Neutral Citation: [2017] IEHC 190

THE HIGH COURT

JUDICIAL REVIEW

[2014 No. 225 J.R.]

BETWEEN:

G.S.

APPLICANT

AND

THE COMMISSIONER OF AN GARDA SÍOCHÁNA, THE GARDA CENTRAL VETTING UNIT, THE PROVOST, FELLOWS AND SCHOLARS OF THE UNIVERSITY OF DUBLIN (TRINITY COLLEGE), THE HEALTH SERVICE EXECUTIVE, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Mr. Justice McDermott delivered the 10th day of March, 2017

1. By notice of motion dated 10th April, 2014 the applicant seeks inter alia the following reliefs;

> (i) an order of *mandamus* compelling the first and second named respondents to retract the vetting disclosure made to the third named respondent and to restate same without reference to non-convictions;
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> (ii) an order of *certiorari* quashing the decision of the second named respondent to communicate two non-convictions relating to the applicant through the vetting process;
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> (iii) a declaration that the vetting system operated by the first and second respondents is unconstitutional, breaches the applicant's right to fair procedures, does not adequately respect his right to earn a livelihood and that the system infringes his rights under Article 8 of the European Convention on Human Rights Act, 2003.

The applicant also seeks damages for breach of constitutional rights pursuant to the European Convention on Human Rights Act, 2003 and an order for costs for the present proceedings.

Background

2. The applicant commenced a degree course in Psychiatric Nursing at Trinity College in September 2013. This course involved a number of practical placements before which it was necessary for students to undergo Garda vetting for the purpose of the protection of children and vulnerable persons.

3. The Garda Vetting Disclosure procedure was operated by An Garda Síochána subject to a Code of Practice: it was an administrative non-statutory process. Bona fide organisations might register to avail of Garda Vetting disclosures. Vetting could only be carried out with the consent of the person who was the subject of the vetting. Disclosures could then be made to a designated individual within an organisation. This individual was referred to as an authorised signatory and trained in the procedure.

4. The applicant signed a Garda Vetting Application Form on the 17th October, 2013 whereby he consented to the following process:-

> "I, the undersigned who have applied to work as/employed as Student Nurse/General/Children's Intellectual Disabilities/Mental Health hereby authorise An Garda Siochána to furnish the Health Service Executive (HSE) a statement that there are no convictions recorded against me in the Republic of Ireland or elsewhere, or a statement of all prosecutions, successful or not, pending or completed in the State or elsewhere as the case may be." [Emphasis in original]

In the body of the form the applicant declared that he had never been convicted of an offence in the Republic of Ireland and though asked to provide the details "of all prosecutions successful or not, pending or completed in the State or elsewhere" left the box provided for the details thereof blank. The vetting was processed by Ms. Frances McHugh. An application was sent to the Central Vetting Unit, following which a disclosure was made to Ms. McHugh on the 13th of December, 2013.

5. The relevant chronology of events is as follows:-

> (i) Superintendent Meyler made the Vetting disclosure to Ms McHugh the HSE Garda Vetting Liaison Officer on 13th December, 2013. The records established that on the 22nd December, 2007 (when he was twenty years old) the applicant had been convicted in the District Court of intoxication in a public place and fined €100 contrary to s.4 of the Criminal Justice (Public Order) Act, 1994. On the 17th May 2010 a charge laid against him for unlawful possession of drugs contrary to s.3 of the Misuse of Drugs Act, 1977 as amended, was struck out in the District Court. On the 18th February 2011 a charge of criminal damage contrary to s.2 of the Criminal Damage Act, 1991 was also struck out.
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> (ii) The applicant was due to begin his first placement on the 6th January, 2014.
>
> (iii) Having undergone the vetting procedure, he attended a meeting in early January. Present at this meeting were Ms. Maria McGuinness of Cherry Orchard Allocations and Mr Colum Bracken, Director of Nursing. He claimed that this meeting was "conducted in an accusatorial fashion where the applicant was effectively cross-examined." He informed them that he was unaware that the payment of the fine was recorded as an actual conviction. He believed that he had paid money into the court "poor box". He accepted the record in respect of this conviction. He explained in his affidavit that the drugs charge arose from the improper furnishing of his name to Gardaí by another and that he was not present at the location of the alleged offence. The case was struck out when he attended court and the Garda realised that he was not the same person. He stated that the criminal damage charge was made by a former girlfriend who did not make a statement or attend court. The issue concerned alleged damage to what he states was his own television during a domestic "occurrence". It was struck out after it had been set down for hearing.

(iv) The applicant was informed that he would not be permitted to take part in the placement as a result of the disclosures. The applicant authorised the HSE to obtain further details in respect of the drugs and criminal damage charges from the Garda Vetting Office.

(v) It was alleged that Mr. Bracken misunderstood the meaning and effect of an order striking out a charge and accused the applicant of trying to hide convictions. The applicant denied this assertion. He explained that he viewed the criminal damage charge which was struck out as a vexatious claim by an ex-girlfriend and the s.3 charge as a case of mistaken identity and believed them to be irrelevant. In relation to the s.4 offence, the applicant believed he had made a donation to charity but accepted he had been convicted and fined. The applicant noted that he had previously worked in many placement locations and did not understand why the Garda vetting would preclude him from taking part in placements. It is stated that Mr. Bracken surmised that the applicant had previously incorrectly filled out Garda vetting forms and should not have worked at the locations in question. At the end of the meeting Mr. Bracken and Ms. McGuinness expressed their dissatisfaction with the applicant's explanations.

(vi) The applicant was asked to attend a second meeting on the 7th February, 2014 and was asked to provide a comprehensive written explanation of the matters which had been struck out and to obtain three letters; (i) a letter from the Garda who prosecuted the s. 3 of the Misuse of Drugs Act, 1977 offence to clarify the sequence of events leading to the strike out; (ii) a letter from the applicant's former employer Three Q to include a character reference and details of their knowledge of the applicant's criminal history and previous vetting during that employment; and (iii) a character reference from Dorset College.

(vii) The applicant submitted his written explanation of matters as well as the first two letters sought. The explanation was forwarded by Mr. Bracken to Ms. McHugh on the 6th of March, 2014. It was confirmed by the second respondent that the applicant's explanation was correct.

(viii) The applicant attended a third meeting in early March 2014. Having missed the first ten week placement, he was informed that he could complete the placement, at his own expense, during the summer of 2014. Due to the ongoing uncertainty, he was unable to progress in his course without completing the placement and the applicant did not return to lectures when they resumed on the 18th March, 2014.

(ix) The applicant contacted Mr. Fintan Sheerin, of the Trinity College School of Nursing, to discuss his options. Mr. Sheerin presented the applicant with two options;

(a) he could go 'off the books' for a year, that is, he could return to college and attend lectures while awaiting Garda clearance;

(b) he could repeat the year and pay full fees, contingent on Garda clearance.

(x) Due to financial considerations these options were not viable for the applicant.

6. In a letter dated 12th June, 2014 the solicitors for the fourth named defendant informed the applicant that following a risk assessment he would be permitted to complete the placement. An accommodation was reached with the third and fourth named respondents. The applicant completed the placement and repeated first year; his fees were waived. By a letter dated 23rd of July, 2014 the first and second respondents requested that the case against them be struck out with no order. The applicant on the 27th August, 2014 sought an undertaking from the Garda respondents that the strike-out orders would not be disclosed in future vetting applications. This was not forthcoming. Consequently, the applicant wished to continue with his claim against the first and second named respondents. The court directed that a statement of opposition be filed and that the case proceed on the 26th January 2015.

7. A statement of opposition on behalf of the respondents was filed with an affidavit of Superintendent Sarah Meyler of the Garda Central Vetting Unit, dated 16th of February, 2015. The respondents restated their position that the vetting procedures were lawful. They had been carried out with the applicant's consent. The information disclosed was not of a private nature and was factually correct. The respondents do not accept that the applicant's constitutional rights to fair procedures, to earn a livelihood and/or privacy or his Article 8 right to respect for his private life were infringed. It was claimed that the main difficulty encountered by the applicant, namely the stalling of his degree course, was a consequence of the actions of the third and fourth named respondents, the registered organisations for the purposes of Garda vetting disclosures to which the report was furnished.

8. The striking out of a criminal charge in the District Court is a procedure that occurs regularly. It may arise at any stage of the proceedings. A prosecution is initiated by way of complaint and the formulation of a charge against the accused. The accused is given notice to attend at the District Court or is arrested and brought to court. Article 34.1 of the Constitution provides that "justice shall be administrated in courts established by law … and, save in such special and limited cases as may be prescribed by law, shall be administered in public". Thus there is an overriding mandatory constitutional requirement that criminal proceedings be conducted in public. The outcome cannot be predicted but the procedures are clearly established: the accused may be acquitted or convicted and sentenced: the charge may be dismissed without prejudice or struck out. Every element of the case must be conducted in a public forum. As a result, it is likely that the criminal proceedings will come to the attention of relatives, friends, neighbours, acquaintances, fellow employees or putative employers or employers of the accused. If a person charged with an offence is later acquitted or the charge is withdrawn or struck out, he/she retains the presumption of innocence in respect of the charge. It is unavoidable that the experience will be uncomfortable and embarrassing. This is an inevitable consequence of the administration of justice in public in a democratic society.

9. The striking out of a charge is an order of the District Court. The District Court is a court of record under s. 13 of the Courts Act 1971. The order to strike out a charge is permitted under O. 23, r. 3 of the District Court Rules 1997 when the accused attends court but the prosecution is not present. Under O. 38, r. 1(4) if the offence charged does not constitute an offence known to the law or if neither the prosecution or the accused appears, the court may strike out the charge. If the court considers that it has no jurisdiction to deal with the charge it may strike it out (per Barr J. in *Carpenter v. Kirby* [1990] ILRM 764).

10. The question that arises in this case is whether the fact that the applicant was charged with two offences in the District Court which were struck out by order of the district judge ought to have been disclosed under the vetting system. It was operated for the purpose of the protection of children and vulnerable persons from persons who were unsuitable for employment in close contact with those groups. A disclosure of prior convictions and/or orders related to the striking out of criminal charges may have a potentially damaging effect on a person's career prospects. The disclosure during the vetting process had an immediate effect in this case because it became a source of conflict and prejudicial comment in the course of an interview for a placement which the applicant was

obliged to undertake in his course of study. It is clear that part of the problem encountered by the applicant was the failure on the part of the interviewers to understand the nature of the process which led to the striking out of the charges, the effect of those orders and the factual background to the charges which was not furnished as a part of the disclosure. The applicant was effectively accused of trying to hide convictions. This was incorrect. An Garda Síochána had simply reported the making of the orders based on the record of court proceedings. Their obligation was to report truthfully as to whether there were any convictions in respect of the applicant and whether there were any prosecutions pending or which had been unsuccessfully completed against the applicant.

11. It is submitted by counsel for the applicant that the actions of the first and second respondents, in the disclosure of non-convictions to the HSE and Trinity College, resulted in the applicant initially losing his placement, the stalling of his education and the necessity to repeat the first year of his degree course. It is claimed that the disclosure of the two orders was unnecessary and irrelevant to the placement sought and that before it was made the applicant ought to have been given the opportunity to make submissions as to why it should not have been made and/or to ensure that the full factual background to the records was made clear.

12. The applicant does not accept that in signing the consent form he gave a true voluntary consent to the furnishing of the information by the Garda Vetting Office to the HSE or Trinity College Dublin or that he is estopped thereby from maintaining these proceedings. Counsel relies upon *O'Connell v. The Turf Club & Anor* [2015] IESC 57. In that case the applicants, when applying for licences, agreed to be bound by the Rules of Racing. It was held that the applicants could not be estopped from bringing the proceedings based on those agreements. It was stated by Hardiman J. that:-

> "It is true that Mr. O'Connell followed the occupation of a jockey under a licence from the Club. It is also true that he had absolutely no option but to seek that licence from the Club if he wished to work as a jockey. The application for such a license is in no real sense voluntary so as to constitute a contract freely entered into."

I am satisfied that the applicant is not estopped from bringing or maintaining these proceedings. In effect he could not have proceeded with the course or the placement if he did not sign the consent.

13. The vetting procedures in issue in these proceedings are administrative and were introduced by An Garda Síochána for the purpose of the protection of children and vulnerable persons under the Code of Practice. The Vetting Unit made the disclosure but it was for the registered organisation to consider the relevance of its contents. Disclosures were made to authorised signatories who could discuss the disclosure with the data subject and where necessary clarification could be sought from the Garda Vetting Office.

14. The Code of Practice at s. 1(h) provided that it was the responsibility of the authorised signatory to ensure that information in disclosures was managed within the decision making process as established by the registered organisation. The Garda respondents submit that it makes clear that they bore no responsibility for how the information disclosed might be used. The introduction to the Code states inter alia:

> "The decision to engage in Garda Vetting of personnel as part of normal recruitment and selection practices is underpinned by the imperative to observe best practice in the protection of children and vulnerable adults, to whom personnel within a Registered Organisation may have unsupervised access by virtue of their position within the organisation"

15. Paragraphs 2(g) and 5(d) provided that it was the responsibility of the authorised signatory to manage all disclosures made within a "Legislative, Human Rights and Natural Justice framework". Paragraph 6 provides

"Decision Making in respect of Garda Vetting Disclosures

> a) Details contained in a Garda Vetting Disclosure should be verified with the Vetting Subject in advance of any decision being made which may affect them.
>
> b) A Decision Maker …should be appointed within a Registered Organisation to assess Garda Vetting Disclosures received in respect of Vetting Subjects.
>
> c) The decision making process in relating to Garda Vetting Disclosures should be established solely as a mechanism to assist the Registered Organisation in assessing the suitability of a Vetting Subject for a position within the organisation, vis-à-vis the details contained in the Disclosure.
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> d) Decisions in respect of the suitability of a Vetting Subject for a position within a Registered Organisation are the responsibility of the Decision Maker/Decision Making Committee within the organisation and the Garda Central Vetting Unit will have no input into any such decisions."

16. A dispute mechanism existed under the scheme whereby the Vetting Subject might dispute any detail in respect of the data contained in a disclosure issued in his case. Paragraph 7 provided a procedure whereby the subject could outline the basis of the dispute and submit it in writing to the authorised signatory. Further checks could be requested. It is again emphasised in paragraph 7(e) that at the conclusion of any dispute process the decision in respect of the suitability of the subject remained the responsibility of the organisation and that the Garda Vetting Unit had no input into same. A clarification process was followed in this case. The conviction was accepted but the applicant's explanation of the other two records required further clarification by the Vetting Office which was provided after further enquiries.

17. In March 2014, an Administrative Filter for Garda Vetting Disclosures was introduced. This had the effect that certain minor offences over seven years old need no longer be disclosed. In the future, therefore, the s. 4 conviction in 2007 would not have been disclosed. However, this would not necessarily affect the striking out orders of 2010 and 2011 as these might be disclosed under para. D albeit following the application of a procedure which reflects those set out in the 2012 Act discussed below which it anticipates. Under the Filter non-convictions would be disclosed if they were thought to give rise to a bona fide concern that the subject may harm a child or a vulnerable person. The Filter was not applicable at the time of this disclosure in December 2013.

18. The vetting process is now regulated by statute. The National Vetting Bureau (Children and Vulnerable Persons) Act, 2012 as amended by the Criminal Justice (Spent Convictions and Certain Disclosures) Act, 2016 incorporates some of the protections previously available prior to its enactment but also provides a number of statutory rights to the subject of a vetting application. Part 3 of the Act sets out the procedure applicable to Vetting Disclosures since its commencement on the 29th April 2016 by the National Vetting Bureau (Children and Vulnerable Persons) Act. 2012 (Commencement) Order, S.I. No.214 of 2016. Section 12 provides as follows:-

"12. - (1) A relevant organisation shall not-

(a) employ (whether under contract of employment or otherwise) any person to undertake relevant work or activities,

(b) enter into a contract for services with any person for the provision by that person of services by that person of services which constitute relevant work or activities,

(c) permit any person to undertake relevant work or activities on behalf of the organisation (whether or not for commercial or any other consideration),

(d) in a case where the relevant organisation is a provider of any course of education, training or scheme, including an internship scheme, place or make arrangements for the placement of a person as part of such education, training or scheme, if a necessary and regular part of such placement requires the participation by the person in relevant work or activities, unless the organisation receives a vetting disclosure from the Bureau in respect of that person."

The new procedures apply to "relevant work and activities" in respect of children and vulnerable persons more particularly described in Part 1 of Schedule 1 to the Act. A "vetting disclosure" in respect of a person means a disclosure made by the National Vetting Bureau of the Garda Síochána under s.14 of the act. An application for vetting disclosure under s.13 from a relevant organisation must contain various details in respect of the person to be vetted including the relevant work or activity to which the application relates. On receipt of the application the Bureau shall, under s. 14:-

"(a) make such enquiries of the Garda Síochána as it deems necessary to establish whether there is any criminal record or specified information relating to the person, and

(b) undertake an examination of the database to establish whether it contains particulars of any record of, or specified information relating to, the person concerned."

Section 2 defines "criminal record" as:-

(a) the 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

(b) a record of any prosecutions pending against the person, whether within or outside the State, for any criminal offence"

An order striking out a charge is not contained within the definition of 'criminal record' which is to be the subject of a mandatory vetting under s.12.

"specified information" means "information concerning a finding or allegation of harm to another person that is received by the Bureau from-

(a) the Garda Síochána pursuant to an investigation of an offence or pursuant to any other function conferred on the Garda Síochána by or under any enactment or the common law, or

(b) a scheduled organisation."

A striking-out order in respect of an allegation of harm to another qualifies as "specified information". Section 15 sets out in detail the procedure to be followed by the Bureau in assembling the specified information, the provision of notice to the person who is subject to the vetting of that information and an opportunity to make a written submission in respect thereof. The Bureau must then assess the specified information but should not make a disclosure of same unless it reasonably believes that the information is of such a nature as to give rise to a bona fide concern that the person may be a source of harm to a child or vulnerable adult under s.15 (a) and that disclosure is necessary, proportionate and reasonable in the circumstances for the protection of children or vulnerable persons under s.15(b). Section 15(4) requires the Bureau, in making its assessment to take account inter alia of the relevance of the information to the relevant work or activity to which the application for disclosure relates. These provisions did not apply in this case as they were not in force at the time.

19. It is submitted that this section seeks to codify the fair procedures applicable to a vetting application and is a useful template against which the procedure followed in this case may be measured and that any such measurement must lead to a conclusion that the procedure adopted in this case was deficient by reference to that standard. It is clear that the procedure is markedly different from that adopted in the Code of Practice but that of itself does not mean that the administrative procedure applied was unfair.

20. The constitutional right to fair procedures under Article 40.3 of the Constitution is said to have been breached because the Garda Vetting Office did not engage with the applicant before the disclosure was made. No attempt was made to assess which records concerning the applicant, if any, were relevant to the inquiry made. It is claimed that the Garda Vetting Office ought to have ascertained and determined the relevance of the records it held to the placement proposed prior to disclosure. If it proposed to make a disclosure it ought then to have informed the applicant and given him an opportunity to make submissions as to why disclosure ought not to have been made in the circumstances. At that stage it ought to have considered any such representations and made its decision. This would have given the applicant the opportunity to proffer the explanations later given and accepted as correct in relation to the records. Clearly, the drugs charge record was completely irrelevant to his previous life as it was accepted by An Garda Síochána that he was an innocent victim of identity misuse by another. His explanation of how the criminal damage charge came about and was ultimately struck out was also accepted as correct. If given notice of intended disclosure these issues might have been addressed and he might have avoided the negative interviews concerning his failure to explain the records as disclosed and the ensuing consequences. It is claimed that this caused him serious hardship in the pursuit of his studies and placed a question-mark over the pursuit of his chosen career. At the time I have no doubt that this was a legitimate and serious concern for him. It set back his progress for a year.

21. It was clear to the Vetting Unit that the vetting was sought in respect of a placement involving the care of children or the vulnerable within the health service. The context of the concerns was provided by the source and nature of the application. The relevance of criminal damage committed by a person whether in domestic circumstances or otherwise, or his/her unlawful possession of drugs to such a placement was readily apparent – if he had been convicted. It seems to me that their disclosure would also have to be considered under the 2012 Act as relevant information, though a different procedure would have been followed prior to any

disclosure contemplated under the Act.

22. The applicant did not give a fully accurate account of his engagement with the criminal justice system in his application form, claiming that he had no prior conviction and omitting details of his previous prosecutions which ended with the striking out orders. It is clear that the HSE before accepting him for placement was anxious to establish his history in a clear and forthright manner. It made the request to the applicant to reveal prior convictions or previously unsuccessful criminal proceedings brought against him. That necessarily required a full and truthful answer from the putative employee or placement candidate.

23. An employer is entitled to a truthful answer to such a question if it is lawfully asked, as a condition precedent to or a condition of employment. It is difficult to see, absent a statutory or constitutional prohibition on such a contractual condition, how the asking of the question is unlawful. This is all the more important to the employer if the existence of criminal convictions is of direct relevance to its business or statutory function and obligations. A bank will not normally wish to employ a convicted fraudster or bank robber. The HSE will not wish to employ a convicted child sex offender in a hospital or child care service. That is common sense. However, there are some circumstances where it will be inappropriate to require disclosure, e.g. if a conviction is spent. This is now clearly addressed in respect of vetting concerning the protection of children and vulnerable persons by, inter alia, ss. 14 and 14A of the 2012 Act as amended, s.6 of the Criminal Justice (Spent Convictions and Certain Disclosures) Act 2016 and s.258 of the Children Act 2001.

24. In any employment application or vetting system the truth is of supreme importance. Thus the court is not greatly impressed by the applicant's answers which were clearly wrong when completing his application form. However, there is also a clear implication in the submissions made that the broad nature of the question posed was itself too wide and should not have encompassed the two striking out orders which were a number of years old. I am not satisfied that this is so. The question posed was an important one for the third and fourth respondents who have extremely important duties of care to protect children and the vulnerable.

25. The applicant however, also submits that the decision maker should not have been given his complete record in the form provided and allowed to determine whether it was relevant to the applicant's suitability because the charges recorded gave rise to a disproportionate prejudice to him in that he was demonstrably innocent of one charge and enjoys the presumption of innocence in respect of both. At common law there was nothing to stop the employer from asking the question. There was no statutory protection from disclosure of prior convictions at that time and a person duly convicted of a minor offence years previously had no right to shield himself by not telling his potential employer about it: that is now to a limited extent changed under the statutory provisions outlined earlier.

26. The very broad questions posed were answered by the Vetting Office under the Code of Practice. The issues that arise in this case were largely resolved for the future by the Administrative Filter and the 2012 Act in that, in any future vetting application, the subject of the vetting is now allowed an opportunity to contest the record in relation to error and/or relevance before the disclosure is made. The opportunity to correct the record or dispute any detail, in this case, arose only after disclosure was made under the former administrative system. The subject might, after disclosure, raise a dispute by way of a written report in respect of any detail in the disclosure but by that stage prejudice had been suffered. It should be noted that the nature and extent of the information covered by the questions answered by the applicant are somewhat wider than the more focussed vetting process under the Act.

27. The HSE is a public body and in conducting a placement process with Trinity College was obliged to conform with fairness of procedures. It is charged with the onerous duty of protecting and vindicating the personal rights to bodily integrity and health of those children and vulnerable persons entrusted to its care. If it wished to exclude persons who has been convicted or charged with certain criminal offences from appointment to a position in which they would be in contact with children or vulnerable persons, thereby given rise to a risk of injury or abuse, it could do so. It was entitled to adopt a vetting procedure which had regard to a person's previous character and to rely upon the disclosure of relevant records held by An Garda Síochána to achieve that end. Of course, nothing of such gravity was recorded in respect of the applicant in this case. However, the scope of any such measures, whether administrative or statutory must be fair and proportionate to that objective. I am satisfied that prior to making the disclosure in this case the Vetting Unit should have accorded natural justice to the applicant and he should have been informed of the terms of the disclosure and given a reasonable opportunity to respond or object to it or make such submissions as he thought appropriate to ensure that the full circumstances relating to the disclosure were made known (see M.Q. v. Gleeson [1998] 4 I.R. 85).

28. In *Cox v. Ireland* [1992] 2 I.R.503 the applicant, a teacher, challenged the constitutionality of s.34 of the Offences Against the State Act, 1939, which provided, inter alia that a person convicted of a scheduled offence would forfeit his/her public employment and be disqualified from holding any such employment for a period of seven years following their conviction. The Supreme Court held that the provision was invalid. It was satisfied that the provision when applicable

> "potentially constitutes an attack, firstly on the unremunerated constitutional right of that person to earn a living and secondly, on certain property rights protected by the Constitution, such as the right to a pension, gratuity or other emolument already earned, or the right to the advantages of a subsisting contract of employment.
>
> It constitutes a major inroad on these rights, for having regard to the number of activities in which persons employed are funded by State funds…an inability of a person convicted in this manner, not only to continue his pre-conviction employment, but to take up employment in any of the other categories of employment coming within the provisions of s.34, is a major curtailment of his earning capacity."

29. The Court was satisfied that the State was entitled, for the protection of public peace and order, and for the maintenance and stability of its own authority, by its law to provide onerous and far-reaching penalties and forfeitures as a major deterrent to the commission of such crimes and to ensure that persons who commit such crimes are not involved in carrying out the functions of the State. The section applied only to those convicted by the Special Criminal Court of a scheduled offence and that venue could only be avoided by a decision of the Director of Public Prosecutions in respect of which the accused had no right to be heard. The Court was therefore satisfied that the provision failed to protect the constitutional rights of the citizen and was "impermissibly wide and indiscriminate". I am satisfied that the administrative Code of Practice as operated in this case engages the applicant's right to earn a livelihood and fair procedures. The State and its agencies are obliged to protect and vindicate the personal rights of children and vulnerable person by ensuring that unsuitable persons are not given access to them or cause them harm but any vetting procedure adopted to achieve that purpose must be fair, necessary and proportionate to that end.

30. In *Webster v The Commissioner of An Garda Síochána, Ireland and the Attorney General* [2013] IEHC 449, the applicant challenged the system of Garda Vetting disclosures. He argued that by maintaining, distributing and relying on records of non-convictions the respondents had failed to vindicate his good name and reputation. He had been first on a panel for a job as a fire fighter at Urlingford Fire Station. Garda vetting disclosed a number of previous charges which had not resulted in convictions. His application was unsuccessful based on this information. It was argued by counsel for the applicant that the system was

unreasonable, disproportionate and not in accordance with constitutional principles. The action was settled during the judicial review proceedings, in favour of the applicant. He subsequently sought an undertaking from the respondents to the effect that the information relating to non-convictions would not be disclosed in future vetting disclosures. The defendants refused. The applicant sought declarations that the Garda Vetting Procedure failed to vindicate the plaintiff's right to his good name, reputation and livelihood and a declaration under s. 5 of the European Convention on Human Rights Act 2003, that the vetting procedure was incompatible with the State's obligations under the Convention. It was also claimed that the future dissemination of records of charges of which he was not convicted in a vetting disclosure constituted a violation of his constitutional and convention rights. However, Laffoy J., dismissed the case as an abuse of process because of the prior settlement between the parties of proceedings in which these elements of the claim had not been, but might have been advanced. Thus the substantive issues concerning future vetting were not determined by the court.

31. In *G v. The Minister for Justice, Equality and Law Reform* [2007] IEHC 52, (Unreported High Court, Quirke J. 17th January 2007), a nephew of Mr. G who had been convicted of serious sexual offences had been allowed to live for a short time with the family. This fact was recorded in confidential documents compiled and distributed within An Garda Síochána. The details of his residence were confirmed to the media. This resulted in widespread knowledge of the fact and considerable abuse, harassment and intimidation of the family which obliged them to leave their home permanently. Quirke J., held that it was unlawful and a violation of the Plaintiffs' rights to privacy for An Garda Síochána to disclose confidential and sensitive information to the media arising from a request from a journalist for verification of information which was already in the journalist's possession unless the disclosure was made in order to protect the constitutional rights of others or was in the interests of the common good; "the wrong was the unlawful disclosure of confidential and sensitive information procured by the State" (at p. 21: see also *Kennedy v. Ireland and the Attorney General* [1987] 1 I.R. 587). I am satisfied that the disclosure of information which should and would in the normal course be withheld by a State agency may engage the right to privacy but the right is not absolute and is subject to disclosure which is made to protect the constitutional rights of others or the common good.

32. The two orders disclosed in this case though made in public were recorded by agents of the State. They were held by An Garda Síochána and would not and could not have been disclosed to any third party unless to protect another's constitutional right or in the interests of the common good. However, that was the very purpose of disclosure in this case. I am satisfied therefore that the real issue is one of the fairness of procedures adopted before the disclosure was made. If the disclosure was made in compliance with fair procedures, its purpose would clearly be to protect the rights of children and vulnerable persons and could not be regarded as a violation of the applicant's right to privacy.

33. The procedures applicable are also informed by the requirements of Article 8 of the European Convention on Human Rights which provides:-

> "(1) Everyone has the right to respect for his private…life…
>
> (2) There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals and for the protection of the rights or freedom of others."

34. It was established that the retention and disclosure of a citizen's information engages the right to private life under Article 8. In Rotaru v Romania (2000) 8 BHRC 449, the Court considered the implications of the storage and disclosure of criminal records. The applicant's complaint centred on the retention of information and the lack of a mechanism to correct or remove untrue information. The Court rejected the state's argument that Article 8 was not applicable as the information concerned related to the applicant's political activities and criminal record and was thus related not to his private life but to his public life. The Court stated that:-

> "43. ... public information can fall within the scope of private life where it is systematically collected and stored in files held by the authorities. That is all the truer where such information concerns a person's distant past.
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> 44 In the instant case the Court notes that the RIS's letter of 19 December 1990 contained various pieces of information about the applicant's life, in particular his studies, his political activities and his criminal record, some of which had been gathered more than fifty years earlier. In the Court's opinion, such information, when systematically collected and stored in a file held by agents of the State falls within the scope of "private life" for the purposes of Article 8 § 1 of the Convention."

I am satisfied that the right to private life is engaged by the retention of data by the State concerning the applicant's previous record of engagement with the criminal justice system as a person charged with criminal offences and its subsequent disclosure notwithstanding the fact that the two orders were made in open court.

35. In *R(L) v. Commissioner of the Metropolis* [2010] 1 AC 410 the United Kingdom Supreme Court (UKSC) considered the disclosure by the police of child neglect information on a criminal record certificate issued pursuant to statute which the applicant was obliged to seek to continue her employment as a midday supervision assistant in a secondary school. She had no criminal convictions. Her employment was not renewed. A challenge was made against the disclosure. The Court of Appeal rejected the challenge on the basis that the relevant statutory provision permitted the disclosure of non-criminal conviction information if that was thought to be relevant to her suitability for a post involving the supervision of children.

36. The UKSC dismissed the appeal on its particular facts. The information disclosed was found to be true and relevant to the position to which the applicant was appointed and ought to have been disclosed. However, the court in analysing the application of Article 8 reviewed its previous jurisprudence and the case law of the European Court of Human Rights (ECHR). The statutory provisions under which disclosure was made, s. 115, subs. 6 and 7 of the Police Act 1997 as amended permitted disclosure by certificate to a prospective employer under consideration for appointment to a position involving the care of children. The court accepted that the disclosure could constitute an interference in the private life of the applicant. Lord Hope of Craighead stated that it was established that the scope of the right to respect for private life embraces the disclosure of information collected and stored in central records (including convictions) and that its release would interfere with an applicant's private life. He acknowledged that it was in one sense public information in that convictions took place in open court. However, the systematic storing of the information in central records meant that it was available for disclosure long after the event when everybody other than the person concerned was likely to have forgotten about it. He stated that as a conviction receded into the past, it became part of the person's private life which must be respected. He noted that much of the other information that might be disclosed under the 1997 Act related to things which happened behind closed doors such as a caution given in private. Section 115(7) required a Chief Constable to form an opinion as to whether the information might be relevant and ought to be included in the disclosure. Lord Hope stated that in forming an opinion under the

section on relevance the officer must ask himself whether the information might be true and then consider the degree of connection between the information and the purpose described, if he thought it might. Even though the evidence might be relevant, the opinion must also be formed as to whether it "ought" to be included in the disclosure under the section. In each such case it must be considered whether there is likely to be an interference with the applicant's private life and if so whether that interference can be justified. Lord Hope stated:-

> "42. So the issue is essentially one of proportionality. On the one hand there is a pressing social need that children and vulnerable adults should be protected against the risk of harm. On the other there is the applicant's right to respect for her private life. It is of the greatest importance that the balance between these two considerations is struck in the right place.
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> …
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> 46. In cases of doubt, especially where it is unclear whether the position for which the applicant is applying really does require the disclosure of sensitive information, where there is room for doubt as to whether an allegation of a sensitive kind could be substantiated or where the information may indicate a state of affairs that is out of date or no longer true, Chief Constables should offer the applicant an opportunity of making representations before the information is released. … But it will not be necessary for this procedure to be undertaken in every case. It should only be resorted to where there is room for doubt as to whether there should be disclosure of information that is considered to be relevant. The risks in such cases of causing disproportionate harm to the applicant outweighed the inconvenience to the Chief Constable."

Lord Hope concluded that there was no doubt that the information disclosed about the applicant was relevant for the purpose for which it was required and he did not consider that insufficient weight was given to the applicant's right to respect for her private life. The facts that were conveyed were true. It was information that bore directly on the question of whether she was a person who could safely be entrusted with the job of supervising children in a school canteen or playground. It was therefore for the employer to decide what to make of the information but he noted that it was not at all surprising that a decision was made to terminate her employment.

37. Lord Neuberger (concurring) stated:-

> "81. Having decided that information might be relevant under s. 115(7)(a), the Chief Officer then had to decide under s. 115(7)(b) whether it ought to be included and, in making that decision, there will often be a number of different, sometimes competing, factors to weigh up. Examples of factors which could often be relevant are the gravity of the material involved, the reliability of the information on which it is based, whether the applicant has had a chance to rebut the information, the relevance of the material to the particular job application, the period that has elapsed since the relevant events occurred, and the impact on the applicant of including the material … both in terms of her prospects of obtaining the post in question and more generally. In many cases, other factors may also come into play, and in other cases, it may be unnecessary or inappropriate to consider one or more of the factors I have mentioned. Thus, the material may be so obviously reliable, relevant and grave as to be disclosable however detrimental the consequential effect on the applicant.
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> 82. In a nutshell, as Lord Hope has said, the issue is essentially one of proportionality. In some, indeed possibly many, cases where the Chief Officer is minded to include material in [a certificate] on the basis that he inclines to the view that it satisfies s. 115(7)(b), he would, in my view, be obliged to contact the applicant to seek her views, and take what she says into account, before reaching a final conclusion. Otherwise, in such cases, the applicant's Article 8 rights will not have been properly protected. Again, it is impossible to be prescriptive as to when that will be required. However, I would have thought that, where the Chief Officer is not satisfied that the applicant has had a fair opportunity to answer any allegation involved in the material concerned, where he is doubtful as to its potential relevance to the post for which the applicant has applied, or where the information is historical or vague, it would often, indeed perhaps normally, be wrong to include it in an ECRC without first giving the applicant an opportunity to say why it should not be included."

38. In *MM v. United Kingdom* [2012] ECHR 1906, the disclosure of a caution and the lack of safeguards in the system governing the retention and disclosure of such data gave rise to a breach of the applicant's Article 8 rights. The case which originated in Northern Ireland concerned a non-statutory regime operated at the time. Disclosures were made, under common law powers, to a prospective employer, which concerned a caution received by the applicant for child abduction. It occurred when the applicant took her grandchild in a desperate if futile attempt to try to bring the parents back together and discourage the child's mother from returning with the child to Australia. It was accepted by the police that there was no threat to the welfare of the child. The Court recognised the difficulties that would be caused by future disclosures as the impugned data would be stored for life and would be disclosed whenever the applicant applied for employment falling under the scope of the Police Act, 1997. The Court concluded:-

> "206. In the present case, the court highlights 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. It further refers to the absence of any mechanism for independent review of a decision to retain or disclose data, either under common law police powers or pursuant to Part V of the 1997 Act. Finally, the court notes the limited filtering arrangements in respect of disclosures made under the provisions of the 1997 Act: as regards mandatory disclosure under s. 113A, no distinction is made on the basis of the nature of the offence, the disposal in the case, the time which has elapsed, the time which has elapsed since the offence took place or the relevance of the data to the employment sought.
>
> 207. The cumulative effect of these shortcomings is that the court is not satisfied that there were, and are, sufficient safeguards in the system for retention and disclosure of criminal record data to ensure that data relating to the applicant's private life have not been, and will not be, disclosed in violation of her right to respect for her private life. The retention and disclosure of the applicant's caution data accordingly cannot be regarded as being in accordance with the law. There has therefore been a violation of article 8 of the Convention in the present case. This conclusion obviates the need for the court to determine whether the interference was 'necessary in a democratic society' for one of the aims enumerated therein."

39. The two striking out orders in this case gave minimal information. The difficulty in transmitting such incomplete information results from a complete absence of any context in the disclosure made. The orders were disclosed in a process which suffered from most, if not all of the inadequacies described in MM . The orders were made in public but much of what transpired was unexplained by the bare record. It was essential to the applicant and the potential placement supervisor and employer that this information be disclosed

at the same time, but the deficiencies of the process did not allow for this. While the background facts are not required in all cases of disclosure (e.g. where the nature and relevance of a criminal conviction is obvious), the process should have included the safeguards thought to be essential in MM .

40. In *Regina (T) v Chief Constable of Greater Manchester Police and others* [2014] UKSC 35, the UKSC heard joined cases involving two claimants. The first had received warnings from the defendant police force when he was 11 years old for the theft of two bicycles. He sought to enrol in a sports degree course when he was 18. As the course involved teaching children the university sought and received an enhanced criminal record, which revealed the police warnings. The second claimant was a 40 year old woman who had received a caution from the police for failing to pay for an item taken from a store. A number of years later, having completed a training course to work in the care sector, a criminal record check revealed the caution. She was thereafter refused the opportunity to work with vulnerable people. A third claimant had been involved in a carjacking incident with her boyfriend which resulted in a fatal stabbing. The claimants sought judicial review seeking a declaration that the disclosure provisions as operated under s.113B of the Police Act, 1997, were not compatible with the right to private life under Article 8 of the Convention.

41. The Court of Appeal held that the statutory regime as set out in s. 113B of the Police Act, 1997 which prescribed a system of mandatory disclosure of all convictions, cautions and warnings relating to recordable offences recorded on a police database, was disproportionate. This blanket disclosure went beyond the aims of protecting vulnerable adults and children as well as enabling employers to assess the suitability of prospective employees for such work because it was not made on appropriate criteria such as relevance, the seriousness of the offence, the offender's age, the sentence imposed, the manner of disposal of the charge, the time since the commission of the offence and whether the offender had subsequently re-offended and the nature of the work.

42. The Court of Appeal found that the scheme, operating on the basis of a bright line rule, was not proportionate. It was noted that it would be possible for the legislature to produce a proportionate scheme which did not insist on a thorough examination of the facts in every case. It was held that the system of disclosure provisions under the 1997 Act were not compatible with Article 8 of the Convention. Both cases were appealed to the UKSC which upheld the judgment of the Court of Appeal.

43. The UKSC applied the principles set out in *M.M. v. United Kingdom*. Lord Reed in his judgment stated that legislation which required the indiscriminate disclosure by the State of personal data which it has collected and stored does not contain adequate safeguards against arbitrary interference with Article 8 rights. He said:-

> "114. This issue may appear to overlap with the question whether the inference is "necessary in a democratic society": a question which requires an assessment of the proportionality of the interference. These two issues are indeed interlinked, as I shall explain, but their focus is different. Determination of whether the collection and use by the State of personal data was necessary in a particular case involves an assessment of the relevance and sufficiency of the reasons given by the national authorities. In making that assessment, in a context where the aim pursued is likely to be in the protection of national security or public safety, or the prevention of disorder or crime, the court allows a margin of appreciation to the national authorities, recognising that they are often in the best position to determine the necessity for the interference. As I have explained, the court's focus tends to be on whether there were adequate safeguards against abuse, since the existence of such safeguards should ensure that the national authorities have addressed the issue of the necessity for the interference in a manner which is capable of satisfying the requirements of the Convention. In other words, an order for the interference to be "in accordance with the law" there must be safeguards which have the effect of enabling the proportionality of the interference to be adequately examined. Whether the interference in a given case was in fact proportionate is a separate question.
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> …
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> 119. In the light of the judgment in *M.M. v. United Kingdom* it is plain that the disclosure of the data relating to the respondent's cautions is an interference with the right protected by Article 8.1. The legislation governing the disclosure of the data, in the version with which these appeals are concerned, is indistinguishable from the version of Part V of the 1997 Act which was considered in M.M. That judgment establishes, in my opinion persuasively, that the legislation fails to meet the requirements for disclosure to constitute an interference "in accordance with the law". That is so, as the court explained in M.M., because of the cumulative effect of the failure to draw any distinction on the basis of the nature of the offence, the disposal in the case, the time which has elapsed since the offence took place or the relevance of the data to the employment sought, and the absence of any mechanism for independent review of a decision to disclose data under section 113A."

Lord Reed also agreed with Lord Wilson that the disclosure of the respondents' cautions could not in any event be regarded as necessary in a democratic society. The disclosure of warnings for dishonesty which had been given to one of the applicants when a young child bore no rational relationship to the aim of protecting the safety of children with whom, as an adult, he might come into contact. In respect of the second respondent the impact on her private life of the disclosure of her caution for minor dishonesty many years earlier was disproportionate to its likely benefit in achieving the objective of protecting people receiving care.

Conclusion

44. I am satisfied that the Garda Vetting Disclosure procedure applied in this case operated on a blanket disclosure basis and does not satisfy the test of proportionality. I am persuaded by the judgments of the UKSC and it is clear from the jurisprudence of the ECHR that it is necessary for a valid police vetting system to operate with due regard to its legitimate aims. It is undoubtedly appropriate to have a Garda Vetting process for the stated purpose of protecting children and vulnerable adults. Nevertheless, the test of fairness and proportionality must also be satisfied. This required that the provider place the strike out orders as well as minor previous convictions and other information in their proper context. In some, if not many instances, not involving convictions, that will require a review of the background to the case and engagement with the subject, in order to establish the facts and their relevance. The inflexible system operated by the Garda Síochána Vetting Unit which, as a matter of course disclosed striking out orders fails the test of fairness and proportionality.

45. I am also satisfied that the respondents have not identified any discernible aim which was satisfied by the disclosure of the impugned information. In contrast to the case law based on the disclosure of cautions in the United Kingdom, it is notable in the present case that a striking out order does not involve acceptance that one has committed the offence. Indeed, it is acknowledged that the applicant was not guilty of the s. 3 charge and that his version of the circumstances leading to the criminal damage charge was accepted.

46. I am satisfied that the disclosure policy of the respondents failed to respect the applicants right to fair procedures in a decision which impinged upon his right to earn a livelihood. That right could have been adversely and unfairly affected by future similar

disclosures. The facts as later clarified following the "dispute" raised by the applicant, did not indicate any relevant reason for the inclusion of the two orders whether based on its reflection of the applicant's character or his suitability to work in his chosen profession with children or vulnerable people. The disclosure procedure was not governed by statute and there was no mechanism for correction or alteration of information prior to disclosure. I am satisfied therefore that the decision to disclose the two orders was fundamentally flawed and in breach of the applicant's constitutional and Convention rights.

The Remedy

47. Counsel for the first and second respondent submits that the applicant's argument has been rendered moot following the resolution of issues with the third (Trinity College) and fourth (HSE) named respondents. A full and final settlement was reached with the fourth respondent. The applicant agreed not to proceed against the HSE which agreed to pay the applicant fifty percent of his costs as recorded in an Order of the Deputy Master made the 14th October 2014. On the 26th January 2015, on the applicant's application for costs it was directed that the first and second respondents deliver a Statement of Opposition and that the applicant pay to the said respondents their costs of that application. It would appear that absent an undertaking in the form of the orders sought in respect of future vetting, the court was informed that the case was not moot against the first and second respondents. A statement of Opposition and verifying affidavit were delivered.

48. The respondents claim that the applicant's argument centres on the reaction of Mr. Bracken to the disclosure made by the second named respondent, rather than the disclosure itself. As Mr. Bracken was not employed by the first and second respondent, nor acting as their agent, they cannot be responsible for his actions. Counsel refuted the contention that the actions of the respondents precipitated the applicant's withdrawal from lectures and it is asserted that any negative impact on the applicant was not the fault of the respondents.

49. I am not satisfied that the applicant's claim at the time it was initiated was unreasonably brought. It is correct that the correspondence indicates that the applicant was greatly concerned about any future vetting that might result in the same disclosure. Indeed, absent the commencement of the 2012 Act, I am satisfied that the court would have been constrained to grant an order of *certiorari* of the second respondent's decision to disclose the two orders. The proceedings were reasonably initiated and maintained. It was only following the conclusion of legal argument in the case that the 2012 Act was brought into force. The Administrative Filter was introduced in 2014. Leave to apply for judicial review was granted on the 7th April, 2014. The Deputy Master made an order on the 14th October, 2014 recording the full and final settlement of the proceedings against the fourth named respondent. The case against all respondents continued well into 2014.

50. I am satisfied that the system of vetting operated by the respondents on the basis of the case law and principles cited above constituted a violation of the applicant's right to fair procedures and earn a livelihood and his right to private life under Article 8 of the Convention. The practical consequences of the disclosure made and the manner in which it was made had to be addressed by the applicant and caused him embarrassment and upset and a setback in his studies and career. This was addressed to some degree in the settlement reached with the fourth named respondent and recorded in October 2014. The applicant had legitimate concerns in relation to the future vetting which he might face when applying for other placements or employment involving children or vulnerable persons. While it now seems likely, on an analysis of the case law set out above and on the commencement of the 2012 Act that he will not be faced with a vetting procedure which is flawed and constitutes a breach of his constitutional and convention rights, the applicant submits that it was necessary to continue the proceedings in 2015 because an undertaking that a disclosure of a similar kind would not be made in the future was not forthcoming.

51. The charge under s. 3 of the Misuse of Drugs Act 1977 could not be the subject of disclosure since it is entirely irrelevant to the applicant. It is accepted that he is innocent of that charge. The second charge of criminal damage which was struck out was the subject of an explanation ultimately accepted by An Garda Síochána. It seems to me that in respect of this charge the applicant was entitled to the fair procedures described above which were not applied in the initial vetting. It also seems to me that had such procedures being applied there is a strong possibility that this charge might not have been the subject of disclosure. There was always an argument to be made that the disclosure of either of the striking out orders was entirely lacking in proportionality and unnecessary in the circumstances, but the applicant was not accorded an appropriate and fair procedure within which to make it prior to the disclosure: this contributed to the set-backs in his studies already described.

52. The decision to make the disclosure, which was made prior to the administrative and statutory changes subsequently introduced was fundamentally flawed. However, the consequences of the disclosure have now been addressed by the parties and the applicant has been allowed to proceed with a placement with due account taken of the flawed process and its consequences and in particular, the facts behind the two striking out orders. It does not appear to the court that that process should be further disrupted by the making of orders that might in some way suggest that issues which are now somewhat historical should be re-opened. If the applicant is subject to future vetting, I am satisfied that he will be dealt with under the 2012 Act in a compliance with its provisions, the Constitution and Article 8.

53. In those circumstances I do not consider that an order of *certiorari* is appropriate in respect of the disclosure. I am satisfied that the court should exercise its discretion not to grant that relief while accepting that the process was fundamentally flawed. The court will grant a declaration that the process operated by the first and second respondents as applied in this case was in breach of the applicant's right to fair procedures and earn his livelihood under Article 40.3 of the Constitution and his right to private life under Article 8 of the Convention.