constraints upon both counsel and the court, had the former hit the spot, perhaps the latter would have too.

PETER MIRFIELD

Address for Correspondence: Jesus College, Oxford, OX1 3DW, UK. Email: peter.mirfield@jesus.ox.ac.uk

REFORMED OFFENDERS, CRIMINAL RECORD DISCLOSURES AND EMPLOYMENT

EACH year, The Disclosure and Barring Service (DBS) in England and Wales, or Access NI in Northern Ireland, oversee the publication of some four million or more Basic, Standard or Enhanced Criminal Record Certificates ("CRCs"). These furnish an applicant's current or prospective professional body and/or employer with a full list of any previous convictions, cautions, reprimands or other relevant information the police may hold on them. Such disclosures are intended to allow a regulator or employer to determine whether the applicant is suitable for admission or engagement in certain sensitive activities – such as work involving children or vulnerable adults. Over the past decade, however, several cases have provoked debate over the type of information the DBS/Access NI and police have the power to disclose when issuing CRCs. Disagreement has particularly centred on whether they ought to have the right to disclose "spent" convictions – convictions that, after a period of rehabilitation, are deemed to have expired – along with warnings and reprimands imposed during one's youth. The Supreme Court's recent decision in *R. (on the application of P and others) v Secretary of State for the Home Department* and *LG for Judicial Review* (Northern Ireland) [2019] UKSC 3, [2019] 2 W.L.R. 509 has finally brought the debate to a head.

P, G, W (England and Wales) and LG (Northern Ireland) had all previously been convicted of, or received cautions or reprimands for, comparatively minor offending. Under the Rehabilitation of Offenders Act 1974, s. 4 (the 1974 Act), and the corresponding Order in Northern Ireland, SI 1978/1908 (the 1978 Order), the respondents' past convictions were deemed "spent". However, all four argued that the disclosure of their criminal records to their current or prospective employers had, or would, make it more difficult for them to obtain employment. They argued that certain aspects of the framework, including the disclosure of other relevant information held on the Police National Computer (PNC) were incompatible with Article 8 of the European Convention on Human Rights.

Challenging the two related schemes, the respondents claimed, first, that the exempted offices, professions, and employments listed under the Rehabilitation of Offenders Act 1974 (Exceptions) Order, SI 1975/1023 (the 1975 Order), Sch. 1, and the corresponding Order in Northern

Ireland, SR (NI) 1979/179 (the 1979 Order), circumvented the protection afforded to them by section 4 of the 1974 Act and the 1978 Order, insofar as neither allowed them to lawfully withhold information on any "spent" convictions or past offending when asked about them. Indeed, the effect of the 1975 and 1979 Orders is that applicants seeking admission or appointment to certain professions or roles are obliged to make a full disclosure of any past convictions or offending, something the respondents argued was disproportionate.

Second, the respondents argued that the Police Act 1997 (the 1997 Act), Part 5 and ss. 113A and 113B, compels the DBS/Access NI and police to disclose all past convictions, cautions and reprimands, where "conditions for the [issuing] of a [CRC or Enhanced CRC] were satisfied" – something a processing officer would be "powerless to withhold", even where they were aware of the "likely impact" of an irrelevant disclosure, given the position sought. The respondents therefore claimed that the schemes were neither "in accordance with the law" (the legality test), nor were they "necessary in a democratic society" (the proportionality test) – thus violating Article 8(2) of the ECHR.

The Court of Appeal in England and Wales and Northern Ireland had agreed with the respondents, and held in their favour ([2017] EWCA Civ 321, [2017] 2 Cr. App. R. 12 and [2016] NICA 42). Dismissing the appeals from these decisions, but varying the orders of the Courts of Appeal, Lord Sumption held for the majority of the Supreme Court that there was only a limited breach of the second limb of Article 8 of the ECHR – the legality and proportionality requirements, and that Article 2A(3)(c) of the 1975 Order (as applied to LG and P) and the disclosure of young offender reprimands (as applied to G) were both apt to be declared incompatible. He explained how the former was "capricious", and in no way indicative of one's "propensity" to offend, while the latter was intended to be "rehabilitative" or "curative", and "an alternative to prosecution" during one's formative years (at [63]–[64]). Rightfully, this particular aspect of the majority's decision is likely to attract praise for having avoided imposing a potentially "deleterious effect" on the lives of certain ex-offenders. The same cannot be said for the remainder of Lord Sumption's judgment.

Relying principally on the decisions in *T* and *MM v United Kingdom* (2013) 2 E.H.R.L.R. 200, Lord Sumption argued that the two contested schemes were "highly prescriptive", well defined, and left "no discretion [as to] what [was] disclosable" (at [42]). The majority therefore encountered no difficulty finding that the existing legislation rested on sufficiently clear principles, with adequate safeguards, such as to render them both "accessible and foreseeable" (as required by Article 8): see *Catt v United Kingdom* (Application no. 43514/15), Judgment of 24 January 2019. In her judgment, Lady Hale expanded upon the majority's position, unsympathetically observing while this was a "troubling case", sometimes "bright line rules"

had to be imposed (see *Evans v United Kingdom* (2008) 46 EHRR 34) (at [70]); indeed, in her view, the current schemes are a proportionate response to the legitimate aim of safeguarding the public (at [77]–[78]).

Furthering the majority's reasoning, Lord Sumption argued that the aforementioned schemes are appropriate since it was "only the employer [who could] judge whether the particular characteristics of [a] particular job make it inappropriate to employ [an] ex-offender" (at [51]). Here, he claimed little empirical evidence existed to suggest employers could not "be trusted to take an objective view" (at [52]). However, the majority's position contradicts several warnings previously advanced by the courts, citing empirical evidence which reveals employer prejudice in this domain is particularly widespread: see for example *R. (on the application of Pinnington) v Chief Constable of Thames Valley Police* [2008] EWHC 1870 (Admin), at [55]. Hence, Lord Sumption emphatically rejected the respondents reliance upon Lord Neuberger's concerns in *R. (L) v Commissioner of the Police of the Metropolis* [2009] UKSC 3, [2010] 1 A.C. 410 (noted [2010] C.L.J. 4), in which he stated the disclosure of one's past offending would, in most cases, "represent something close to a killer blow" to anyone seeking admission or appointment to certain regulated professions or employments (at [75]). Here, the majority seemingly failed to recognise that, even for roles in unregulated sectors, applicants are often required to disclose whether or not professional registration or employment has ever been declined or terminated on the basis of a CRC or some other vetting requirement, which could further narrow the pool of opportunities open to them.

Conversely, in his dissent in *P and Others*, Lord Kerr lambasted the "considerable impact … the continued operation of the current disclosure systems" had, and would continue to have, on the everyday lives of ex-offenders (at [80]). He argued that his fellow Justices had condemned individuals such as P to an "infinite period – quite possibly a life time – of disadvantage" (at [87]). First, he suggested that a fuller account of the respondents' predicaments would have led the majority to reach a different conclusion. Specifically, he argued that the current schemes fail to provide "sufficient guarantees" against "abuse and arbitrariness" (which is what legality under Article 8 required), and that their "significant impact" is disproportionate (at [185], [190]). Second, he highlighted how the majority had erred in their application of *T*, *MM* and, more recently, the doubts expressed by Judge Koskelo in *Catt* – the last of which Lord Sumption did not consider in his judgment. Lord Kerr emphasised how the court in *T* had specifically ruled that adherence to Article 8 required the presence of "adequate safeguards" and the "proper evaluation" of disclosures – something the present system failed to afford applicants (at [149]). Moreover, he argued that DBS/Access NI certificates were issued in such a way that one could never call into question the set categories of disclosure

as these relate to the "individual circumstances of particular cases", and the absence of any independent review mechanism meant there was "at least the potential for widespread disproportionate outcomes", thus rendering the current regime incompatible with Article 8 (at [149]). Lord Kerr would have dismissed the appeals, and reaffirmed the declarations of incompatibility handed-down by the Courts of Appeal.

Lord Kerr's incisive dissent uncovers several flaws in the majority's reasoning. It more fairly balances safeguarding the interests of service users and public with ensuring reformed offenders are not "forever shut out from achieving [their] full potential or from making a valuable contribution to society" (at [88]; see further Martufi (2019) 25 Maastricht J. 672).

KIERAN LEE MARSHALL

Address for Correspondence: King's College London, Strand, London, WC2R 2LS, UK.
Email: kieranlee.marshall@kcl.ac.uk

RECREATIONAL EASEMENTS: A RIGHT TO HAVE FUN?

IN *Regency Villas Title Ltd. and others v Diamond Resorts (Europe) Ltd.*, the majority of the Supreme Court expressly issued "a clear statement that the grant of purely recreational (including sporting) rights over land which genuinely accommodate adjacent land may be the subject matter of an easement" ([2018] UKSC 57, [2019] A.C. 553, at [81]). In so doing, it was very conscious that this was entering upon new territory, with specific reference to the extensive facilities provided for the owners and occupiers of a timeshare complex. Recognition of "this new species of easement" was regarded as consistent with changing social attitudes, which now see such recreational and sporting activity as "so clearly a beneficial part of modern life that the common law should support structures which promote and encourage it, rather than treat it as devoid of practical utility or benefit" (at [76], [81]). That having been said, Lord Carnwath J.S.C. delivered a strong dissenting judgment, while it may also be suggested that the rather unusual factual matrix may preclude any opening of the floodgates.

Broome Park, the former home of Lord Kitchener, was converted into a country club which included a substantial leisure complex on the lower floors of the main Mansion House, together with a range of outdoor sporting and recreational facilities, among which were an 18-hole golf course, an outdoor heated swimming pool, tennis and squash courts and formal gardens. The first and second floors of the Mansion House were converted into timeshare apartments with free rights through a leasehold structure to use the communal and leisure facilities within the lower floors of the Mansion House and its surrounding grounds. In 1981, the owners of Broome Park transferred Elham House, a smaller villa on the estate, to