ECHR 2007-V); the destruction of frozen embryos (Evans v. the United Kingdom [GC], no. 6339/05, ECHR 2007-I); and assisted suicide (Pretty v. the United Kingdom, no.2346/02, ECHR 2002-III); as well as in the context of a prohibition on religious advertising (the above-cited case of Murphy v. Ireland).

108. It emerges from that case-law that, in order to determine the proportionality of a general measure, the court must primarily assess the legislative choices underlying it (James and Others, § 36). The quality of the parliamentary and judicial review of the necessity of the measure is of particular importance in this respect, including to the operation of the relevant margin of appreciation (for example, Hatton, at §128; Murphy, at § 73; Hirst at §§ 78-80; Evans, at § 86; and Dickson, at § 83, all cited above). It is also relevant to take into account the risk of abuse if a general measure were to be relaxed, that being a risk which is primarily for the State to assess (Pretty, § 74). A general measure has been found to be a more feasible means of achieving the legitimate aim than a provision

> allowing a case-by-case examination, when the latter would give rise to a risk of significant uncertainty (Evans, § 89), of litigation, expense and delay (James and Others, § 68 and Runkee, § 39) as well as of discrimination and arbitrariness (Murphy, at §§ 76-77 and Evans, § 89). The application of the general measure to the facts of the case remains, however, illustrative of its impact in practice and is thus material to its proportionality (see, for example, James and Others, cited above, § 36).
>
> 109. It follows that the more convincing the general justifications for the general measure are the less importance the court will attach to its impact in the particular case. This approach of the court to reviewing general measures draws on elements of its analysis in both the above-cited VgT and Murphy cases, the latter of which was applied in TV Vest. The VgT (no. 2) judgment of 2009 (cited above) is not relevant, concerned as it was with a positive obligation on the State to execute a judgment of this court.
>
> 110. The central question as regards such measures is not, as the applicant suggested, whether less restrictive rules should have been adopted or, indeed, whether the State could prove that, without the prohibition, the legitimate aim would not be achieved. Rather the core issue is whether, in adopting the general measure and striking the balance it did, the legislature acted within the margin of appreciation afforded to it (James and Others v. the United Kingdom, § 51; Mellacher and Others v. Austria, § 53; and Evans v. the United Kingdom [GC], § 91, all cited above)."

We shall make further mention of *Animal Defenders infra.*

[44] By the route traced at paras [32]–[43] above one reaches the most recent contribution of the Supreme Court to this subject, in *Re P*. In that case the indelible alignment between *Animal Defenders* and the UK jurisprudence first visible in *Bank Mellat (No 2)* was resoundingly affirmed, as appears from paras [48]–[56] and [75]–[77] of the majority judgment. Within these passages there are several key passages. These include the following in particular. First, per Lord Sumption:

> [PARA 48] In principle, the legitimacy of legislating by reference to pre-defined categories in appropriate cases has been recognised by the Strasbourg court for many years …

> [PARA 50] In those cases where legislation by pre-defined categories is legitimate, two consequences follow. First, there will inevitably be hard cases which would be regarded as disproportionate in a system based on case-by-case examination. As Baroness Hale observed in R (Tigere) v Secretary of State for Business, Innovation and Skills [2015] 1 WLR 3820, para 36, the Strasbourg court's jurisprudence "recognises that sometimes lines have to be drawn, even though there may be hard cases which sit just on the wrong side of it." Secondly, the task of the court in such cases is to assess the proportionality of the categorisation and not of its impact on individual cases. The impact on individual cases is no more than illustrative of the impact of the scheme as a whole. Indeed, as the Strasbourg court pointed out at para 109 of Animal Defenders, the stronger the justification for legislating by reference to pre-defined categories, the less the weight to be attached to any particular illustration of its prejudicial impact in individual cases. In my judgment, the legislative schemes governing the disclosure of criminal records in England and Wales and Northern Ireland provide as good an example as one could find of a case where legislation by reference to pre-defined categories is justified …
>
> [PARA 55] 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. Once it is accepted that a category-based scheme of disclosure is justifiable, it must inevitably follow that some candidates will find themselves in a category apparently more serious than the facts of their particular case really warrant…"

Next, per Baroness Hale:

> "[PARA 75] The scheme as it now stands does not have that indiscriminate nature. It has been carefully devised with a view to balancing the important public interests involved. In my view there are at least three of these. There is, of course, the importance of enabling people who

> have committed offences, and suffered the consequences of doing so, to put their past behind them and lead happy, productive and law-abiding lives. The full account of the facts of the four cases before us, given by Lord Kerr, is ample illustration of the importance of this aim, and of the devastating effect that disclosure of past offending can have upon it. There is, on the other hand, the importance of safeguarding children and vulnerable adults from people who might cause them harm, as well as ensuring the integrity of the practice of certain occupations and activities. No-one who has read Sir Michael Bichard's Report, prompted by the murder of two Soham school girls by their school caretaker (The Bichard Inquiry Report (2004) HC 653), can be in any doubt of that. There is also, in my view, a public interest in devising a scheme which is practicable and works well for the great majority of people seeking positions for which a criminal record certificate is required. Neither they nor their prospective employers should have to wait too long for the results of their enquiry…
>
> [PARA 76] … it cannot be a pre-requisite of any proportionate scheme that it seeks to assess the relevance of the data to be disclosed to the employment or activity in question… Leaving it to the prospective employer to judge the relevance of the particular offending to the particular post is probably the only practicable solution, although of course I accept that employers are likely to take a precautionary approach if they have more applicants than posts available.
>
> [PARA 77] I am also persuaded that the only practicable and proportionate solution is to legislate by reference to pre-defined categories or, as these are sometimes pejoratively described, "bright line rules." For me, the most important of the four reasons given by Lord Sumption is his third, the need for certainty (Lord Sumption at para 53)."

The Respondent's Case

[45] The respondent's endorsement of the first instance judgement is based on four judicial decisions. One of these is *Re P*, which we have considered above and will revisit *infra*. We turn to the other three cases invoked by the respondent. Given the evolution of the applicable jurisprudence identified above it is appropriate to consider these cases in chronological sequence.

[46] In *R (F) v The Secretary of State for the Home Department* [2011] 1 AC 331 the claimants, who had been convicted of serious sexual offences, were automatically and indefinitely subject to the statutory notification requirements. They successfully sought a declaration of incompatibility on the ground that the absence of any mechanism for review interfered disproportionately with their rights to respect for private and family life guaranteed by article 8 ECHR via the Human Rights Act. At para [17] Lord Phillips of Worth Matravers PSC framed the proportionality test in the following way:

> "In order to decide whether interference with a fundamental right is proportionate to the legitimate end sought to be achieved the court has to ask the questions identified by the Privy Council in *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69, 80:
>
> > 'whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective.'
>
> However, as Lord Bingham of Cornhill observed in *Huang v Secretary of State for the Home Department* [2007] 2 AC 167, para 19, there is an overriding requirement to balance the interests of the individual against those of society."

At para [34], referring to the decisions in *S v United Kingdom* 48 EHRR 169 and *Bouchacourt v France* (Unreported) Lord Phillips stated:

> "Those decisions show …. that the Strasbourg Court considers that the possibility of reviewing the retention of sensitive personal information and notification requirements in respect of such information is highly material to the question of whether such retention and notification requirements are proportionate and thus compliant with Article 8."

At para [42] Lord Phillips drew attention to one unsatisfactory feature of the statutory scheme:

> "Giving information to the local police in relation to one's address and one's movements coupled with the explanation that this is necessary because one is on the sexual offences register will necessarily carry the risk that the information may be conveyed to third parties in circumstances where this is not appropriate."

[47] There is a noteworthy passage in the judgment of Lord Rodger JSC, concurring, at para [68]. There he debated the scope for respectable differing views on the question of whether a child offender should be subjected to these lifelong requirements. The central theme of this passage is that of respect for the choice of the democratically elected legislature and associated judicial restraint.

[48] *Re F* predated the jurisprudential developments in, in particular, *Animal defenders*, *Bank Mellat (No 2)* and *Re P*. As a result the more comprehensive and nuanced prism emerging from those decisions was not applied. The approach of the trial judge in the present case replicated *mutatis mutandis* that of the leading judgment in *Re F*. We shall examine the implications of this *infra.*

[49] The third of the four cases forming the bedrock of the respondent's case is *Gaughran v United Kingdom (Application No 45245/15).* This concerned the statutory scheme under which the police retained indefinitely within its records the DNA profile, fingerprints and photograph of the applicant generated following his arrest on suspicion of having committed the offence of driving with excess alcohol, to which he pleaded guilty subsequently. The central issue was the proportionality of the impugned statutory measure. At para [76] the court adopted its formulation of the "*relevant Convention*" principles in *S and Marper v United Kingdom* (Applications Nos 30562/04 and 30566/04) at paras [101]–[104]. The latter passages state in material part:

> "101. An interference will be considered "necessary in a democratic society" for a legitimate aim if it answers a "pressing social need" and, in particular, if it is proportionate to the legitimate aim pursued and if the reasons adduced by the national authorities to justify it are "relevant and sufficient." While it is for the national authorities to make the initial assessment in all these respects, the final evaluation of whether the interference is necessary remains subject to review by the Court for conformity with the requirements of the Convention (see *Coster v. the United Kingdom [GC]*, no. 24876/94, § 104, 18 January 2001, with further references).
>
> 102. A margin of appreciation must be left to the competent national authorities in this assessment. The breadth of this margin varies and depends on a number of

> factors including the nature of the Convention right in issue, its importance for the individual, the nature of the interference and the object pursued by the interference. The margin will tend to be narrower where the right at stake is crucial to the individual's effective enjoyment of intimate or key rights … Where a particularly important facet of an individual's existence or identity is at stake, the margin allowed to the State will be … Where, however, there is no consensus within the Member States of the Council of Europe, either as to the relative importance of the interest at stake or as to how best to protect it, the margin will be wider …"

[50] Next, the court devoted a separate paragraph to the topic of "Margin of Appreciation" at para [102] in these terms:

> "A margin of appreciation must be left to the competent national authorities in this assessment. The breadth of this margin varies and depends on a number of factors including the nature of the Convention right in issue, its importance for the individual, the nature of the interference and the object pursued by the interference. The margin will tend to be narrower where the right at stake is crucial to the individual's effective enjoyment of intimate or key rights (see Connors v. the United Kingdom, no. 66746/01, § 82, 27 May 2004, with further references). Where a particularly important facet of an individual's existence or identity is at stake, the margin allowed to the State will be restricted (see Evans v. the United Kingdom [GC], no. 6339/05, § 77, ECHR 2007-...). Where, however, there is no consensus within the Member States of the Council of Europe, either as to the relative importance of the interest at stake or as to how best to protect it, the margin will be wider (see Dickson v. the United Kingdom [GC], no. 44362/04, § 78, ECHR 2007-...)"

At para [87] the court outlined some of its earlier decisions. In summary, in those cases the proportionality assessment took into account the duration of the retention period and whether the necessity for retention was subject to review. At para [88] the court stated that the duration of the retention period is not "necessarily conclusive" in the measurement of the State's margin of appreciation in the particular context. The court also identified "risk of stigmatisation" as a material consideration.

[51] The fourth decision which the respondent prayed in aid is *MC v United Kingdom [Application No 51220/13]*. There the applicant's article 8 complaint related to the disclosure by the police to a prospective employer of her spent conviction of failing to stop after a road traffic accident. Her application was dismissed. The court noted the decision of the Supreme Court in *Re P*, simultaneously highlighting the principles established in *Animal Defenders*. It determined that its application of the proportionality test would be informed by the "following considerations" at para [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."

[52] In its reasoning the court identified the following considerations: the need for certainty in the sphere under scrutiny; the probable need for "considerable additional resources, financial and logistical" if a case by case scheme for the determination of disclosure obligations were introduced; the research and consultation which preceded adoption of the impugned measure; the difficult value judgement involved in balancing the risk of blighting the employment prospects of ex-offenders with that of appointing unsuitable people to sensitive positions; the nuanced nature of the scheme, with its different qualifying periods which reflected the perceived seriousness of the offending; the scheme's time limitation; the relative seriousness of the applicant's offending; and her ability to secure the employment in question following disclosure of her previous conviction. Emphasising that the impugned measure was one of general application which involved the striking of the aforementioned balance, the court applied the ultimate touchstone of whether the State had acted within its margin of appreciation, answering this question affirmatively.

[53] In essence, the respondent's submission based on these two Strasbourg decisions is that in a challenge of this species to a general legislative measure the ingredients of the proportionality test are (in Mr Southey's words) "multi-faceted." This is unexceptional.

[54] At the conclusion of his submissions Mr Southey drew together the various considerations pointing to a finding of disproportionality in these terms: the absence of a safeguard such as a code of practice (as in *Re P*); the breadth of the circumstances in which the respondent's previous convictions are potentially disclosable; the absence of any time limitation; the lack of any independent review mechanism; the viability of such a mechanism; an inappropriate emphasis on the interests of putative employers; and the impact which the impugned measure has had on the respondent. He submitted that these factors had been appropriately recognised and analysed by the trial judge.

Analysis

[55] In *De Freitas* Lord Clyde purported to provide a comprehensive formulation of the test for proportionality in qualified human rights cases. With the evolution of the case law in the highest court this formulation has developed in certain material respects. First, the third of Lord Clyde's tests ("… no more than is necessary to accomplish the objective") is now expressed in the language of "whether a less intrusive measure could have been used" and more fully:

> "The question is whether a less intrusive measure could have been used without unacceptably compromising the objective."

Both quotations belong to *Bank Mellat (No 2),* para [20]. Second, a fourth test has been added namely whether "... a fair balance has been struck between the rights of the individual and the interests of the community" (Huang, supra). Third, the ECtHR has identified a "core issue" (which might be considered an overarching test) in cases where the legislature has proceeded by way of general measure(s), namely "whether, in adopting the general measure and striking the balance it did, the legislature acted within the margin of appreciation afforded to it.": *Animal Defenders,* para [110]. Fourth, the legitimacy of legislating by pre-defined categories in appropriate contexts has been resoundingly approved.

[56] All of the leading cases, European and domestic alike, make clear the unmistakable nexus between the state's margin of appreciation and the doctrine of proportionality. In assessing the measure of respect to be accorded the primary decision maker – in the present instance, the legislature – the court is required to assess the nature of the Convention right in play, the extent of the interference, the importance of the objectives underpinning the impugned measure and, where available evidentially, the actual assessment made by the public authority concerned in its decision making. Furthermore, as spelled out in *Animal Defenders* at para 108,

in the case of a general measure (ie the present case) the court must "primarily" assess the legislative choices. This exercise will include evaluating the quality of the parliamentary consideration, with alertness to the margin of appreciation. Any risk of abuse flowing from the adoption of a more relaxed measure – which is primarily a matter for the state to assess – must also be weighed.

[57] The task of the court has another important ingredient. As *Re P* makes clear at [50], it is "… to assess the proportionality of the categorisation and not of its impact on individual cases", the reason being that impact on individual cases "… is no more than illustrative of the impact of the scheme as a whole." This is derived from *Animal Defenders* at para [109]:

> " .. the more convincing the general justifications for the general measure are, the less importance the court will attach to its impact in the particular case."

[58] As the above survey of the Supreme Court and ECtHR cases demonstrates, the self-direction of the trial judge on the test for proportionality does not fully and faithfully reflect the leading decisions of the Supreme Court and ECtHR on this topic, in the following respects. First, the judge posed the question of "... whether the means used to impair the Article 8 rights in this case are proportionate **or no more than are necessary to accomplish the objective**" (emphasis added) rather that of "… **whether a less intrusive measure could have been used without unacceptably compromising the objective":** *Animal Defenders* at para 110 and *Bank Mellat (No 2)* at paras [20] and [72].

[59] Second, the judge did not acknowledge the legitimacy of the pre-defined categories statutory model which the 1978 Order mirrors, approved in principle in *Animal Defenders* and *Re P*. On the contrary, he stated at para [96]:

> "The system by definition does not distinguish between those who are known to be at high risk resulting in a sentence designed to address risk, such as a life sentence, and those who are not."

As a result he did not grapple with the two considerations highlighted in *Re P*, para [50], namely (a) there will inevitably be hard cases which would be regarded as disproportionate in a system based on case by case examination and (b) the task of the court in such cases is to assess the proportionality of the categorisation and not the impact on the individual case.

[60] Related to the foregoing, there was an undue focus and emphasis upon the impact of the impugned measure on the individual (see paras [94] – [96] in particular). In this context, while the judge recited the *Huang* test, he did not expressly apply it. Fourth, the judge did not apply the overarching (or "core") test in para [110] of *Animal Defenders*.

[61] Furthermore, the judge made the assessment that one of the objectives of the impugned measure, namely public confidence in the justice system, paid insufficient weight to the interests protected by article 8: see para [94]. Of course, the effect of the various ingredients in the test for proportionality considered above is that a public authority's assessment of the importance of a consideration such as public confidence in the justice system is not necessarily or quintessentially a matter for the public authority alone and, thus, does not bind the court of review. However, we consider that this provides a clear illustration of a matter requiring appropriate respect by the court and, consequentially, suitable restraint.

[63] As highlighted in *Bank Mellat (No 2)* at para [20], while the four criteria enshrined in the proportionality test are "*logically separate*":

> "… in practice they inevitably overlap because the same facts are likely to be relevant to more than one of them."

However, Colton J in essence confined the several considerations just noted to the application of the first and second criteria. He did not take them into account in the exercise upon which he then embarked, namely his consideration of whether the impugned measure was "… no more than … necessary to accomplish the objective." Contrary to the guidance in *Bank Mellat (No 2)* his approach was one of treating the criteria as belonging to self-sealed compartments.

[64] Colton J also examined *seriatim* the four reasons proffered by the majority in *Re P* at paras [51]–[54]. It is necessary to appreciate that these four reasons were formulated in support of the overarching conclusion that:

> "… the legislative schemes governing the disclosure of criminal records in England and Wales and Northern Ireland provide as good an example as one could find of a case where the legislation by reference to pre-defined categories is justified."

The provisions of the 1978 Order which featured in *Re P* are rehearsed at paras [6]–[8]. The structuring of the majority judgement entailed isolating at the outset the "in principle" question of whether legislating by pre-defined categories in this way was permissible. This exercise gave rise to an affirmative conclusion and the four reasons formulated in support thereof. Colton J, at para [83], considered that "… the application of all four reasons can be distinguished from the circumstances of this application." We consider, with respect, that this approach fell into error as it failed to recognise the nature of the exercise in which the majority were engaged at paras [47]–[55] of *Re P*. The most obvious consequence of this error was the judge's failure to recognise that he was bound by all of the reasoning and conclusion contained in the foregoing paragraphs.

[65] The second consequence flowing from this error is that the judge, in making his finding of disproportionality, was clearly influenced by his critique of the four reasons. Thus his key conclusion is undermined by an impermissible exercise. It is further weakened by the following:

(i) As regards the first reason, we consider, in respectful disagreement with the judge, that read as a whole para [51] of *Re P* is concerned with all occupations, not only sensitive ones.

(ii) As regards the second reason, the judge, while correctly acknowledging that the scope of disclosure under the 1978 Order extends beyond disclosure to employers in sensitive occupation contexts, did not develop the analysis and, in particular, did not identify either any primary evidence or anything from which inferences could be drawn to the effect that this wider disclosure invalidated the second reason, namely that the material supporting the suggestion that prospective employers could not be trusted to take an objective view of the true relevance of a person's conviction was "distinctly thin."

(iii) We consider that the third reason, namely the certainty and foreseeability of the statutory disclosure regime, is not diluted by the consideration that, as regards agencies such as insurance companies or landlords, the person concerned "will not know in advance whether any of the people/institutions to which he applies will seek details of previous convictions."

(iv) The fourth reason included an express recognition that a system of administrative review appeared to be feasible in Northern Ireland. The judge does not appear to demur.

[66] The decisive consideration identified by the judge was his view that a system of administrative review would be "both practical and proportionate." There were some limited indications in the papers that this was evidently functioning adequately in two other contexts, namely applying for removal of the indefinite sex offenders' notification requirements and the independent review of information disclosed in standard and enhanced criminal record certificates issued by Access NI. Taking the evidence as a whole, we consider that it was open to the judge to form this view. However, the weight which he attributed to it is undermined by the preceding critique.

The Role of This Appellate Court

[67] We turn to consider the role of this court in an appeal of this *genre*. In *R (AR) v Greater Manchester Police* [2018] UKSC 47, the claimant challenged the issue by the police of a so-called "enhanced criminal record certificate" under the Police Act 1997 invoking his rights under article 8 ECHR. His case was dismissed in both the High Court and the Court of Appeal. The approach of the latter court had been to limit

appellate court intervention on the first instance court's assessment of proportionality to a "significant error of principle." This was reversed by the Supreme Court on appeal, holding that the correct test in relation to the standard of appellate review in proportionality cases is whether the initial court erred in principle or was wrong in reaching its conclusion: see paras [64]–[65]. Elaborating, Lord Carnwath, giving the unanimous decision of the court, explained that a first instance decision of this kind may be wrong because of an identifiable flaw in the judge's reasoning which undermines the cogency of the conclusion. He further explained that it would not suffice that the appellate court might have made a different evaluation.

[68] Lord Carnwath also adverted to "the general policy consideration that the purpose of the appeal is to enable the reasoning of the lower court to be reviewed and errors corrected …": see para [57]. In the sense explained, the function of this court is one of review rather than rehearing.

[69] Notably, the decision in *Greater Manchester* followed fast upon the heels of the earlier decision of the Supreme Court in *DB v Chief Constable of PSNI* [2017] UKSC 7. The operation of those principles is illustrated in the recent decision of this court in *Lewis v McNicholl Hughes* [2023] NICA 17. The "appellate court reticence" exhorted in *DB* is shaped by its context, namely that of reviewing "findings made by a judge at first instance" and "the assessment of factual issues" by the first instance court: per Lord Kerr at paras [79] and [80]. Furthermore, Lord Kerr made clear that the case for such reticence is less potent in a litigation context of affidavit evidence.

[70] The present appeal concerns the correctness in law of the trial judge's approach to the test of proportionality in an article 8(2) ECHR context. The exhortations in *DB* belong to a different context. The decision in *Greater Manchester* is clearly the *lex specialis* governing the instant appeal. The difference between the two cases is highlighted by the consideration that, one year later, *DB* did not feature in the unanimous decision in *Greater Manchester*.

Our First Conclusion

[71] In paras [58] – [66] above we have diagnosed certain errors in the trial judge's approach to and application of the proportionality test. We have concluded in particular that these are not harmonious with three of the leading cases, namely *Animal Defenders*, *Bank Mellat (No 2)* and *Re P*. In essence the correct legal prism was not formulated and then applied. This assessment clearly falls within the review jurisdiction of this court as explained in the *Greater Manchester* decision.

[72] In *Daly (supra*, Lord Steyn stated at para [28]):

> " … the respective roles of judges and administrators are fundamentally distinct and will remain so."

The same theme resonates in Lord Bingham's statement in *A v SSHD* [2004] UKHL 56, at paras [29] and [38]:

> "The more purely political (in a broad or narrow sense) a question is, the more appropriate it will be for political resolution and the less likely it is to be an appropriate matter for judicial decision. The smaller, therefore, will be the potential role of the court. It is the function of political and not judicial bodies to resolve political questions. Conversely, the greater the legal content of any issue, the greater the potential role of the court, because under our constitution and subject to the sovereign power of Parliament it is the function of the courts and not of political bodies to resolve legal questions … Those conducting the business of democratic government have to make legislative choices which, notably in some fields, are very much a matter for them, particularly when (as is often the case) the interests of one individual or group have to be balanced against those of another individual or group or the interests of the community as a whole. The European court has recognised this on many occasions …"

We consider that these passages, unshaken by later Supreme Court and Strasbourg authority, are especially pertinent in the context of the present challenge.

[73] The proportionality assessment of this court is as follows:

(i) The 1978 Order legitimately legislates by pre-defined categories.

(ii) The making of the 1978 Order followed a structured process involving appropriate consultation and careful assessment.

(iii) Legislative choices had to be made. The scheme adopted in the 1978 Order reflects a delicate exercise of balancing the rights and interests of individuals with those of the community as a whole.

(iv) The statutory scheme is a nuanced measure.

(v) Offences which are not capable of becoming "spent" belong to a statistically small class and only a very small proportion of offenders is affected in this way.

(vi) The aforementioned class encompasses the most severe sentencing disposals.

(vii) The scheme has the virtues of certainty, expedition and predictability, which would be compromised by the case by case approach advocated by the respondent and endorsed by the judge.

(viii) Given the foregoing characteristics, the impact of the impugned statutory provision on the respondent attracts little weight. The right in play (Art 8 ECHR) is a qualified one.

(ix) The exclusion of the most serious sentencing disposals in the 1978 Order reflects the statutory regimes in the sister jurisdictions of both England & Wales and Scotland.

(x) The 1978 Order is also vulnerable to legislative review and change. The evidence establishes that this possibility is real rather than fanciful or theoretical.

Given this constellation of factors, we consider that the impugned statutory provision, Art 6(1) of the 1978 Order, reflects the discretionary area of judgement enjoyed by the legislature in a sphere where a reasonable margin of appreciation must be recognised and thus withstands the challenge mounted by the respondent.

The Declaration of Incompatibility

[74] Section 4 of the Human Rights Act invests the High Court with a discretionary power to make a declaration that a provision of primary legislation is incompatible with one of the protected Convention rights. In the present case the exercise of this power was not open to the trial judge because the impugned statutory provision forms part of a measure lying outwith the definition of "*primary legislation*" in section 21(1) of the Human Rights Act. Its status is, rather, that of subordinate legislation. The judge, in essence, invoked a common law discretionary remedy power. It was not suggested that he acted *ultra vires* in doing so.

[75] The effect of the distinction which we have explained is that the statutory outworkings of a section 4 declaration of incompatibility do not apply to the declaration made by the judge. Accordingly, if this court had upheld the conclusion upon which the declaration was founded the remedial action provisions of section 10 of the Human Rights Act would not have been triggered.

[76] The discrete question on which the parties joined issue before this court was whether the qualifying conditions for the declaration made by the judge were satisfied. The arguments of both parties were, in substance, founded on the premise that the qualifying conditions for the making of a section 4 declaration of incompatibility were in play. This rested on the unspoken assumption that the approach to both types of declaration is identical.

[77] As a result, the court received no argument on the issue of the principles governing the exercise of the judicial discretion to award the remedy of declaring incompatible a provision of Northern Irish subordinate legislation other than under section 4 of the Human Rights Act. In light of our primary conclusion it is not strictly necessary to determine this issue. On the other hand, we are mindful of the general principle that an appellate court should normally determine all live issues in an appeal. With the *caveat* expressed we would add the following.

[78] The phenomenon of the "*ab ante*" legislative challenge features in two decisions of the Supreme Court. These are *Christian Institute v Lord Advocate* [2016] UKSC 51 and the *Safe Access Zones* case (*ante).* Neither of these cases concerned the declaration of incompatibility regime of section 4 of the Human Rights Act since the legislative measure under scrutiny had not become law: hence the "*ab ante*" appellation. Neither case concerned proposed legislation in the form of an Act of the Westminster Parliament and any such challenge would have been in contravention of Article 9 of the Bill of Rights 1688. In both cases the question for the Supreme Court was whether the draft devolved legislation under scrutiny was outside the competence of the devolved legislature on the ground that it was incompatible with Convention Rights. In both cases the Supreme Court cautioned that challenges of this kind confront a "*high hurdle*", devising the following test:

> "… if a legislative provision is capable of being operated in a manner which is compatible with Convention rights, in that it will not give rise to an unjustified interference with Article 8 Rights, in all or almost all cases, the legislation itself will not be incompatible with Convention rights."

See *Christian Institute* at para [88], adopted without qualification in *Re Abortion Services* at para [13]. At para [14] the court emphasised that in an "*ab ante*" challenge there is no issue of the application of the proposed statutory measure to a particular factual matrix.

[79] In *Re McLaughlin* [2018] UKSC 48 the Supreme Court made a declaration that a specified provision of extant Northern Irish primary legislation was incompatible with Convention rights. In so doing it invoked the *Christian Institute* test: see per Baroness Hale at para [43]. In *Safe Access Zones* the Supreme Court observed, in substance, that Baroness Hale had incorrectly glossed the *Christian Institute* test: see per Lord Reed at paras [18]–[19].

[80] Our analysis is as follows. In *Re McLaughlin* the Supreme Court, unanimously, clearly considered the *Christian Institute* test to govern the determination of whether a provision of extant primary legislation is compatible with a Convention Right. In *Safe Access Zones* the Supreme Court, again unanimously, did not disagree. The extent of its disagreement with *Re McLaughlin* was confined to the aforementioned gloss. The Supreme Court did not suggest that

any different test should have been applied in *McLaughlin*. The argument on behalf of the respondent did not include any contention that the wrong test had been applied in *Re McLaughlin*. Nor did it identify any decided cases, binding on this court or otherwise, espousing a different test to be applied to provisions of extant (to be contrasted with draft, or uncommenced) legislation of whatever status.

[81] We consider that a declaration that a provision of legislation is incompatible with a Convention right, whether made within or outwith section 4 of the Human Rights Act, by its very nature reflects an assessment of a general nature applying to a broad panorama, clearly extending beyond the particular facts of the individual case in which the question of granting this discretionary remedy arises. Such a remedy declares the relevant provision of the legislation generally to be incompatible with a Convention right. This is to be contrasted with a remedy personal to a successful claimant, such as an order of certiorari quashing an act or decision held to have infringed that person's Convention right/s or a suitably tailored mandatory order or an order declaring such violation. This contrast highlights the general nature and reach of a declaration of incompatibility.

[82] Our interpretation of the decision in *Safe Access Zones* is, for the reasons explained, that it applies to both extant legislation (on the one hand) and draft, or uncommenced, legislation (on the other). There is no reason in principle why this test, which applies to a declaration of incompatibility under section 4 of the Human Rights Act, should not apply also to an equivalent declaration under section 18(1)(d) of the Judicature (NI) Act 1978.

Our Second Conclusion

[83] The question of whether an unjustified interference with a qualified Convention right has been established on the facts of the particular case is to be determined by reference to the proportionality principles discussed above. If the court holds that such an interference has been established, the next question which arises is that of discretionary remedy. The test – of whether the relevant provision will give rise to an unjustified interference "in all or almost all cases" – applies at the relief stage.

[84] If, contrary to our first conclusion, the judge was correct to hold that the respondent's article 8 rights had been violated, in granting the declaration in respect of the impugned statutory provision he did not apply the *Christian Institute* test, as reaffirmed in *Safe Access Zones* (which was decided after Colton J's judgment). It follows that the declaration of incompatibility under appeal cannot be upheld as it did not entail the application of the correct test.

[85] Satisfaction of the correct test will invariably require consideration of agreed facts, examination of the evidence amassed and the making of legitimate inferences together with, where appropriate, the application of the doctrine of judicial notice. In our estimation, applying these touchstones, the test is not satisfied in the present

case. This is so, in essence, on account of the heavy emphasis on the respondent personally, with little indication of other potentially affected members of the notional class. The assembled evidence is lacking in this important respect. This doubtless explains why the "all or almost all" test was so strongly contested on behalf of the respondent.

[86] Insofar as any reinforcement of the foregoing conclusion is required, we would add that the remedy in play being discretionary in our view the imminence of an amended 1978 Order and the impact on the other two jurisdictions are factors militating against the declaration made. We are mindful of comparable restraint in the Supreme Court in *R (Chester) v Secretary of State for Justice* [2013] UKSC 63 , per Lord Mance at para [39] especially; *R (Ali) v Secretary of State for the Home Department* [2015] UKSC 68, per Lord Hope at para [76] especially; *R(Roberts) v Commissioner of Police of the Metropolis* [2015] UKSC 79; and *R(Nicklinson) v Ministry of Justice* [2014] UKSC 38.

[87] We would highlight the importance of full and timeous compliance with Order 121, Rule 3A of the Rules of the Court of Judicature in cases such as the present where the possibility of a declaration outwith the s4 regime arises.

The Cross – Appeal

[88] The respondent's cross-appeal against the judge's decision refusing his application for damages is rendered moot by our decision on the substantive appeal. However, given the desirability of an appellate court determining all live issues (*supra*) and having regard to the issues raised and the industry of counsels' arguments we consider it appropriate to determine it.

[89] Colton J, in another careful judgment, considered the leading authority on this subject, namely *R (Greenfield) v Secretary of State for the Home Department* [2005] UKHL 14. As both article 41 ECHR and *Greenfield* make clear, necessity is the supreme criterion. See per Lord Bingham of Cornhill (delivering the unanimous judgment of the House of Lords) at p 678 C:

> "It is evident that under article 41 there are three pre-conditions to an award of just satisfaction: (1) that the Court should have found a violation; (2) that the domestic law of the member state should allow only partial reparation to be made; and (3) that it should be necessary to afford just satisfaction to the injured party. There are also pre-conditions to an award of damages by a domestic court under section 8: (1) that a finding of unlawfulness or prospective unlawfulness should be made based on breach or prospective breach by a public authority of a Convention right; (2) that the court should have power to award damages, or order the payment of compensation, in

> civil proceedings; (3) that the court should be satisfied, taking account of all the circumstances of the particular case, that an award of damages is necessary to afford just satisfaction to the person in whose favour it is made; and (4) that the court should consider an award of damages to be just and appropriate. It would seem to be clear that a domestic court may not award damages unless satisfied that it is necessary to do so, but if satisfied that it is necessary to do so it is hard to see how the court could consider it other than just and appropriate to do so. In deciding whether to award damages, and if so how much, the court is not strictly bound by the principles applied by the European Court in awarding compensation under article 41 of the Convention, but it must take those principles into account. It is, therefore, to Strasbourg that British courts must look for guidance on the award of damages."

[90] One of the central themes emerging from Lord Bingham's *excursus* through the jurisprudence of the ECtHR is that the focus of the ECHR is "on the protection of human rights and not the award of compensation": see page 679 E. This explains why, in Lord Bingham's words, the practice of treating a finding of a violation as in itself just satisfaction has become "routine." In the specific case of non-pecuniary loss:

> "In the absence of a clear causal connection, the court's standard response has been to treat the finding of violation without more as just satisfaction." (Page 681 H.)

This applies to both "loss of opportunity" claims and claims for anxiety and frustration: see p 680 H and page 682 E. In Lord Bingham's memorable words, the Human Rights Act "… is not a tort statute."

[91] Colton J also gave consideration to the decision of the Supreme Court in *R (Faulkner and Sturnhan) v Secretary of State for Justice* [2013] UKSC 23. This decision and that in *Greenfield*, as the judge noted, were considered by this court in *Re Jordan* [2019] NICA 61. The judge considered an array of ECtHR decisions. He essentially considered these to be fact specific and context sensitive cases, distinguishable from the instant case: see paras [13]–[23].

[92] At para [26] the judge acknowledged that, in principle, damages for the non-pecuniary loss of upset, distress and frustration could be awarded under section 8. The test, he observed, was whether such an award would be necessary to provide just satisfaction to the respondent. At para [28] the judge recorded that there was no claim for pecuniary loss, continuing:

> "At its height the applicant has lost the opportunity to have his conviction regarded as 'spent.' As a result he has been obliged to disclose it in limited circumstances which it is accepted has caused him distress and frustration."

[93] The kernel of the judge's reasons for dismissing the respondent's claim for just satisfaction is found in [2022] NIQB 42 paras [29]–[30]:

> "In the court's view this is a classic public law challenge to a statutory scheme of universal application. It does not involve a case, as was the situation in the decisions relied upon by the applicant, where the State had disclosed specific information relating to the claimant alone. The scheme challenged in this application is in the process of reform. There is a live legislative process in train, and it is expected that this judgment will inform that process.
>
> [30] It will be noted that this case was properly supported by the Northern Ireland Human Rights Commission which further demonstrates the public nature of this claim. That alone of course is not determinative of the issue as the applicant contends that the provisions about which he complains have had a particular bite on his personal life and circumstances."

Developing this theme, the judge adopted the approach in *SXC v Secretary of State for Work and Pensions* [2019] EWHC 2774 (Admin), at para [12]:

> "In some circumstances a claim under the Human Rights Act 1998 is the vehicle to vindicate rights equivalent to those recognised in private law. The circumstances of *Alseran* and *D* are examples of such a situation (see per Leggatt J in *Alseran* at paragraph 933). In such instances, compensation may be the primary if not sole way in which just satisfaction can be afforded for the breach of Convention rights. But the present claim is not of that nature. Rather, the circumstances of this claim are a classic example of an instance where the Human Rights Act is relied on for the purposes of a purely public law challenge. The claim was brought on the premise that when regulations 3(7) and 3(8) of the Original Regulations were given effect, they would fail to ensure lawful treatment of a class of persons including SXC who had already migrated to Universal Credit. The central objective in this case was to quash the secondary legislation on transitional payments, and require the

> Secretary of State to think again. The New Regulations have made new provision for transitional payments. Overall, this claim is indistinguishable from the overwhelming majority of public law claims in which one or the other of the remedies specified in section 29 of the Senior Courts Act 1981 is sought, and in which the grant of that remedy is sufficient to address the wrong alleged. In this case, those remedies are sufficient also to provide just satisfaction for the breach of Convention rights that has occurred."

[94] On behalf of the respondent paras [28]–[30] of the judgment are criticised. We reject the criticisms. The judge, in substance, made an assessment that the predominant purpose of the proceedings was to establish that Article 6 of the 1978 Order is incompatible with the respondent's rights under article 8 ECHR. This is clearly reflected in the Order 53 Statement at para 3.1 and in the "primary relief" sought at para 4.1(i)–(v). The claim for damages is at the end of this lengthy list. There is a clear parallel between the approach of the ECtHR in its frequent treatment of a finding of a Convention breach as just satisfaction and that of the United Kingdom courts, in the exercise of their discretion, in routinely making quashing and declaratory orders rather than awards of damages in judicial review proceedings.

[95] Next the judge is criticised for taking into account the process of statutory reform in this jurisdiction. The respondent's contention that this factor was not relevant is undeveloped. We consider that this was a factor to be legitimately weighed in the exercise of a judicial discretion of considerable breadth: see further para [96] *infra*. There is no express prohibition against weighing a factor of this kind in either article 41 ECHR or section 8 of the Human Rights Act and none is to be implied.

[96] The next submission on behalf of the respondent is that the judge's decision is not compatible with *Mollat Sali v Greece* [2020] 71 EHRR SE 3. There the Grand Chamber stated at paras [32]–[33]:

> "32. The court reiterates its case-law to the effect that a judgment in which it finds a breach imposes on the respondent State a legal obligation to put an end to the breach and make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach (see Kurić and Others v. Slovenia (just satisfaction) [GC], no. 26828/06, § 79, ECHR 2014). The Contracting States that are parties to a case are in principle free to choose the means whereby they will comply with a judgment in which the Court has found a breach. This discretion as to the manner of execution of a judgment

reflects the freedom of choice attaching to the primary obligation of the Contracting States under the Convention to secure the rights and freedoms guaranteed (Article 1). If the nature of the breach allows of restitutio in integrum, it is for the respondent State to effect it, the Court having neither the power nor the practical possibility of doing so itself. If, on the other hand, national law does not allow – or allows only partial – reparation to be made for the consequences of the breach, Article 41 empowers the Court to afford the injured party such satisfaction as appears to it to be appropriate (see Brumărescu v. Romania (just satisfaction) [GC], no. 28342/95, § 20, ECHR 2001-I, and Guiso-Gallisay MOLLA SALI v. GREECE JUDGMENT (JUST SATISFACTION) 9 v. Italy (just satisfaction) [GC], no. 58858/00, § 90, 22 December 2009). The court enjoys a certain discretion in the exercise of that power, as the adjective "just" and the phrase "if necessary" attest (see Comingersoll S.A. v. Portugal [GC], no. 35382/97, § 29, ECHR 2000-IV). To that end, it may have recourse to equitable considerations (see Vistiņš and Perepjolkins v. Latvia (just satisfaction) [GC], no. 71243/01, § 36, ECHR 2014; The former King of Greece and Others v. Greece (just satisfaction) [GC], no. 25701/94, § 79, 28 November 2002; S.C. Granitul S.A. v. Romania (just satisfaction), no. 22022/03, § 15, 24 April 2012; and Kryvenkyy v. Ukraine, no. 43768/07, § 52, 16 February 2017). 33. The Court further reiterates that there is no express provision for non-pecuniary or moral damage. In *Varnava and Others v. Turkey* ([GC], nos. 16064/90 and 8 others, § 224, ECHR 2009) and Cyprus v. Turkey ((just satisfaction) [GC], no. 25781/94, § 56, ECHR 2014), the court confirmed the following principles, which it has gradually developed in its case-law. **Situations where the applicant has suffered evident trauma, whether physical or psychological, pain and suffering, distress, anxiety, frustration, feelings of injustice or humiliation, prolonged uncertainty, disruption to life, or real loss of opportunity can be distinguished from those situations where the public vindication of the wrong suffered by the applicant, in a judgment binding on the Contracting State, is an appropriate form of redress in itself. In some situations, where a law, procedure or practice has been found to fall short of Convention standards this is enough to put matters right. In other situations, however, the impact of the violation may be regarded as being of a nature and degree as to have impinged so significantly on the moral wellbeing of the applicant as**

> **to require something further.** Such elements do not lend themselves to a process of calculation or precise quantification. Nor is it the Court's role to function akin to a domestic tort mechanism court in apportioning fault and compensatory damages between civil parties. Its guiding principle is equity, which above all involves flexibility and an objective consideration of what is just, fair, and reasonable in all the circumstances of the case, including not only the position of the applicant but the overall context in which the breach occurred. Its non-pecuniary awards serve to give recognition to the fact that moral damage occurred as a result of a breach of a fundamental human right and reflect in the broadest of terms the severity of the damage (see Sargsyan v. Azerbaijan (just satisfaction) [GC], no. 40167/06, § 39, 12 December 2017)."

The particular passage on which the respondent relies is highlighted. We consider that while within these paragraphs there is a comprehensive statement of the governing principles, they contain nothing especially novel or prescriptive. Their main theme is the manifest breadth of the judicial discretion in play, while the court's formulation of the "guiding principle" is of obvious importance.

[97] In his first judgment Colton J accepted the respondent's claims about the non-pecuniary impact of the impugned statutory measure on him. In a context where the facts were largely uncontentious, he found that the personal effect had been "significant." At para [26] of his second judgment the judge expressly acknowledged the discretionary power to award just satisfaction compensation for upset, distress and frustration. Contrary to the respondent's argument, the judge demonstrably had this factor in mind. At para [28] the judge did nothing more than to state that, in his opinion, the main feature of the respondent's claim for just satisfaction was the absence of any opportunity to achieve the status of a rehabilitated person. This assessment is in our view irreproachable. The respondent's argument is rejected in consequence.

[98] It is correct that the second judgment of Colton J contains no reference to *Molla Sali*. However, as our analysis above demonstrates, we consider that there is no identifiable resulting disharmony. The judgment of Colton J contains correct self-directions and identifies the leading cases. We consider that *Molla Sali* is in substance a comprehensive collation of pre-existing principles in the Strasbourg case law. It does not claim to be, and in our estimation is not, a significant jurisprudential development. The judgment of Colton J is to be evaluated accordingly. Moreover, the judgment is not at variance with section 2(1)(a) of the Human Rights Act. Finally, *Greenfield* and *Faulkner*, each considered by the judge, continue to be the authoritative leading cases in the United Kingdom case law.

[99] For the reasons given the cross-appeal is dismissed.

Disposal

[100] For the reasons explained the judge's primary conclusion, namely that Article 6(1) of the 1978 Order is incompatible with article 8 ECHR, is reversed. The judge's consequential decision that a declaration of incompatibility should follow is also reversed. Thus, the appeal of DOJ is allowed. The respondent's cross–appeal against the judge's decision to refuse his claim for damages as just satisfaction is dismissed.