Neutral Citation Number: [2020] EWCA Civ 130

Case No: C1/2018/0783/QBACF

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE DIVISIONAL COURT
LORD JUSTICE HOLROYDE & MRS JUSTICE NICOLA DAVIES
2017/0783 & 0787

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/02/2020

Before :

LORD JUSTICE BEAN
LADY JUSTICE KING
and
LORD JUSTICE HICKINBOTTOM

- -

Between :

THE QUEEN ON THE APPLICATION OF **(1) QSA** **(2) FIONA BROADFOOT** **(3) ARB**	**Claimants**
- and -	
(1) SECRETARY OF STATE FOR THE HOME DEPARTMENT **(2) SECRETARY OF STATE FOR JUSTICE**	**Respondents**

- -
- -

Karon Monaghan QC and Keina Yoshida (instructed by **Birnberg Peirce**) for the **Claimants**
Kate Gallafent QC and Christopher Knight (instructed by **Government Legal Department**) for the **Respondents**

Hearing date: 21 January 2020

- -

Approved Judgment

Lord Justice Bean :

1. Each of the three Claimants was convicted in the 1980s or 1990s of multiple offences of loitering or soliciting in a street or public place for the purpose of prostitution, contrary to section 1 of the Street Offences Act 1959 ("SOA 1959 s 1"). Those convictions, notwithstanding the passage of time, remain on their records. They contend on this appeal from the Divisional Court (Holroyde LJ and Nicola Davies J: [2018] EWHC 407 (Admin)) that the criminalisation of their actions and the recording and retention of information concerning their convictions all contravene their rights under the ECHR.

2. Each Claimant succeeded in removing herself from prostitution many years ago. The 50 soliciting offences of which the first claimant has been convicted were committed over a period of eight years, the last conviction being in 1998. In the second claimant's case, the 49 soliciting offences of which she has been convicted were committed over a period of three years, the last conviction being in 1988. In the third claimant's case, the 9 soliciting offences of which she has been convicted were committed over a period of four years, the last conviction being in 1992. In relation to each of them, the penalties imposed for the soliciting offences were almost always fines, with conditional discharges being ordered on a few occasions.

3. Although the offences were committed long ago, and the penalties imposed were comparatively minor, the convictions for soliciting offences have continuing consequences for each of the claimants. They are not statutorily barred from working with children or vulnerable adults, but the effect of the relevant statutory provisions is that, throughout their lives prior to this litigation, they had to disclose their convictions if they applied for certain types of employment, and were required to obtain a certificate verifying any such disclosure.

4. The principal issue before the Divisional Court was the Claimants' challenge to what was described as the multiple convictions rule, namely the requirement of a series of statutory provisions that when applying for certain jobs anyone with more than one spent conviction has to disclose them. The Claimants succeeded in the Divisional Court on that issue. The Secretaries of State obtained permission to appeal from that decision but their prospective appeal was undermined by the judgment of the Supreme Court handed down on 30 January 2019 in the cases of *R (P) v Secretary of State for Justice and another*, reported at [2019] 2 WLR 509, holding that the multiple convictions rule was not a proportionate way of meeting its objective of disclosing to potential employers criminal records indicating a propensity to re-offend. The Defendants' appeal in the present case was accordingly withdrawn and dismissed by consent.

5. That left the Claimants' application for permission to appeal against their other grounds for seeking judicial review which had been rejected by the Divisional Court. Only two remain in issue now. These are:-

    a) that the criminalising of conduct falling within the scope of SOA 1959 s 1 violates Article 8 read with Article 14 of the ECHR because it is gender discriminatory;

b) the recording and/or retention of data concerning convictions under SOA 159 s 1 violates Article 4 and/or Article 8 and/or Article 14 read with Article 8 of the ECHR and is accordingly unlawful.

6. Permission to appeal on these two issues was refused by the Divisional Court but granted in this court by Rafferty and King LJJ following an oral hearing on 11 June 2019.

The legislation

7. In its present form, the offence of soliciting contrary to SOA 1959 s 1 can be committed by either a man or woman. The position was different at the time when the Claimants were convicted of their offences. As originally enacted, the section read:

> "1 **Loitering or soliciting for purposes of prostitution**.
>
> (1) It shall be an offence for a common prostitute to loiter or solicit in a street or public place for the purpose of prostitution.
>
> (2) A person guilty of an offence under this section shall be liable, on summary conviction, to a fine not exceeding ten pounds or, for an offence committed after a previous conviction, to a fine not exceeding twenty-five pounds or, for an offence committed after more than one previous conviction, to a fine not exceeding twenty-five pounds or imprisonment for a period not exceeding three months or both."

8. Case law established that this was an offence which could only be committed by a woman: *R v De Munck* [1918] 1 KB 635. There was already by 1959 a similar offence which could only be committed by a man. Section 32 of the Sexual Offences Act 1956 provided -

> "**Solicitation**
>
> 32. It is an offence for a man persistently to solicit or importune in a public place for immoral purposes."

The object of the solicitation under this provision could be a man or a woman: *R v Goddard* (1990) 92 Cr.App.R 185, although most of those prosecuted under s 32 of the 1956 Act were gay men. The offence remained in force until repealed by the Sexual Offences Act 2003.

9. SOA 1959 s 1 has been amended on a number of occasions. The possibility of imprisonment for a second or subsequent offence was removed in 1983, although a higher maximum fine for repeat offenders remained. The 2003 Act made the offence applicable to male as well as female defendants. By amendments contained in the Policing and Crims Act 2009 s 16 the word “persistently” was inserted into s 1 (1), defined as set out in s 1 (4), and the term “common prostitute” was removed from the section.

10. At the same time the court was given the power to impose, in lieu of any other penalty, an order requiring attendance at up to three meetings with a supervisor. The Serious Crime Act 2015 s 68 limited the scope of the offence to defendants aged 18 or over.

11. In its present form SOA 1959 s 1 provides as follows:-

> "1 Loitering or soliciting for purposes of prostitution.
>
> (1) It shall be an offence for a person aged 18 or over (whether male or female) persistently to loiter or solicit in a street or public place for the purpose of prostitution.
>
> (2) A person guilty of an offence under this section shall be liable on summary conviction to a fine of an amount not exceeding level 2 on the standard scale, or, for an offence committed after a previous conviction, to a fine of an amount not exceeding level 3 on that scale.
>
> (2A) The court may deal with a person convicted of an offence under this section by making an order requiring the offender to attend three meetings with the person for the time being specified in the order ("the supervisor") or with such other person as the supervisor may direct.
>
> (2B) The purpose of an order under subsection (2A) is to assist the offender, through attendance at those meetings, to—
>
> (a) address the causes of the conduct constituting the offence, and
>
> (b) find ways to cease engaging in such conduct in the future.
>
> (2C) Where the court is dealing with an offender who is already subject to an order under subsection (2A), the court may not make a further order under that subsection unless it first revokes the existing order.
>
> (2D) If the court makes an order under subsection (2A) it may not impose any other penalty in respect of the offence.
>
> (3) . . . . . .
>
> (4) For the purposes of this section
>
> (a) conduct is persistent if it takes place on two or more occasions in any period of three months…….

12. Although the offence of soliciting contrary to SOA 1959 s 1 can now be committed by either a man or a woman, it is undisputed that 98-99% of defendants charged with it, and convicted of it, are women.

13. It is not only the wording of the offence which has changed since the period of the Claimants' convictions. The number of defendants prosecuted under SOA 1959 s 1 has very substantially reduced. In 2006 the Government published a "co-ordinated prostitution strategy" which set out measures to be taken to achieve the aims of (1) challenging the view that street prostitution was here to stay; (2) achieving an overall reduction in street prostitution; (3) improving the safety and quality of life of communities affected by prostitution; and (4) reducing all forms of commercial sexual exploitation. In 2008 the Government published a review entitled "Tackling the Demand for Prostitution" which focused on buyers of sex.

14. The evidence before the Divisional Court and this court includes a witness statement dated 2 November 2017 from William Jones, the Home Office lead official for sexual violence and victims of child sexual abuse. He noted that the 2006 strategy document and the 2008 review "emphasised the need to tackle prostitution as a crime and as a considerable public nuisance, as well as a source of associated crime and disorder. They also recognised the vulnerability of many prostitutes and the difficulties they have in exiting prostitution and [sought] to develop policies to assist. In addition, they recognised that some prostitutes will have been victims of trafficking."

15. Mr Jones described the amendments to the legislation made by the Policing and Crime Act 2009. The 2009 Act also introduced offences to give better protection to prostitutes and to seek to limit prostitution. Section 14 introduced a strict liability offence of paying or promising payment for the sexual services of a prostitute who has been subject to exploitative conduct of a kind likely to induce or encourage the provision of paid sexual services.

16. Mr Jones continued:-

> "19. However, at no stage did Parliament consider repealing the section 1 offence altogether. Nor is doing so a current part of Government policy. Neither the Strategy nor the Review recommended it. It is a central part of the Strategy that prostitution remains both a considerable public nuisance and is something which should be reduced rather than accepted as a fact of life. It would be entirely counter to that Strategy to decriminalise prostitution and sex work itself. Instead, the aim has been to encourage both the police and the courts to explore with prostitutes and sex workers the best ways of assisting them out of prostitution and sex work, hence the inclusion of the rehabilitation orders to emphasise precisely that.
>
> 20. That is not to say that the Government considers that prosecution of prostitutes and sex workers under section 1 should be the focus; as the amendments in 2009 evidence, it is quite the opposite. Indeed, from figures provided to the Home Office by the Crown Prosecution Service, the number of prosecutions has dropped by more than 90% since 2005/6 from 1,798 to just 127 in 2016/17. These figures are entirely consistent with the NPCC guidance document I referred to above, which aims to encourage a contextual, sensitive and victim-centred

> approach to the policing of prostitution and sex work and related offences."

17. Turning to the recording of criminal convictions, and the obligation to disclose them in certain circumstances, section 27 of the Police and Criminal Evidence Act 1984 (as amended) provides:

> "(4) The Secretary of State may by regulations make provision for recording in national police records convictions for such offences as are specified in the regulations.
>
> (4A) In subsection (4) '*conviction*' includes –
>
> a. a caution within the meaning of Part 5 of the Police Act 1997; and
>
> b. a reprimand or warning given under section 65 of the Crime and Disorder Act 1998."

18. Most offences which may be recorded in national police records are those punishable by imprisonment. However, the National Police Records (Recordable Offences) Regulations 1985 made convictions for offences under SOA 1959 s 1 recordable even though they were by then punishable only with a fine. Those Regulations were revoked and replaced (and their ambit extended to include formal police cautions and similar sanctions) by the National Police Records (Recordable Offences) Regulations 2000, regulation 3 of which provides –

> "(1) There may be recorded in national police records-
>
> (a) convictions for; and
>
> (b) cautions, reprimands and warnings given in respect of,
>
> any offence punishable with imprisonment and any offence specified in the Schedule to these Regulations."

19. Paragraph 50 of the Schedule specifies offences of soliciting contrary to SOA 1959 s 1. Convictions and cautions for soliciting offences are therefore recorded on the Police National Computer ("PNC") and so may come within the statutory provisions as to disclosure of convictions.

20. Part V of the Police Act 1997 introduced a statutory scheme for the disclosure of criminal records, and in some cases of other information, where it is required for the purpose of assessing the suitability of an applicant for certain categories of jobs: broadly, employment with children or vulnerable adults, or employment which requires a high degree of trust. Sections 113A-B of the 1997 Act have the effect that a person who applies for such employment, and who will have to answer a question about previous convictions or cautions, must apply to the Disclosure and Barring Service ("DBS") for either a Criminal Record Certificate ("CRC") or an Enhanced Criminal Record Certificate ("ECRC"). The difference between the two is that the former provides details only of convictions or cautions, whereas the latter may also provide information which the relevant chief officer of police reasonably believes to be relevant.

Criminalisation

21. Ms Monaghan and Ms Yoshida argue that the criminalisation of conduct falling within the scope of SOA 1959 s 1 violates Article 8 read with Article 14 of the ECHR because it is gender discriminatory. They do not attack the criminalisation of such conduct on simple Article 8 grounds: it would be extremely difficult to do so, although there is no dispute that Article 8 is engaged. Rather they argue that;-

    a) discrimination for the purposes of Article 14 is a broad concept encapsulating treatment which disadvantages women whose circumstances warrant different treatment to that which is normally meted out (*Thlimmenos v Greece* (2001) 13 EHRR 15).

    b) a general policy or measure which has disproportionate effects on a particular group may be considered discriminatory notwithstanding that it is not specifically aimed at that group (*Opuz v Turkey* (2010) 50 EHRR 28 at para 183, citing *DH and others v Czech Republic* (2008) 47 EHRR 3);

    c) very weighty reasons are required to justify any discrimination connected to, or resulting from, sex (see eg *Abdulaziz and others v UK* (1985) 7 EHRR 471).

22. Ms Monaghan referred us to recommendations of the Committee established under the UN Convention on the Elimination of All Forms of Discrimination against Women ("CEDAW") that Member States should repeal all legal provisions that allow, tolerate or condone forms of gender-based violence against women, including legislation that criminalises women in prostitution or any other criminal provisions that affect women disproportionately (General Recommendation no. 35 on gender-based violence against women, 14 July 2017, para 31A)).

23. The recommendations of CEDAW express a point of view which is entitled to respect; and Ms Monaghan drew to our attention that in paragraph 185 of its judgment in *Opuz* the European Court of Human Rights has held that "when considering the definition and scope of discrimination against women… the court has to have regard to the provisions of more specialised legal instruments and the decisions of international legal bodies on the question of violence against women". Nevertheless the challenge on the criminalisation ground fails in my view for several reasons.

24. The first and most obvious is that any challenge can only be to the *continued* criminalisation of soliciting for prostitution; but there is no dispute that all the Claimants in this case have long since given up committing the offence, The continued existence of the offence (as opposed to the retention of records of their old convictions, or any requirement to disclose them) is thus academic or hypothetical in their cases.

25. It is now too late to challenge the original convictions as such. It would, in any event, be an odd exercise to consider now whether the offence at the time of the convictions was a gender-discriminatory infringement of the Claimants' Convention rights. All occurred in the years prior to the enactment and implementation of the Human Rights Act 1998; and under a statutory regime which, as I have noted, was substantially different from that which is in force now. From 1959 until 2004 the offence under s 1 of the 1959 Act could only be committed by women, while a very similar but more

heavily penalised offence (s 32 of the 1956 Act) was in existence which could only be committed by men.

26. Ms Gallafent and Mr Knight are correct to submit in their skeleton argument that the criminalisation challenge brought by these Claimants is "a purely hypothetical and abstract claim which should await consideration if raised by a person directly affected". They add that "there is no reason in principle (if it were meritorious) why it could not be raised by an individual charged [now] under section 1".

27. In any event I do not see how a challenge to the continued criminalisation of solicitation for the purposes of prostitution, brought by one of the rapidly diminishing number of people prosecuted for it, would succeed on the grounds that the offence in its modern form is gender discriminatory. I simply do not understand the argument that because over 98% of SOA 1959 s 1 defendants are women, that of itself shows a prima facie case of discrimination. Most criminal offences, certainly most offences of violence, are committed overwhelmingly by men, but that has never so far given rise to a successful argument that the existence of the particular offence is a breach of the defendant's rights under Article 14 read with Article 8, or that it has a disparate adverse impact on men. It would be otherwise if the evidence tended to show that men who commit the offence of soliciting are not prosecuted. I agree with the observations of Hickinbottom LJ on this part of the case, and how it contrasts with *DH v Czech Republic* (2008) 47 EHRR 3.

28. The *Thlimmenos* argument does not depend on statistics, but is really no more arguable than the statistical one. It seems to me to present the simple decriminalisation argument in a slightly different form. It is a legitimate point of view that prostitution should not be a criminal offence, since so many of those who resort to it are vulnerable women who should be treated differently, but there is no consensus among ECHR Member States to this effect. In Sweden, for example, prostitution has been decriminalised but paying for the services of prostitutes is an offence. In the Netherlands neither party to the transaction commits an offence; but evidence considered by the House of Commons' Home Affairs Select Committee in 2016-17 showed that decriminalisation there has led to an increase in prostitution which has become a cause for concern.

29. I would therefore dismiss the appeal from the Divisional Court's refusal of permission to proceed with the criminalisation challenge. For essentially the same reasons I would also hold that any challenge to the recording (at the time) of these Claimants' convictions cannot succeed. The real argument on the second ground of appeal concerned the retention of records of the Claimants' convictions, to which I now turn.

Retention

The decision of the Divisional Court

30. The Divisional Court held that this ground was unarguable. They said at paragraph 116:-

> "There is only a very limited interference with an individual's Article 8 rights when the State records and retains information about criminal convictions, and that limited interference is plainly justified in the public interest – especially where, as is

> the case under SOA 1959 s 1, the maximum penalty is increased when there is a conviction [for] a second or subsequent offence. In our judgment there is no merit in this ground and we refuse permission."

Retention: the Claimants' submissions

31. Ms Monaghan submitted that the Divisional Court was wrong to conclude that it was not arguable that the retention of the Claimants' convictions violated their right to private life under Article 8 of the ECHR.

32. It is well established that the retention of conviction information interferes with the Claimants' rights under Article 8. In *S and Marper v United Kingdom* (2009) 48 EHRR 50 the Grand Chamber of the ECtHR confirmed at [67] that the "mere storing of data relating to the private life of an individual amounts to an interference within the meaning of Article 8". Ms Monaghan submitted that the degree of interference increases when the information concerned is personal, sensitive and historic. *MM v United Kingdom* (Application no. 24029/07) concerned police guidance which gave effect to a "presumption in favour of retention" of cautions until "the data subject is deemed to have reached 100 years of age": the Fourth Section of the ECtHR held that the storing of information will more readily fall within the scope of Article 8 when "the information concerns a person's distant past". Since the information retained in the present case concerns convictions which are sensitive and historic, it is submitted that the Divisional Court was wrong to find that there was only a "limited interference" with Article 8.

33. Secondly, Ms Monaghan QC submitted that the interference is not in accordance with the law. As the ECtHR noted in *MM v United Kingdom*, the law must be sufficiently accessible, foreseeable and precise to satisfy this requirement. It must "afford adequate legal protection against arbitrariness and accordingly indicate with sufficient clarity the scope of discretion conferred on the competent authorities and the manner of its exercise". As noted above, the relevant law is contained in s 27(4) of PACE 1984 and regulation 3(1) of the National Police Records (Recordable Offences) Regulations 2000. Neither s 27(4) of PACE nor regulation 3(1) sets out a mechanism for reviewing or deleting the records. Instead, retention is carried out in accordance with guidance produced by the National Police Chiefs' Council ("NPCC"). Its "Deletion of Records from National Police Systems Guidance" states that records should be kept on the Police National Computer ("PNC") until an individual is 100 years old. The guidance provides no mechanism for reviewing or deleting the records before that time.

34. Ms Monaghan QC submitted that in the light of cases such as *MM v United Kingdom*, s 27(4) and regulation 3(1) are insufficiently clear and precise. *MM v United Kingdom* concerned the common law powers of the police to retain records of cautions in accordance with the general principles set out in the Data Protection Act 1998. Although the police had produced a number of policy documents, the court held that "the absence of a clear legislative framework for the collection and storage of data, and the lack of clarity as to the scope, extent and restrictions of the common law powers of the police to retain and disclose caution data" meant that the "retention and disclosure of the applicant's caution data accordingly cannot be regarded as being in accordance with the law": see [206]-[207].

35. Thirdly, Ms Monaghan submitted that the interference was not justified because it was neither necessary nor proportionate for the conviction information to be retained until the Claimants are 100 years old, particularly when there exists no effective procedure for reviewing the retention. She relied on the recent decision of the ECtHR in *Catt v United Kingdom* (2019) 69 EHRR 7, to which I shall return below.

36. Ms Monaghan further submitted that the Divisional Court was wrong to conclude that it was not arguable that the retention of the Claimants' convictions violated their rights under Article 4 of the Convention, which so far as material provides:

> "Article 4: Prohibition of slavery and forced labour
>
> No one shall be held in slavery or servitude.
>
> No one shall be required to perform forced or compulsory labour."

37. The Claimants submit that Article 4 imposes positive obligations on Member States to protect victims of trafficking: *LE v Greece* (2016) (Application no. 71545/12). Article 4 must also be construed in light of the Council of Europe Convention on Action Against Trafficking in Human Beings ("the Trafficking Convention"): *Chowdhury v Greece* (2017) ECHR 300. Article 26 of the Trafficking Convention holds that Member States shall "provide for the possibility of not imposing penalties on victims for their involvement in unlawful activities to the extent that they have been compelled to do so" and Article 11 of the same Convention creates an obligation on Member States to protect the privacy of trafficking victims. A similar obligation is found in Article 8 of Directive 2011/36/EU, which provides that Member States should "ensure that competent national authorities are entitled not to prosecute or impose penalties" on trafficking victims. CEDAW also recommends that Member States take measures to rehabilitate women engaged in prostitution.

38. Ms Monaghan submitted that the Claimants are victims of gender-based violence and that the retention of their SOA 1959 s 1 convictions is a "penalty" for the purposes of Article 4 because it is a direct consequence of their convictions. Although the United Kingdom has (partially) given effect to the Trafficking Convention by enacting s 45 of the Modern Slavery Act 2015, there remains no mechanism to challenge the retention of convictions, even where the offences were committed by victims of human trafficking. Retention is stigmatising and, as a penalty, violates the positive obligations of the United Kingdom under Article 4.

39. Ms Monaghan further submitted that the Divisional Court was wrong to conclude that it was not arguable that the retention of the Claimants' convictions violated their rights under Article 14 (read with Articles 4 and 8) of the Convention. Retention of information relating to SOA 1959 s 1 convictions is discriminatory against women. The information also relates to the Claimants' status as victims of gender-based violence.

Retention: the Respondents' submissions

40. Ms Gallafent QC and Mr Knight submitted that the Claimants' arguments do not get off the ground because the Respondents are not responsible for the retention of conviction information. It is the NPCC, rather than either Secretary of State, whose

guidance contains the policy of retaining conviction information on the PNC until the Claimants' are 100 years old. The Claimants' challenge should have been directed at the NPCC, as occurred in *R (Catt) v Association of Chief Police Officers* [2015] UKSC 9.

41. On the merits, Ms Gallafent QC submitted that it is not arguable that the retention of information violated the Claimants' rights under Article 8. First, although retention engages Article 8, the Divisional Court was right to hold that the interference was "limited". In *R (C & J) v Commissioner of Police of the Metropolis* [2012] EWHC 1681 (Admin), Richards LJ held at [61] that an interference with Article 8, caused by the retention of information on the PNC, was "small" and "justified on any view".

42. Ms Gallafent QC submitted that the retention was justified and proportionate. In *Chief Constable of Humberside v Information Commissioner* [2009] EWCA Civ 1079, this court considered whether the retention of conviction information until the claimants were 100 years' old complied with the principles in the Data Protection Act 1998 and the Claimants' rights under Article 8. At [28], Waller LJ set out the ways in which the police use data retained on the PNC. They included police investigations, employment vetting and disclosure, disclosure to the CPS and courts and multi-agency work (for example with social service departments). Waller LJ concluded that these purposes were sufficient to render the retention compliant with data protection principles, before making the following findings in relation to Article 8 at [50]:

> "50. I am not persuaded that article 8(1) is engaged at all in relation to the retention of the record of a conviction. Disclosure might be another matter but this appeal is not about disclosure. Even if that were wrong, if my conclusions so far are right, the processing is in accordance with the law and necessary in a democratic society. I do not think any extra point arises by reference to article 8 on its own and I mean no disrespect in dealing with this aspect so shortly."

43. Ms Gallafent QC submitted that although *Humberside* primarily concerned compliance with the Data Protection Act 1998, this passage is binding authority for the proposition that the indefinite retention of minor convictions does not violate Article 8. She argued that this approach was confirmed recently by *R (P, G and W) v Secretary of State for Justice* [2017] EWCA Civ 321, where the Court of Appeal considered the NPCC's guidance. At [71], Sir Brian Leveson PQBD made a number of observations (which were not subsequently appealed to the Supreme Court) about the policy:

> "71. … not only does [the NPCC] policy deal with retention of material lawfully seized but which should no longer be retained (following *S & Marper* in the ECtHR), these options also provide a degree of elasticity to the previously more rigid operation of the police deletion policy in relation to out of court disposals. The absence of any mechanism to challenge a decision, however, creates the risk that those who wish to do so will be driven to judicial review…"

44. Ms Gallafent QC distinguished *MM v United Kingdom* and *Catt v United Kingdom* on the grounds that those cases concerned the retention of non-conviction information. *MM* concerned cautions, while *Catt* concerned arrests. There are good reasons why the retention of convictions is more readily justifiable. Convictions are imposed after a fair trial process and, because they are judicial records, cannot be rewritten by the NPCC nor by the Respondents. Although SOA 1959 s 1 convictions are summary-only, there are good reasons to justify the retention of information about relatively minor offences; for example, they involve transitory offending and repeated commission, and can help identify patterns of offending.

45. Ms Gallafent submitted that the argument of a breach of Article 14 read with Article 8 falls with the Claimants' arguments under criminalisation. If the SOA 1959 s 1 offence is not discriminatory itself, then neither is the retention of records of convictions for that offence. Since the vast majority of criminal offences are committed by men, the vast majority of retention of conviction information is also targeted at men. Ms Gallafent submitted further that the relevant approach was set out in *R (SG) v Secretary of State for Work and Pensions* [2015] UKSC 16; [2015] 1 WLR 1449 where Lord Reed stated at [8] that a violation of Article 14 occurs where there is: "(1) a difference in treatment, (2) of persons in relevantly similar positions, (3) if it does not pursue a legitimate aim, or (4) if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised". The relevant comparator – a male prostitute convicted of the SOA 1959 s 1 offence – would be subject to the same treatment as a female prostitute. His convictions would be retained on the same databases under the same guidance, so there is no difference of treatment. Ms Gallafent QC submitted that even if the retention *did* cause discrimination, it could be justified for the reasons which she gave in relation to Article 8.

46. On the Article 4 issues, Ms Gallafent QC submitted that Article 26 of the Trafficking Convention and Article 8 of Directive 2011/36/EU only require Member States to permit the "possibility" of not prosecuting (or imposing penalties on) trafficking victims. This obligation has been implemented through section 45 of the Modern Slavery Act 2015. As the Court of Appeal made clear in *R v M(L)* [2010] EWCA Crim 2327, Article 26 does not require Member States to refrain from prosecuting or punishing all victims of trafficking. At [13], Hughes LJ stated that:

> "13. It is necessary to focus upon what Article 26 does and does not say. It does not say that no trafficked victim should be prosecuted, whatever offence has been committed. It does not say that no trafficked victim should be prosecuted when the offence is in some way connected with or arises out of trafficking. It does not provide a defence which may be advanced before a jury. What it says is no more, but no less, than that careful consideration must be given to whether public policy calls for a prosecution and punishment when the defendant is a trafficked victim and the crime has been committed when he or she was in some manner compelled (in the broad sense) to commit it. Article 26 does not require a blanket immunity from prosecution for trafficked victims."

47. Ms Gallafent submitted that other provisions in the Trafficking Convention and Directive 2011/36/EU demonstrate that its non-penalisation provisions were not intended to extend to the retention of conviction data. As the Divisional Court held at [107], the language of "penalty" is referred to within the instruments as the imposition of a sanction or punishment as a result of a criminal conviction. Moreover, interpreting the word "penalty" to mean a wider adverse effect, such as the retention of data, would contradict cases such as *R (A) v Criminal Injuries Compensation Authority* [2018] EWCA Civ 1534, in which the court rejected a challenge to the reliance on an unspent criminal conviction of a trafficking victim to prohibit a claim for compensation. In any case, being convicted of a SOA 1959 s 1 offence does not indicate whether or not the individual is a victim.

The Strasbourg decision in Catt v UK

48. Since this case was before the Divisional Court the European Court of Human Rights has given judgment in *Catt v United Kingdom* (2019) 69 EHRR 7. Mr Catt, by then well into his nineties, had been a regular attender at peace movement demonstrations since 1948. In 2005 he began participating in demonstrations against the activities in this country of EDO MBN Technology Ltd, a US-owned company which manufactured weapons and weapon components and had a factory in Brighton. The demonstrations were organised by a group called Smash EDO; some of them involved serious disorder and criminality. Mr Catt had been arrested twice at Smash EDO protests but had never been convicted of an offence. A subject access request to the police under the Data Protection Act 1998 revealed numerous entries about him held on a police "extremism database", not all of them relating to Smash EDO demonstrations. In 2010 he asked the police to delete entries which mentioned him. When they refused he issued judicial review proceedings, contending that the retention of his data was "not necessary within the meaning of Article 8(2)".

49. The High Court held that Article 8 was not engaged and, even if it were, the interference was justified under Article 8(2). This court unanimously held that the continued retention of his personal data constituted an unjustifiably disproportionate interference with his Article 8 rights. The UK Supreme Court held that Article 8 was engaged but, by a majority of four to one, that the interference was justified and that the invasion of privacy involved in the retention of the applicant's data was minor. That was how Mr Catt's case stood when the present claim was before the Divisional Court. But on 24 January 2019 the ECtHR found in Mr Catt's favour.

50. I appreciate, of course, that Ms Gallafent argues that a database of convictions involves different arguments from those in *Catt*, where the material was what Ms Monaghan described as "soft intelligence"; and also that the decision of this court in the *Humberside* case is binding in her favour. Nevertheless it is at the very least arguable that conclusions about the compatibility of the retention policy with the Claimants' rights under Article 8 require revisiting in the light of the ECtHR decision in *Catt.*

51. Under Article 14, the obstacles in the Claimants' path are the same as in relation to criminalisation, which I have dealt with above. If the existence of the SOA 1959 s 1 offence is not gender-discriminatory, the retention of records of such convictions for a very long period cannot be gender-discriminatory either (whatever else may be said against it). I would dismiss the appeal from the Divisional Court's decision in so far as it relates to the argument that the policy of retaining records of the Claimants'

convictions violates their rights under Article 14 read with Article 8 because it is gender discriminatory.

52. Turning to Article 4, it is rightly accepted by the Respondents that human trafficking may fall within its scope, and that ECHR Member States are obliged to penalise and prosecute effectively those responsible. Ms Monaghan submits that Article 4 must be construed in the light of the Trafficking Convention, Article 26 of which "provides for *the possibility of not imposing penalties* on victims for their involvement in unlawful activities to the extent that they have been compelled to do so"; and of EU Directive 2011/36/EU on Preventing and Combatting Trafficking in Human Beings and Protecting its Victims, Article 8 of which requires EU Member States to ensure that national authorities are "*entitled not to prosecute or impose penalties"* on such victims of trafficking [emphasis added in both cases]. But, as the Court of Appeal, Criminal Division, held in *R v M(L)* [2010] EWCA Crim 2327 (before the enactment of the Modern Slavery Act 2015) the Convention and Directive do not say that no trafficked victim should be prosecuted or subject to penalties, whatever the circumstances.

53. It is also very doubtful whether the retention of the record of a conviction is a penalty within the meaning of the non-penalisation provisions of the Trafficking Convention and the EU Trafficking Directive. Ms Gallafent drew our attention to *R v L* [2013] EWCA Crim 991, in which Lord Judge CJ said at paragraph 9:

> "These provisions recognise that different Member States have different legal systems for providing the necessary protection for victims of trafficking, and that this may take the form of non-prosecution or the imposition after prosecution and conviction of what in this jurisdiction would be described as a discharge. Whether absolute or conditional, this order does not constitute a penalty. If it arises, it is the end of the process. That issue, however, is not the problem to which the present appeals give rise: we are concerned with the prosecution and conviction of the Claimants rather than the sentences imposed after conviction.""

54. It is clear from this paragraph that Lord Judge was not considering the issue of the retention of records of convictions. But if the imposition of a conditional discharge does not amount to a penalty for the purposes of the Trafficking Convention or the Directive, it is difficult to see how the retention of records of convictions could be so regarded.

55. I would therefore also dismiss the appeal from the Divisional Court's decision in so far as it relates to the argument that the policy of retaining records of the Claimants' convictions violates their rights under ECHR Article 4.

Conclusion

56. I consider that it is clearly arguable that the policy of retaining data concerning convictions under SOA 1959 s 1 until the offender's 100th birthday interferes with the Claimants' rights under Article 8 ECHR to an extent which is not justified as being necessary and proportionate. Ms Gallafent's threshold argument that on this issue the claim has been brought against the wrong Defendants may have technical merit; but in my view it would be quite unsatisfactory to treat this as a knock-out point, especially since it does not appear to have been formed any significant part of the argument before

the Divisional Court, nor to have been advanced before Rafferty and King LJJ as a reason why permission to appeal on this ground should be refused. The retention issue under Article 8 is an important one which should be argued out on its merits at first instance with the police being represented and having the opportunity to put in evidence, if necessary, to justify the policy.

57. I would therefore allow the Claimants' appeal against the decision of the Divisional Court refusing permission to proceed with a judicial review of the retention policy on Article 8 grounds. I would instead grant permission to proceed and remit that part of the case for rehearing by a fresh Divisional Court. Any application for leave to add one or more new defendants and for any further directions should be made to the Judge in charge of the Administrative Court within 28 days of this judgment being handed down.

Lady Justice King

58. I agree with both judgments.

Lord Justice Hickinbottom

59. For the reasons given by my Lord, Bean LJ, I too agree that the appeal should be dismissed save for the appeal against the decision below to refuse permission to proceed on the challenge to the retention policy on Article 8 grounds; and I agree that, for the reasons he gives, on that ground the appeal should be allowed, permission to proceed granted and the substantive judicial review remitted to the Administrative Court for hearing.

60. I would simply add a few observations on the Claimants' submission, based upon statistics, that because over 98% of those who are convicted of SOA 1959 s1 offences are women, the offence is *prima facie* discriminatory on gender grounds.

61. Bean LJ considers that that argument is empty (see paragraph 26 above). I agree: the statistics upon which it relies cannot bear the weight of the argument placed upon them.

62. In some discrimination cases, statistics can be and are used as evidence of discriminatory treatment. They were in *DH v Czech Republic* (2008) 47 EHRR 3, in which it was alleged that the allocation of Roma children to state-run special schools in the town of Ostrava, established after the First World War ostensibly for children with special educational needs, was discriminatory on grounds of race. Roma represented only 2.26% of the 33,000 school-aged children in the town, but the proportion of Roma children assigned to special schools was over 50% (see [190]). It was contended that Roma children were not properly assessed to see whether they should go to a mainstream school, and that this difference in treatment effectively amounted to racial segregation.

63. The European Court of Human Rights rightly noted the difficulty applicants may have in showing discriminatory treatment, such that "less strict evidential rules should apply in cases of alleged indirect discrimination" (at [186]). The applicants sought to rely upon statistical data that, across the Czech Republic, 70% of all pupils at special schools were Roma, and the percentage was as high as 80-90% in some special schools (at [192]). On the basis of that statistical evidence, the court was satisfied that the burden on the applicants of showing discriminatory treatment had been satisfied, and the burden of showing that the difference in impact was the result of factors unrelated to ethnic origin had shifted to the state.

64. However, the situation here is entirely different. Of course, for indirect discrimination, it is important to look at, not just the state measure on its face, but the effect of it as differentially treating individuals or groups of individuals in practice. But in this case, neither the Claimants, nor anyone else, suggest that women who solicit are treated any differently from the relevant comparator group, i.e. men who solicit. The difference in numbers of convictions does not reflect a difference in treatment, but rather the fact that many more women than men commit this crime. Similarly, the statistics relied upon in *DH* (that 70% of children in special schools were Roma) would not have implied discrimination if they had simply reflected the fact that 70% of children in the Czech Republic as a whole were Roma. As Bean LJ has said, many crimes have a substantial difference in the gender balance, e.g. most crimes of violence, including murder, are committed by men. For the same reason, none of these is discriminatory by that reason alone either. It would, of course, be different if the police and prosecuting authorities (e.g.) acted in such a way as to discriminate in favour of prosecuting one gender more than another – that may then fall into *DH* territory – but it is not suggested that that is the case here.

65. For that reason, as well as the fact that for these Claimants the argument is in any event entirely hypothetical, that ground of challenge was bound to fail.