**IRPT Event on Vetting and Criminal Records**

The Minister by way of a reply to a PQ on 22nd May said he was considering the implications of T. v. Greater Manchester Police. Could not give any real indication as to how long this would take.

T v. Chief Constable of Greater Manchester – Court of Appeal 29th January, 2013

3 cases decided together. Largely concerned with cautions as opposed to convictions – however, for present purposes there is little distinction as cautions are somewhat equivalent to convictions under the UK legislation.

The case concerned the blanket requirement in the Rehabilitation of Offenders Act 1974, section 113B of the Police Act 1997 and articles 3 and 4 of the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 that criminal convictions and cautions must be disclosed in an enhanced criminal record check (“ECRC”) in the context of particular types of employment (such as with children or vulnerable adults), even if those convictions or cautions would otherwise be deemed spent by the 1974 Act.

T had received two cautions in relation to two stolen bicycles when he was 11 years old, which was disclosed as part of his participation in a sports studies degree course because he was required to work with children. T was not in fact prevented from completing his degree following the ECRC.

*JB* was a lady who had been refused employment as a care home worker following the revelation in her ECRC that she had a caution for theft of some false nails eight years previously.

A third case was also joined, that of *AW*, who when 16 had received custodial sentences for manslaughter and robbery arising out of a car-jacking and who wished to join the Army.

The real issue in the case was whether the requirement that all criminal convictions be disclosed in a particular eventuality, namely application, for certain types of job, was objectionable.

This is what is sometimes referred to as a *bright line distinction* – the legislature must on occasion draw a line when creating a statutory scheme or regime. The fact that it operates harshly in a given case does not mean it is unfair. There must be a margin of appreciation.

The Court of Appeal had no difficulty in accepting this as a general proposition. Similarly it had no problem in accepting that there were some very legitimate public policy considerations underlying the *bright line distinction –* specifically the policy of ensuring adequate vetting of those who might be employed to care for children, the elderly or otherwise vulnerable people.

However, it ultimately concluded that a regime which required the disclosure of all convictions and cautions, including those that were prima facie so minor as to be irrelevant, was disproportionate to the underlying aim of protecting the elderly, the young and the vulnerable.

The Court of Appeal considered that there would have to be some filtering mechanism to protect the Article 8 rights of those who had been convicted of such offences. This was because the arbitrary disclosure of such information interfered with the right to private life.

The Court summed up its concern in this regard in a fairly pithy fashion:

*The issue of what does and what does not lie within the scope of article 8 has been considered many times. The judgment of Lord Hope in R (L) at paras 24 to 27 contains a useful summary of the jurisprudence. There are two separate bases on which the disclosure of information about past convictions or cautions can constitute an interference with the right to respect for private life under article 8(1). First, the disclosure of personal information that individuals wish to keep to themselves can constitute an interference. In one sense, criminal conviction information is public by virtue of the simple fact that convictions are made and sentences are imposed in public. But as the conviction recedes into the past, it becomes part of the individual's private life. By contrast, a caution takes place in private, so that the administering of a caution is part of an individual's private life from the outset. Secondly, the disclosure of historic information about convictions or cautions can lead to a person's exclusion from employment, and can therefore adversely affect his or her ability to develop relations with others: this too involves an interference with the right to respect for private life. Excluding a person from employment in his chosen field is liable to affect his ability to develop relationships with others, and the problems that this creates as regards the possibility of earning a living can have serious repercussions on the enjoyment of his private life…*

The Court of Appeal was not suggesting that an appropriate system for disclosure of convictions would have to include an individualised analysis of the relevance of a person’s convictions. Rather, specific rules could be put in place that would make for a considerably more refined system which would cause only the most relevant convictions to be disclosed.

A system that caused inherently irrelevant convictions to be disclosed was of itself disproportionate.

It is very important to bear in mind that the issues that arose in T. v. Greater Manchester Chief Constable related to the relatively special circumstance of disclosure in the context of somebody applying for a particular and specific position. A fortiori the conclusion of the Court of Appeal must apply with as much, if not greater, force to those applying for positions that are not sensitive.

So, would the Irish statutory regime measure up if the same logic were to be applied to it?

National Vetting Bureau (Children and Vulnerable Persons) Act 2012

This obliges certain employers to vet prospective employees in relation to certain sensitive positions – working with the young, elderly and vulnerable. The vetting process results in a *vetting disclosure* being made under Section 14 of the Act:

*14 (4) A vetting disclosure shall be in such form (including electronic form) as the Bureau may specify and shall in respect of the person who is the subject of the application for vetting disclosure—*

1. *include—*
2. *particulars of the criminal record (if any) relating to the person…*

It can be seen immediately that there is no filtering process in place here. There is no restriction on the basis of relevance whether on the basis of an individual consideration or on foot of clear and transparent rules. Rather, every conviction will be disclosed as a matter of course.

Indeed, the concept of a criminal conviction under the Act is somewhat wider than one might have anticipated:

*“criminal record”, in relation to a person, means—*

1. *a record of the person’s convictions, whether within or outside the State, for any criminal offences, together with any ancillary or consequential orders made pursuant to the convictions concerned, or*
2. *a record of any prosecutions pending against the person, whether within or outside the State, for any criminal offence,*

*or both;*

The Spent Convictions Bill also expressly disapplies itself to situations which are the subject of the vetting regime.

As such, precisely the same arguments as those that succeeded in T. v. Greater Manchester Chief Constable would apply to our legislation.

Indeed, the application of the logic in that case could reach even further. It was concerned largely with the disclosure process rather than the definition of spent convictions. However, the same logic must apply to the very concept and definition of a spent conviction. The public policy arguments only come into play in the special case of disclosure in the course of application for a sensitive position. They don’t even arise in the general case.

There are many aspects of the Spent Convictions Bill as currently [drafted] that might be regarded as vulnerable to the logic of T. v. Greater Manchester Chief Constable. However, there is one which merits particular consideration.

Section 2(3) allows only 2 convictions to become spent. Even allowing for the public policy arguments that might be advanced to justify such an approach it is not difficult to see how it leads to an inherently arbitrary result. It is utterly inevitable that such an approach allows for the compulsion of the disclosure of what are clearly irrelevant and minor convictions (subsequent to the first 2), not in the context of applications for sensitive positions, but rather in the context of applications for perfectly ordinary positions.

This is simply impossible to reconcile with the statement of principle outlined by Dyson MR above.

The IPRT pointed out one of the practical difficulties with such an approach not least of which was the fact that courts will frequently record multiple convictions for the one incident. This would mean that anyone who had 3 convictions recorded against them on their first occasion before the courts would be more or less deprived of the effect of the legislation. The trinity of offences contrary to Sections 4, 6 and 8 of the Public Order Act spring immediately to mind.

The Bill has already been amended to take account of this eventuality by means of Section 2(4). This now regards multiple convictions imposed on the same day as one conviction for the purpose of the Bill. Whilst this is no doubt a genuine attempt to deal with the problem it really just serves to underline the inherently blunt and arbitrary nature of the scheme of the Bill. As it stands the amended section allows the serial offender who pleads guilty to dozens of disparate offences on disparate dates to achieve just one conviction for the purpose of the Bill so long as the sentences are imposed on the same day and otherwise satisfy the terms of the scheme. Such a person is in the same position as the person who is convicted and sentenced for just one offence.

It is not difficult to conceive of such distinction being regarded as an arbitrary and invidious form of discrimination.

The decision in T. v. Greater Manchester Chief Constable suggests multiple lines of attack on the Bill as presently drafted. These attacks arise in the context not just of convention jurisprudence but also from the constitutional perspective.

The Oireachtas may have a difficult task accommodating such concerns. However, it is equally clear that doing nothing is not an option. The European Court of Human Rights in MM v. United Kingdom ECHR 24029/12 had no difficulty in concluding that the absence of a formal regime for the disclosure of convictions was equally offensive to Article 8 rights.

It is unlikely that any legislative progress will occur until after the appeal in T. v. Greater Manchester Chief Constable is heard by the UK Supreme Court. This is due to take place on 24th and 25th July next.