**IN THE SUPREME COURT OF THE UNITED KINGDOM** **CASE NO. UKSC 2016/0195**

**ON APPEAL FROM THE COURT OF APPEAL IN NORTHERN IRELAND**
**RE: LORRAINE GALLAGHER'S APPLICATION [2016] NICA 42**

B E T W E E N :-

**DEPARTMENT OF JUSTICE**

Appellant

**-and-**

**LORRAINE GALLAGHER**

Respondent

**-and-**

**(1) UNLOCK**
**(2) CLAN CHILDLAW**

Interveners

**IN THE SUPREME COURT OF THE UNITED KINGDOM** **CASE NO. UKSC 2017/0121**

**ON APPEAL FROM THE COURT OF APPEAL OF ENGLAND & WALES (CIVIL DIVISION) [2017] EWCA CIV 321**

B E T W E E N :-

**THE QUEEN**
**on the application of**
**(1) P (2) G (3) W**

Respondents

**-and-**

**(1) THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**
**(2) THE SECRETARY OF STATE FOR JUSTICE**

Appellants

**-and-**

**(1) UNLOCK**
**(2) CLAN CHILDLAW**

Interveners

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## CASE FOR UNLOCK (INTERVENER)

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## 1. OVERVIEW

1.1 These appeals raise issues of fundamental importance concerning the rights of people with convictions, cautions and reprimands who face stigma and obstacles because of their criminal records, often many decades after they have been sentenced or cautioned, and often throughout their adult lives despite their criminal records dating from childhood. There are two linked appeals before the Court, both concerning the disclosure of such information. In *Gallagher*, the Northern Ireland Department of Justice appeals against an Order of the Court of Appeal of Northern Ireland dated 12th October 2016;[1] and in *P*, *G* and *W*, the Secretary of State for the Home Department and the Secretary of State for Justice ('the Secretaries of State' or 'the Appellants') appeal against an Order of the Court of Appeal dated 26th May 2017.[2] Both Courts of Appeal held that the respective schemes violate Article 8 of the European Convention on Human Rights ('ECHR').

1.2 Unlock is grateful for the opportunity to intervene in these linked appeals, pursuant to Rule 26, Supreme Court Rules 2009. Unlock (the National Association of Ex-Offenders Limited) is an independent charity for people with cautions and convictions, founded in 2000 by a group of former prisoners. It assists people with cautions and convictions to move on positively with their lives by empowering them with information, advice and support, and it promotes fair and inclusive practice towards people with cautions and convictions, including at government policy level, but also, for example, by providing training courses on criminal records disclosure for organisations that work with people with convictions, by supporting employers to deal fairly with employees and applicants for employment who have convictions, and by challenging employers who do not act appropriately. Unlock regularly consults and engages with individuals whose interests will be directly affected by the outcome of these appeals. For these reasons, Unlock is particularly well-placed to address the issues arising.

1.3 Unlock is mindful of the need for interveners to avoid duplication of submissions made by others and to add value to assist the Supreme Court in considering appeals before it. In filing these submissions Unlock has had sight of the Statement of Facts and Issues in both appeals and the Appellants' and Respondents' Statements of Case. Unlock is in broad agreement with the submissions made to date by the Respondents. These submissions address additional points, or amplify issues raised by the Respondents, drawing on Unlock's particular expertise and direct experience of this important area.[3] It is Unlock's case that:

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[1] Gillen, Weatherup and Weir LJJ.
[2] The President of the Queen's Bench Division, Beatson and Thirlwall LJJ.
[3] Unlock is conscious that Practice Direction 6, at para. 6.9.4, indicates that an intervention should not normally exceed 20 A4 pages. These submissions run to a little over that (28 pages), due to the fact that this is an intervention in two separate appeals, concerning four individual cases, and as the Supreme Court in its Order granting permission indicated that comparative material would be of assistance.

1.3.1 The Court of Appeal in *P*, *G* and *W*, and the Northern Ireland Court of Appeal in *Gallagher*, reached the clear conclusions that the provisions of Part V of the Police Act 1997 in England and Wales and in Northern Ireland ('the current statutory scheme'), in so far as they require that any spent conviction or caution for a specified offence ('the serious conviction rule') and any spent conviction where a person has more than one conviction ('the multiple conviction rule') must be disclosed, are not in accordance with the law and are therefore incompatible with Article 8. Both Courts were right to reach these conclusions, and these appeals should be dismissed;

1.3.2 There is longstanding judicial recognition of the special principles applicable (under domestic, Convention and international law) when considering those convicted of offences as children. These special principles assist in assessing the Article 8 issues that arise in these appeals, namely the recording, retention and disclosure of conviction data concerning adults who were children when they committed their offence(s). The special principles support the conclusion that these appeals should be dismissed;

1.3.3 The Northern Ireland Court of Appeal in *Gallagher* held that the current scheme in Northern Ireland, in so far as it requires mandatory disclosure of any spent conviction where a person has more than one conviction, did not satisfy the 'necessity' test and was therefore unlawful under Article 8. The Court of Appeal in *P*, *G* and *W* did not determine whether the current scheme in England and Wales is incompatible with Article 8 on proportionality grounds, having decided the appeal under the 'in accordance with the law' test. The Court of Appeal of England and Wales was right to find that the impugned scheme is not in accordance with law, but in any event the scheme would fail the necessity test. For the reasons given by the Respondents in these appeals, and the additional reasons advanced in these submissions, it is Unlock's case that both the serious conviction rule and the multiple conviction rule are not 'necessary in a democratic society' as required by Article 8(2), as they fail to satisfy the strict requirements of proportionality and are not the least restrictive means of achieving the legitimate objective of protecting vulnerable adults and children. Unlock focuses in these submissions on two particular points relevant to the necessity analysis: the harsh consequences of the scheme, and the availability of alternative, more calibrated schemes;

1.3.4 The current statutory scheme imposes a number of pronounced, harsh consequences on affected individuals. These consequences support the conclusion that the current statutory scheme is not necessary in a democratic society;

1.3.5 There exist a number of alternative, viable methods for filtering and disclosing criminal records information to remove and/or minimise the significant problems caused by the current statutory scheme. Many jurisdictions have far more calibrated and targeted schemes than those under consideration in these appeals. This undermines the complaint of the Secretaries of State to the effect that creation of a more calibrated scheme would be overly onerous or is impossible when dealing with a large-scale scheme of this kind. These alternative methods support the conclusion that the current statutory scheme is not necessary in a democratic society.

1.4 Against that backdrop, Unlock's focus is upon four specific issues of relevance to the Article 8 analysis:

a. Rights of the child;
b. The numerous harsh consequences of the current scheme;
c. Bright line rules;
d. Alternative schemes for filtering and disclosure.

## 2. UNLOCK'S SUBMISSIONS ON PARTICULAR ISSUES ARISING UNDER ARTICLE 8

### *a. Rights of the child*

2.1 Unlock agrees with the submissions set out in G's Case at paras. 25 - 38 concerning international law obligations in respect of children with convictions or reprimands for criminal behaviour, and makes further submissions drawing upon its expertise and experience. In Unlock's experience many of those adversely affected by automatic disclosure under the current statutory scheme were children at the time of their offence(s). A great many of these children have since developed into mature, law-abiding citizens in adult life, who have put their past behind them. This is unsurprising; children are rightly recognised as being subject to a more restricted level of responsibility for their actions than adults, and due to their youth there is substantial room for changes in their maturity and development.

2.2 In addition to G's own case, there are indicative examples of others adversely affected by the current statutory scheme in the case studies appended to Unlock's May 2018 Briefing, *'Filtering of criminal records from DBS checks'* (see in particular case studies 1 ('Marcus'), 2 ('Wesley') and 3 ('Helen')) and in Unlock's May 2018 Report, *'A life sentence for young people: a report into the impact of criminal records acquired in childhood and early adulthood'* by Christopher Stacey. The affected person ('Wesley') in case study 2 of the May 2018 Briefing summarises the impact: *"as a law-abiding adult I'm baffled that something I did at age 13 would create complications so far into my adult life."*[4] To similar effect, in Unlock's 2018 Report on youth criminal records, one person described it as follows: "*Growing up in quite a deprived area I think*

[4] Unlock, *'Filtering of criminal records from DBS checks: Unlock briefing'* (May 2018), pp.12-13.

*it's so easy to become a product of your environment. I made a stupid, albeit huge mistake as a cocky teenager and it took years to recover from the consequences. I think the main reason was because I was effectively carrying round a piece of paper that was like the mark of Cain."*[5]

2.3 These adverse effects are felt in particular by children in care, as there is a substantial body of evidence indicating that their youthful indiscretions are disproportionately criminalised, rather than them being diverted away from the criminal justice system, and that behaviour which is normal or common in a family home environment (teenage door-slamming, threats during an argument with adults) attracts police attention. For example, see case study 7 ('David') in Unlock's 2018 Report on youth criminal records: "*In one children's home, I had an argument with another boy not long after I'd moved there. Neither of us were seriously injured – it was no more than what two brothers probably get up to on a weekend. Yet because I was new, the care worker insisted on calling the police. We both ended up accepting cautions for ABH. I was told it wouldn't have any affect* [sic] *once I'd turned 18. Now I'm in my early 30's and I want to be a primary school teacher. Yet I'm still having this ABH caution disclosed on my enhanced DBS. Not only does that hold me back in itself, but it also means I've got to explain that I was brought up in care, which is something I know I get judged for. Although I've managed to complete my initial teacher training and placement, I'm worried about future job applications and I feel sick at the thought of having to disclose this for the rest of my life*".[6]

2.4 In 2013 the House of Commons Justice Committee reported concerns that children's homes in England and Wales were calling the police for minor offending and trivial incidents which would never come to police attention if they took place in family homes,[7] concerns which are echoed by the Howard League for Penal Reform, based on its direct work with young people and its research.[8] The Sentencing Council in its 2017 *'Definitive Guideline: Sentencing Children and Young People'* also recognises this, highlighting at para. 1.16 that, *"In some instances a looked after child or young person (including those placed in foster homes and independent accommodation, as well as in care homes) may be before the court for a low level offence that the police would not have been involved in, if it had occurred in an ordinary family setting."* This Guideline applies only to children or young people sentenced on or after 1st June 2017, but it reflects a long-standing reality, and those with earlier criminal records do not benefit from the caution now emphasised in the Guideline.

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[5] Unlock, *'A life sentence for young people: a report into the impact of criminal records acquired in childhood and early adulthood'* (May 2018), p.22.
[6] Ibid, pp.50-51.
[7] House of Commons Justice Committee, 2013, cited by the Howard League for Penal Reform, *'Ending the criminalisation of children in care (Briefing One)'* (July 2017).
[8] Howard League for Penal Reform, *'Ending the criminalisation of children in care (Briefing One)'* (July 2017).

2.5 The courts have regularly considered the different principles at play when considering those convicted of offences as children. Whilst these cases have no direct application in the present context, when considering the Article 8 compatibility of the current scheme, assistance can be derived from the longstanding judicial recognition of the special position of children with criminal records.

2.6 Section 44(1) of the Children and Young Persons Act 1933 requires every court dealing with any juvenile offender to have regard to his or her welfare ('the welfare principle'). Baroness Hale referred to the importance of this provision in *R (Smith) v SSHD* [2006] 1 AC 159, at [25]:

> *…an important aim, some would think the most important aim, of any sentence imposed should be to promote the process of maturation, the development of a sense of responsibility, and the growth of a healthy adult personality and identity. That is no doubt why the Children and Young Persons Act 1933, in section 44(1), required, and still requires, every court dealing with any juvenile offender to have regard to his or her welfare. It is important to the welfare of any young person that his need to develop into fully functioning, law abiding and responsible member of society is properly met. But that is also important for the community as a whole, for the community will pay the price, either of indefinite detention or of further offending, if it is not done.*

2.7 The courts have accepted that the welfare principle requires a different approach to be adopted in relation to the setting of tariffs for children sentenced to detention at Her Majesty's Pleasure, in contrast to adults (*R v SSHD, ex parte Venables* [1998] AC 407, finding that the welfare principle required the Secretary of State to keep the children's detention under continuous review). In *Smith* Lord Bingham strongly rejected the contention that this duty of continuous review was spent once the child reached 18 (that case concerned a girl aged 17 at the time of the murder, and c.30 at the time the case came before the Lords) (pp.167 - 168, [12], emphasis added):

> *Mr Pannick submits that there is no inherent requirement of continuing review where the detainee is no longer a child or young person. He points out that the respondent was aged 27 when the Lord Chief Justice set her minimum term in November 2001, and informs the House that none of the HMP detainees sentenced before 30 November 2000 and still in custody is now under the age of 18. He points out, correctly, that the welfare principle laid down in section 44 of the 1933 Act, as amended by section 72(4) of and Schedule 6 to the Children and Young Persons Act 1969, applies only to children and young persons. Thus in the respondent's case any duty of continuing review is, in effect, spent. This is not a submission which I can accept.* ***The requirement to impose a sentence of HMP detention is based not on the age of the offender when sentenced but on the age of the offender when the murder was committed, and it reflects the humane principle that an offender deemed by statute to be not fully mature when committing his crime should not be punished as if he were. As he grows into maturity a more reliable judgment may be made, perhaps of what punishment he deserves and certainly of what period of detention will best promote his rehabilitation.*** *It would in many cases subvert the object of this unique sentence if the duty of continuing review were held to terminate when the child or young person comes legally of age.*

2.8 This 'humane principle' described by Lord Bingham is, it is submitted, reflected and further developed in multiple provisions of international law, including in particular the UN Convention on the Rights of the

Child ('UNCRC'). The UNCRC is taken into account by the European Court of Human Rights ('ECtHR') when assessing the parameters of the ECHR, particularly Article 8 (see, for example, amongst many authorities, the Grand Chamber in *Neulinger v Switzerland* (2010) 28 BHRC 706, at [131]). It is now clearly established that the UNCRC thus, by virtue of s.2(1) HRA, has a place in the interpretation of Convention rights by the courts in this jurisdiction; see in particular the series of Supreme Court decisions over the past eight years which have emphasised the importance of the best interests principle, and its enforceability in the domestic courts in HRA cases[9]: *ZH (Tanzania) v Secretary of State for the Home Department* [2011] 2 AC 166 ('*ZH*'); *R (HH and PH) v Deputy Prosecutor of the Italian Republic, Genoa; F-K v Polish Judicial Authority* [2013]1 AC 338 ('*HH*'); *BH and KAS/ H v The Lord Advocate and Another (Scotland)* [2013] 1 AC 413 ('*BH*'); *R (SG) v Secretary of State for Work and Pensions* [2015] 1 WLR 1449 ('*SG*'); *Mathieson v Secretary of State for Work and Pensions* [2015] 1 WLR 3250 (and, although it was not argued that any ECHR rights were engaged in that case, *Nzolameso v City of Westminster* [2015] UKSC 22, [2015] PTSR 549 per Baroness Hale at [29]).

2.9 Underpinning these provisions is Article 3(1) UNCRC, which provides that the best interests of the child shall be 'a primary consideration' in all decision-making by the State: *"In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."* This includes not only decision-making in specific individual cases, such as immigration decision-making in *ZH*, or extradition decision-making in *HH* and *BH*. It also applies to decision-making in the form of general policy-making, such as the creation of the new post-*T* and post-*MM* schemes under challenge in these appeals. This is clear from (a) the wording of Article 3(1) itself, which refers expressly to legislative bodies and to *"all actions"*; (b) the *"authoritative guidance"*[10] from the UN Committee on the Rights of the Child in its General Comment No. 14 (2013), para. 6(c), which emphasises that, *"whenever a decision is to be made that will affect a specific child, an identified group of children or children in general, the decision-making process must include an evaluation of the possible impact (positive or negative) of the decision on the child or children concerned … Furthermore, the justification of a decision must show that the right has been explicitly taken into account"*; and (c) the decision of the majority in the *SG* case that the 'benefit cap' – a generalised scheme concerning welfare benefits – breached the UNCRC (Lady Hale, Lord Kerr and Lord Carnwath)[11] (an approach reflected in many other cases, such as, for example, *R (HC) v Secretary of State for the Home Department* [2013] EWHC 982 (Admin), [2014] 1 WLR 1234).

[9] There are of course broader issues raised by some of these cases regarding the relevance of the UNCRC to statutory interpretation and the common law, but they do not arise in these appeals.
[10] *SG*, per Lord Carnwath at [105] - [106].
[11] A different majority found that there was no breach of Article 14 in that case (Lord Reed, Lord Hughes, Lord Carnwath), despite a majority finding there to be a breach of the UNCRC; the critical issue for Lord Carnwath was the lack of a nexus between the Article 14 challenge in that case (concerning discrimination against women, the single mother appellants, under

2.10 The underlying principle of best interests governs all matters concerning children and is reflected throughout the Convention as a whole; and critically, in considering the child's best interests, his or her future and the ramifications of decisions taken during childhood for opportunities and risks in adulthood is a key part of any best interests analysis. This is reflected in the rationale for the requirement that States introduce child-orientated criminal justice systems guided by the best interest of the child, reflected in Articles 37 and 40 UNCRC and the work of the Committee on the Rights of the Child (see G's Case at paras. 28 - 31), together with the Beijing Rules[12] and the Riyadh Guidelines[13]; a key issue raised is *"safeguarding… the future of the young person"*[14] and the importance of *"consideration that youthful behaviour or conduct that does not conform to overall social norms and values is often part of the maturation and growth process and tends to disappear spontaneously in most individuals with the transition to adulthood."*[15] Fundamentally, the obligation to give primary consideration to the best interests of the child reflects the view that childhood is a period of relative vulnerability, limiting children's capacity either to engage in certain activities or to take the necessary action to protect themselves from any consequent harm.

2.11 Article 5 UNCRC is critical to an understanding of the special position of the child: for the first time in an international human rights treaty, the concept of the *"evolving capacities"* of the child is introduced. A study on the evolving capacities of the child described Article 5's fundamental importance as follows:

> *This principle – new in international law – has profound implications for the human rights of the child. It establishes that as children acquire enhanced competencies, there is a reduced need for direction and a greater capacity to take responsibility for decisions affecting their lives. The Convention recognises that children in different environments and cultures who are faced with diverse life experiences will acquire competencies at different ages, and their acquisition of competencies will vary according to circumstances. It also allows for the fact that children's capacities can differ according to the nature of the rights to be exercised. Children, therefore, require varying degrees of protection, participation and opportunity for autonomous decision-*

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Article 14 taken with Article 1, Protocol 1) and the UNCRC breach (concerning the rights of their children). No such nexus difficulty arises in the present case.

[12] United Nations Standard Minimum Rules for the Administration of Justice (commonly known as the Beijing Rules), 1985. See in particular Rules 5, 17 and 21.

[13] United Nations Guidelines for the Prevention of Juvenile Delinquency (the Riyadh Guidelines), adopted by the UN General Assembly 14th December 1990, A/RES/45/112.

[14] See commentary on Rule 17(1)(b), Beijing Rules, available at http://www.ohchr.org/Documents/ProfessionalInterest/beijingrules.pdf, p. 10.

[15] Riyadh Guidelines, 5(e). See also National Association for Youth Justice, *'Child-friendly justice? A compendium of papers given at a conference at the University of Cambridge in September 2017'* (May 2018), p.7, concerning youthful law-breaking as a normal part of development, and the findings of the Edinburgh study data. This data indicates that rule-breaking behaviour and involvement in criminal offending is very widespread; a routine rather than an aberrant dimension of individual development. An overwhelming majority, 96%, of the Edinburgh Study cohort of 4,300 young people admitted to at least one of the offences which was included in the questionnaire at some stage up to age 24; and this is likely to be an underestimate of the prevalence of offending behaviour, given that the questionnaire only included 18 offence-types. Whilst offending was widespread in the teenage years most of this was petty in nature (for example minor shoplifting, graffiti, not paying the correct bus-fare, minor breach of the peace) and most of those involved grew out of it without any formal intervention.

> *making in different contexts and across different areas of decision-making. The concept of evolving capacities is central to the balance embodied in the Convention between recognising children as active agents in their own lives, entitled to be listened to, respected and granted increasing autonomy in the exercise of rights, while also being entitled to protection in accordance with their relative immaturity and youth. This concept provides the basis for an appropriate respect for children's agency without exposing them prematurely to the full responsibilities normally associated with adulthood.*[16]

2.12 Article 5 implies that not only should parents and States respect the capacities of children to exercise rights on their own behalf, but that equally excessive demands should not be imposed upon them, beyond their capacities. The notion of evolving capacities is in part a protective concept, with the UNCRC recognising that *"childhood is a period of entitlement to special protection for children as a consequence of their relative inexperience and immaturity."* This vulnerability and the need for protective measures is clear from, for example, Article 19, requiring States to take particular protective steps to protect the child from forms of abuse or neglect; and other provisions acknowledge that children's lack of experience and maturity entitle them to protection from drug abuse, and from sexual, economic and other forms of exploitation.

2.13 Article 40 UNCRC is, in another context, recognition of the child's vulnerability and the importance of the protective concept of evolving capacities of children. Article 40 recognises the importance of rehabilitation for children. Every child alleged as, accused of, or recognised as having infringed the penal law is to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society. In relation to conviction information arising from childhood conduct, often long since past, an analogous humane principle supports the notion that the individual can at some point have a 'clean slate,' without a trivial matter from childhood remaining permanently subject to automatic disclosure, regardless of its relevance.

2.14 Further, the Grand Chamber in *S and Marper,* [54], cited Article 40 UNCRC, and the Canadian case of *R v RC* [2005] 3 SCR 99. In *R v RC* the Supreme Court of Canada considered the issue of retaining a juvenile first-time offender's DNA sample on the national data bank. The court upheld the decision by a trial judge who had found, in the light of the principles and objects of youth criminal justice legislation, that the impact of the DNA retention would be grossly disproportionate. In his opinion, Fish J observed:

> *Of more concern, however, is the impact of an order on an individual's informational privacy interests. In R v. Plant [1993] 3 SCR 281, at p. 293, the Court found that s. 8 of the Charter protected the 'biographical core of personal information which individuals in a free and democratic society*

[16] Gerison Lansdown, *'The Evolving Capacities of the Child'*, Innocenti Insight, Save the Children Sweden and UNICEF (2005).

*would wish to maintain and control from dissemination to the state'. An individual's DNA contains the 'highest level of personal and private information': S.A.B., at para. 48. Unlike a fingerprint, it is capable of revealing the most intimate details of a person's biological makeup. ... The taking and retention of a DNA sample is not a trivial matter and, absent a compelling public interest, would inherently constitute a grave intrusion on the subject's right to personal and informational privacy.*

2.15 Unlock submits that, when considering the compatibility of the current scheme, this background is of particular relevance. The provisions of the UNCRC apply to those adults whose past offending took place during childhood; the Court should use the UNCRC when construing the ECHR in this appeal; and the UNCRC recognises the vital importance of treating children differently, and safeguarding their futures.

***b. The harsh consequences of the current scheme***

2.16 Unlock has extensive experience of the multiple, harsh consequences that automatic disclosures imposed by the current scheme have on thousands of people each year.[17] These consequences have a double relevance in these appeals:

2.16.1 They support the conclusion that the current statutory scheme is not in accordance with the law. The case law makes clear that the consequences of a bright line rule scheme, including their severity in individual cases and the number of those affected, are relevant when assessing whether that scheme is in accordance with the law, for the reasons at para. 2.39 below. Harsh, startling consequences will tend to support the contention that the scheme is not in accordance with the law;

2.16.2 They support the conclusion that the current statutory scheme is not necessary in a democratic society because (a) harsh and startling consequences indicate that the scheme goes further than is necessary to achieve its stated objective, and (b) such adverse consequences indicate that a fair balance has not been struck between the rights of the individual and the interests of the wider community. The ECtHR has repeatedly emphasised that the proportionality of a bright line rule is to be assessed by close reference to its application in individual cases (see, e.g. *Dickson v UK* (2008) 46 EHRR 41, [82]; *Animal Defenders v UK* (2013) 57 EHRR 21, [108]), and that the enactment of a rule which admits of no exceptions and which does not allow for variation or discretion in the treatment of different categories of individuals by its nature is unlikely to be proportionate in cases where, as here, interference with fundamental rights is at issue (see, e.g. *O'Donoghue v UK* (2011) 53 EHRR 1, [89]; *Dickson* (above), [70]).

2.17 Unlock has summarised below six of the headline problems arising from the current scheme.

[17] Unlock, *'Filtering of criminal records from DBS checks: Unlock briefing'* (May 2018), p.1.

2.18 First, many, many people are caught by the operation of the current scheme, including significant numbers of people whose convictions occurred when they were children.[18] These are far from being a limited number of merely *"hard cases",* or cases *"at the margins",* and the characterisation of them as such in the Secretaries of States' Case is wrong:

2.18.1 In the last 5 years alone, over two-thirds of a million people have received a Criminal Record Certificate ('CRC') or Enhanced Criminal Record Certificate ('ECRC') disclosing a youth[19] criminal record, over a third of a million have received a CRC or ECRC disclosing a childhood criminal record, and half a million childhood criminal records disclosed in that 5 year period were over 30 years old;[20]

2.18.2 Between 2013 and 2015, under-18 shoplifting was disclosed 34,000 times;[21]

2.18.3 In 2015/16, over 240,000 CRC or ECRC checks disclosed convictions or cautions.[22]

2.19 Even putting aside those convictions and cautions not falling under the multiple and serious conviction rules, the number of known cases runs into the thousands. This indicates the broad reach of the bright line rules under the current scheme.

2.20 In addition, those figures only reflect criminal records that were in fact disclosed following a check being made; the number that are disclosable, were an application made for a CRC or ECRC, would be higher.[23] The 'chilling effect' of the scheme cannot be underestimated; knowing that their criminal past may be disclosed, or the prospect of living under a Sword of Damocles if it is concealed, undoubtedly results in pre-emptive behaviour whereby individuals make their own assessments of the potentially stigmatising effect of their criminal backgrounds, and this then denies them access to a range of employment opportunities.

[18] Full details of the numbers involved can be found in Unlock, *'A life sentence for young people: a report into the impact of criminal records acquired in childhood and early adulthood'* (May 2018), pp.8-14.
[19] In Unlock, *'A life sentence for young people: a report into the impact of criminal records acquired in childhood and early adulthood'* (May 2018), 'youth' refers to those between 10 and 25 years of age.
[20] Unlock, *'A life sentence for young people: a report into the impact of criminal records acquired in childhood and early adulthood'* (May 2018), pp.3, 10-14.
[21] Unlock, *'Filtering of criminal records from DBS checks: Unlock briefing'* (May 2018), p.3.
[22] Ibid, p.1.
[23] Unlock, *'A life sentence for young people: a report into the impact of criminal records acquired in childhood and early adulthood'* (May 2018), p.8.

For example, see case study 6 ('Monica') in Unlock's May 2018 Briefing[24] and case studies 2 ('Richard') and 5 ('Hilary') in Unlock's May 2018 Report on youth criminal records.[25]

2.21 Second, the current scheme has a disproportionate, adverse impact on certain vulnerable groups for whom changes in individual circumstances, personal development over time, and the lapse of time since the spent conviction or caution are particularly important. For example:

(i) children, particularly those in care at the time of their offence(s) (see above at paras. 2.3 - 2.4 and case studies 2 ('David') and 8 ('Diana') in Unlock's May 2018 Report on youth criminal records[26]) and those convicted of offences related to confusion in childhood regarding their gender identity[27] or sexual identity[28],

(i) those with mental health conditions,[29]

(ii) women convicted of offences in the context of violent, abusive and controlling relationships (such as case study 4 ('Teresa') in Unlock's May 2018 Briefing),[30]

are all in a position where there is likely to be a particular need for age, the passage of time, personal circumstances, and the context of the offence(s) to be taken into account in determining whether disclosure is required. Currently the scheme does not allow this to be done. The scheme also has the effect of requiring people in these groups to choose between not applying for posts at all, or repeatedly discussing highly personal, often deeply traumatic and difficult details of their lives, and feeling judged as a result. For example, see case study 7 ('David') in Unlock's 2018 Report on youth criminal records.[31]

2.22 Third, the current scheme has a number of damaging effects on those affected by it.[32] The knowledge that disclosure of a previous conviction or caution will be required deters many people from pursuing meaningful, important employment, for which they are well-qualified, at all. For those who do make efforts to apply, many experience significant stress, anxiety and feelings of shame and stigma as a result of the

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[24] Unlock, *'Filtering of criminal records from DBS checks: Unlock briefing'* (May 2018), p.17.
[25] Unlock, *'A life sentence for young people: a report into the impact of criminal records acquired in childhood and early adulthood'* (May 2018), pp.46-47, 49.
[26] Ibid, pp.50-51.
[27] Such as case study 1 ('Marcus'): Unlock, *'Filtering of criminal records from DBS checks: Unlock briefing'* (May 2018), pp.10-11.
[28] Such as case study 2 ('Wesley'): Ibid, pp.12-13. This aspect was emphasised in relation to the case of G by Blake J in *R (G) v (1) Chief Constable of Surrey Police (2) Secretary of State for the Home Department (3) Secretary of State for Justice* [2016] EWHC 295 (Admin) ('*G*'), at [39]: *"Despite the label attached to the offences, this was not exploitation or abuse of young children, but sexual experiments between members of the same peer group, that can and should be seen as part of the process of growing up and nothing more sinister than that. Despite this, he will bear the reprimand indefinitely as a mark of Cain and with no ability to demonstrate that its disclosure is irrelevant and unnecessary in the light of who he is now."*
[29] See, for example, case study 4 ('Teresa'): Ibid, pp.15-16.
[30] Ibid, p.15.
[31] Unlock, *'A life sentence for young people: a report into the impact of criminal records acquired in childhood and early adulthood'* (May 2018), pp.50-51.
[32] Ibid, pp.17-23.

automatic disclosure process. Many of those who apply for employment having disclosed their past conviction(s) or caution(s) are not taken on because of their background. The feelings of inadequacy, worthlessness and shame that this can generate should not be underestimated. For those affected individuals who apply, disclose their past offending, and are fortunate enough to be successful in gaining employment, it is common to arrive at work to find that colleagues have been made aware of their past, or to fear that their colleagues will be made aware at some future point. It is also common for this to cause great distress at interview stage: see, for example, case study 13 ('Laura') in Unlock's May 2018 Report on youth criminal records, now a 51-year-old professional woman, still haunted by a conviction dating from when she was a 19-year-old student, who she describes disclosing this when applying for a senior role in the National Health Service, only to be greeted at interview by the words, *"So you're our criminal…"*[33] In addition, the knowledge that one's employer is aware of past adverse information can itself impact on the affected individual, including in actual or perceived difficulties in seeking promotion. These matters can taint the employment experience and significantly undermine the ability of affected individuals to form relationships with their colleagues and their employer.

2.23 Fourth, the current scheme is premised on employers receiving conviction and caution information and taking a sensible, fair and reasonable approach to its (in)significance. In Unlock's experience that is often not the approach that is adopted. Through Unlock's work, including with employers, and in identifying poor employer practice, Unlock is aware that many employers, *inter alia* (a) make no or no meaningful effort to clarify the significance of the information they receive, (b) do not give the applicant any or any meaningful opportunity to explain the criminal record information, (c) struggle to identify what is and is not relevant in the information disclosed to them, (d) often rely on the information as a reason not to employ the applicant, (e) only employ applicants with a clean CRC or ECRC, and (f) where they do employ an applicant with past conviction or caution information, it is not uncommon for the person's past information to be shared by the employer with other members of staff. Unlock has experience of the above in respect of both private and public sector employers.

2.24 Unlock's experience is borne out by statistics and research into employer attitudes and practices. For example, research data from the Department of Work and Pensions ('DWP') shows that 50% of employers say they will not recruit offenders or ex-offenders,[34] and that statistic is an underestimate relative to other research which indicates that 75% of employers discriminate against applicants on the basis of a criminal

[33] Ibid pp.55-56.
[34] DWP/YouGov 2016 research data: https://d25d2506sfb94s.cloudfront.net/cumulus_uploads/document/42yrwvixdo/YG-Archive-160126-DWPwaves.pdf

record.[35] Further, not disclosing, even where a person need not legally disclose, is often seen as worrying by employers and as a sign of dishonesty.[36]

2.25 In a DWP/YouGov survey that surveyed 1,849 companies about *"offenders and ex-offenders",* when asked if they recruited them, what would they be worried about, the responses were that:

- 45% said they may be unreliable;
- 40% said they may damage the public image of the business;
- 36% said they may upset their colleagues.

2.26 Other academic research suggests that there is a *"punitive culture of checks in England and Wales"*, in contrast to other jurisdictions such as Spain, France and Germany, which compounds the difficulties with the statutory scheme.[37]

2.27 Fifth, the current scheme does not only affect access to employment. Unlock has experience of many people whose ability to volunteer, attend university, travel abroad and even buy home insurance has been hampered by ongoing disclosure of past offending.[38]

2.28 Sixth, there is no opportunity for independent review under the present scheme in England and Wales, as:

2.28.1 While an appeal to the Independent Monitor is available, it does not apply to the automatic disclosures covered by the serious conviction and multiple offence rules. Instead, it allows a review of 'relevant information' such as arrests and allegations. Even then, this provides a possible variation of the disclosure decision after an affected individual has already applied for a CRC or ECRC from a prospective employer. If the individual chooses to pursue an appeal, rather than providing the CRC / ECRC to the prospective employer, the position will clear to the employer, and detrimental to the individual: by this point the potential employer will have been made aware of the existence of past matters and the negative consequences set out in Part 2(b) will be set in train;

2.28.2 The standard of review is unvarnished *Wednesbury* rationality. This provides a limited review function;

[35] Working Links (2010) *'Prejudged: Tagged for life'*, London: Working Links.
[36] D Fletcher, A Taylor, S Hughes and J Breeze, *'Recruiting and employing Offenders'* (2001), pp.35-36.
[37] National Association for Youth Justice, *'Child-friendly justice? A compendium of papers given at a conference at the University of Cambridge in September 2017'* (May 2018), p.30.
[38] Unlock, *'A life sentence for young people: a report into the impact of criminal records acquired in childhood and early adulthood'* (May 2018), pp.3, 19, 21.

2.28.3 The very limited number of appeals to the Independent Monitor affirms its inadequacy as a review mechanism.

***c. Bright line rules***

2.29 Unlock recognises the importance of retaining identification of those charged with or convicted of offences, and disclosing it, in certain circumstances. However, in Unlock's view there is no justification for disclosing the information that is the focus of these appeals due to the application of a bright line rule, regardless of the individual circumstances. It is essential that such powers are used appropriately and proportionately and exercised fairly and in a Convention-compliant manner.

2.30 The Strasbourg court has regularly criticised, in a wide variety of contexts, the application of blanket, general rules, and the Convention generally abhors a blanket rule. This includes when Parliament has mandated such rules: see e.g. *Hirst v UK (No. 2)* (2006) 42 EHRR 41 (GC) ('*Hirst (No. 2)*') at [82] (the statutory blanket ban on serving prisoners voting in House of Commons elections was a *"blunt instrument"* which *"strips the Convention right to vote to a significant category of persons and does so in a way that is indiscriminate."*)

2.31 The current statutory scheme involves two bright line rules – the multiple conviction rule, and the serious conviction rule – which mandate that any conviction or caution for a specified offence and any conviction where a person has more than one conviction must be disclosed on a CRC or ECRC, for all time, irrespective of other factors, including: the particular nature of the individual offence; the personal circumstances of the affected individual when the offence took place; the disposal in the case; the time which has elapsed since the offence took place; and the relevance of the data to the employment sought. Unlock's position is that these bright line rules cannot be justified under Article 8(2); they are neither in accordance with the law nor proportionate.

2.32 Plainly the approach of the Court to the analysis of bright line rule schemes under Article 8 is central to these appeals. Given the detailed submissions from the parties on this issue, Unlock has summarised below, in short terms, its position on the approach to bright line rule schemes so far as relevant to the present appeals and the other aspects of Unlock's submissions, including the harsh consequences of the current scheme, and alternative filtering and disclosure regimes.

2.33 First, where a statutory scheme concerning the disclosure of personal data collected and stored by the State is based on a bright line rule, the compatibility of that bright line rule with Article 8 should be assessed

under the 'in accordance with the law' test, not merely under the 'necessary in a democratic society' / proportionality head. As the Court of Appeal observed in *R (P) v Secretary of State for the Home Department* [2017] EWCA Civ 321 ('*P*'), at [103], *"While Parliament may be entitled to draw bright lines, the court is entitled to assess whether these lines are sufficiently calibrated."* There is strong support in the domestic and Strasbourg authorities for this approach: *MM v United Kingdom* (Application no. 24029/07, 13 November 2012) ('*MM*'), [206]-[207]; *R (T) v Chief Constable of Greater Manchester* [2015] AC 49 ('*T*'), [113]-[114]; *P*, [39].

2.34 Second, in order to be deemed in accordance with the law, a bright line rule scheme requiring the disclosure of personal data collected and stored by the State must include adequate safeguards (plural) so as to allow the proportionality of the interference with Article 8 to be adequately examined. The plural, cumulative nature of the safeguards required is clear from multiple domestic and Strasbourg cases: *Rotaru v Romania* (2000) 8 BHRC 449, [99]; *MM*, [206]; *T*, [113]; *G*, [43], [50]; *R (P and A) v Secretary of State for Justice and Secretary of State for the Home Department* [2016] EWHC 89 (Admin) ('*P and A*'), [85]; *P*, [45].

2.35 In these appeals, the 'in accordance with the law' test requires discriminators sufficient to ensure that there is a coherent and relevant link between the disclosure of a person's past criminal convictions, often long since past, and the public interest relied on as justifying disclosure. As the Court of Appeal observed in *P*, *"the more tenuous the link or relationship between the offending and the public interest to be protected, the more likely that the scheme will tip over"* ([43]).

2.36 Both the multiple conviction rule and the serious conviction rule involve only a single discriminator, and therefore, it is submitted, tip over in the way envisaged by the Court of Appeal:

2.36.1 In the case of the multiple conviction rule, that discriminator is the number of offences committed, irrespective of, *inter alia*, when they were committed, the passage of time between them, their particular circumstances and severity, the development of the individual since the offences were committed, and the extent to which the offences are relevant to the employment being sought;

2.36.2 In the case of the serious conviction rule, the single discriminator engaged is whether the offence appears on a list of specified offences, again irrespective of the matters listed above at para 2.36.1. The Secretaries of State in their Case attempt to justify this by reference to the dangerousness provisions under Chapter 5 of Part 12 of the Criminal Justice Act 2003 ('the 2003 Act'): see their Case, for example, at [106]. However, the analogy is an imperfect one and it emphasises their flawed approach. The 2003 Act requires an individualised decision to be taken; a *"dangerous offender"* is

one who fulfils two criteria – s/he must be both convicted of an offence specified in Schedule 15 (sexual or violent offences carrying a potential penalty of two years or more, including life), and assessed by the court as posing a significant risk to members of the public of serious harm by the commission of further specified offences. There is no such nuance in the impugned scheme here, however; the list of offences in Schedule 15, used in the 2003 Act scheme only for the purposes of assessing potential dangerousness, with no one being assessed as such unless they reach the threshold set out in the Act, is transported into this wholly different context, with the conviction treated as serious regardless of any other relevant factors.

2.37 Both the multiple conviction rule and the serious conviction rule mandate disclosure with no regard to multiple other, relevant safeguards including, *inter alia*:

2.37.1 The particular nature of the offence. In Unlock's experience, the failure of the current scheme to incorporate any consideration of the nature of the individual offence giving rise to the past conviction can have strikingly adverse consequences. The multiple conviction rule takes no account of the nature of the offences, nor does it pay any regard to whether the offences indicate any pattern of behavior, as opposed to individual, unconnected incidents. This can result in the requirement for automatic disclosure of relatively minor past offending, with significant adverse consequences for the individual and no corresponding benefit to the potential employer and the wider public. The serious conviction rule's reliance on a list of specified offences means that no consideration is given to the nature of the *particular* offence; disclosure is based solely on broad categorisation, not the facts and circumstances of the offence. This can have harsh consequences. As stated above at paras. 2.3 - 2.4, Unlock is aware of cases where children in care have received convictions and cautions for youthful behaviour that would not have come to the police's attention in a family setting. These records are then automatically disclosed for life. Certain offences can result from being charged and convicted for youthful mistakes that will result in mandatory life-long disclosure, e.g. pushing over a classmate and taking their phone (robbery), a child sending a classmate a naked picture of themselves (production and distribution of sexual images of a child);[39]

2.37.2 The personal circumstances of the affected individual when the offence took place. As is apparent from the facts of P's case (in which her offences were committed whilst suffering from a serious mental health condition), the inability of the current scheme to have regard to the background to the relevant offence is a significant issue. Unlock's experience is that many affected individuals' offence(s) occurred at a time of youthful indiscretion, including in respect of children in the care

[39] Unlock, *'Filtering of criminal records from DBS checks: Unlock briefing'* (May 2018), p.3.

system, during personal crisis, or as a result of mental health problems, which render the offence wholly out of character. This fact is ignored by the current scheme;

2.37.3 The age of the affected individual at the time of the offence(s). Given the capacity for children to mature and develop from childhood to adulthood, the importance of rehabilitation, and the strong emphasis placed on diverting children away from the criminal justice system, whether an offence was committed when the individual was a child is of particular significance. Neither the serious conviction rule nor the multiple conviction rule make any allowance for age;

2.37.4 The disposal in the case. Both the multiple conviction rule and the serious conviction rule fail to account for how the past offence(s) was disposed of, including whether it resulted in a custodial sentence and, in the case of the serious conviction rule, whether it resulted in a conviction or a caution. In Unlock's experience this is a significant issue. The disposal of a case will very often reflect the degree of culpability and harm involved, the capacity for the offender to be rehabilitated, and the risk posed by the offender in future; for example, see case study 6 ('Monica') in Unlock's May 2018 Briefing.[40] None of this is considered under the current scheme. Further, consideration of disposal may be required to understand whether an offence's severity has been overstated. A child, for example, may plead guilty to an offence, or multiple linked offences, in circumstances where a more appropriate disposal would have involved a lesser offence and / or only a single offence. Similarly, Unlock is aware of cases where individuals have agreed to the disposal of a case having been assured that the offence would not have subsequent consequences. This particularly arises where individuals agree to disposal by acceptance of a caution or reprimand, such as in case study 7 ('David') and the case of 'Anita' in Unlock's May 2018 Report on youth criminal records.[41] The multiple conviction rule and the serious conviction rule cannot take these matters into account;

2.37.5 The time that has elapsed since the offence took place. This is a significant factor. Where substantial time has passed since the offence took place, the scope for rehabilitation and personal development of the affected individual may be especially great, particularly where the individual was a child when the offence(s) took place. Substantial numbers of disclosures of childhood criminal records under the current scheme relate to offences that took place over 30 years ago.[42] This demonstrates the significant passage of time that is not taken into account by the current scheme. In the case study of 'Richard', cited by Unlock, a man convicted of drug possession as a 16 year old, and for stealing

[40] Ibid, p.17.
[41] Unlock, *'A life sentence for young people: a report into the impact of criminal records acquired in childhood and early adulthood'* (May 2018), pp.4, 50-51.
[42] Ibid, p.3.

an item of food from shelves he was stacking as a student, now has these convictions automatically disclosed for life.[43] They are minor, took place 40 years ago, have a gap of a number of years between them, they show no pattern, and they are not relevant to the third sector charity work that the man is seeking to do. None of these factors are taken into account by the current scheme;

2.37.6 The relevance of the information to the employment sought. Because the multiple conviction rule and the serious conviction rule make no allowance for the nature of the particular offence, its individual circumstances, nor the manner in which the offence was disposed of, no consideration is given to whether a person's historical information is in any way relevant to the employment being sought. This effectively imposes a presumption of relevance, or at the very least may have that effect on the employer receiving the information, despite numerous cases where the relevance of disclosure is non-existent or, at the least, very difficult to discern.

2.38 Third, Unlock agrees with the analysis at paras. 34 - 36 of P's Case that to comply with Article 8 a right of individual review is required. However, even taken at its lowest, the case law indicates that for a scheme to be deemed in accordance with the law, a bright line rule scheme *may* require an effective independent review mechanism, depending on the adequacy of the other safeguards (plural) in place (*T*, [119]; *P and A*, [87]; *G*, [48]; *P*, [40]). It is submitted that a scheme that displays no other recognised safeguards (as in the case of the multiple conviction rule), or merely one limited other safeguard (as in the case of the serious conviction rule), is very likely to require an independent review mechanism. In Unlock's view that is the case with the current scheme. However, the current statutory scheme in England and Wales does not have an effective mechanism for independent review, for the reasons set out above at para. 2.28.

2.39 Fourth, the consequences of a bright line rule scheme, including their severity in individual cases and the number of those affected, are relevant when assessing whether that scheme is in accordance with the law (*P and A*, [86] (*"very startling consequences"*), [87] (*"questionable results on their margins"*); *P*, [45] (*"the startling consequences for the claimants in G and W"*).

2.40 It is submitted that the current statutory scheme gives rise to multiple negative consequences (these are addressed in Part 2(b) above). Their relevance when applying the 'in accordance with the law' test is that:

2.40.1 They demonstrate that relevant safeguards are not in place. The number of cases caught by the current scheme and the harsh consequences generated for affected individuals indicate that the current scheme does not incorporate sufficient discriminators to ensure that there is a coherent and

[43] Ibid, pp.46-47.

relevant link between the disclosure of a person's past criminal record and the public interest relied on as justifying disclosure;

2.40.2 For the same reasons, the negative consequences of the current scheme indicate that it does not allow for the proportionality of Article 8 interferences to be adequately examined. Unlock's knowledge of numerous cases where the current scheme impacts negatively on affected individuals is evidence of the inability of the scheme to examine proportionality to an adequate degree;

2.40.3 The negative consequences of the scheme therefore support the submission that the current scheme is not in accordance with the law.

2.41 Fifth, it is relevant when assessing whether a bright line rule is in accordance with the law that there are viable alternative systems operating in the same sphere which impose fewer and less severe adverse consequences on those affected. Below Unlock has identified alternative filtering and disclosure arrangements that are available and summarised examples of comparative jurisdictions where more nuanced schemes operate (see Part 2(d)).

2.42 Sixth, no margin of appreciation is afforded to the State in its compliance with Article 8 when applying the 'in accordance with the law' test (*T*, [114]-[115]). As the Court of Appeal observed in *P*, *"there is no margin of appreciation when it comes to the question of determining whether a system provides adequate safeguards against arbitrary treatment"* ([43]). The Court's analysis of the bright line rule scheme will therefore involve more intensive scrutiny, including of, *inter alia*, the negative consequences of the scheme for those affected (including children and those who were children when they accrued their past criminal convictions) and the viability of alternative schemes in the same arena that do not produce the same negative consequences for affected individuals.

2.43 The absence of a margin of appreciation also means that reliance by the State on cost, administrative burden and inconvenience as justifications should be approached with significant caution. In a democratic society such arguments cannot justify the lack of adequate safeguards for protection of a right as fundamental as that which is at stake in the present case, interference with which has significant consequences for individuals, their employment and, indeed, the potential for their personal rehabilitation. In this regard, it must be recalled, that the effect of disclosure on individuals may, in the words of Lord Neuberger, deliver a *"killer blow"* to attempts to obtain employment in a relevant field (*T*, [20]; *R (L) v Commissioner of Police for the Metropolis* [2010] 1 AC 410, [75]), something which is surely inimical to the rehabilitation of those earlier involved in minor offending. The latter factor is all the more important with regard to the

rehabilitation of child offenders, given the obligations arising under Article 8 and the UNCRC, detailed above.

***d. Alternative schemes for filtering and disclosure***

2.44 It is important to understand the scope of Unlock's submissions under this head. Unlock does not suggest that the Court must set out the particular scheme that should be operated, nor has Unlock identified such a scheme; that is a matter for Parliament, and nothing in these submissions seeks to infringe that ground. However, it is clear from the submissions above that the existence of viable, alternative schemes is relevant to the Court's assessment of whether the current scheme is incompatible with Article 8; this is clear from the President's consideration of alternative filtering arrangements in *P* ([64]-[66]). It is submitted that the alternative schemes summarised below demonstrate that the current domestic schemes that are the subject of these appeals adopt an overly restrictive approach which is not compatible with Article 8.

2.45 Numerous alternative methods for filtering and disclosing historical criminal records are available, including in other jurisdictions, providing a more calibrated approach. It is respectfully submitted that this is of particular relevance in these appeals because:

2.45.1 The availability of viable, alternative schemes for the filtering and disclosure of criminal records supports the conclusion that the current statutory scheme is not in accordance with the law. This is because alternative schemes which impose fewer and less severe adverse consequences on those affected provide compelling evidence that the current statutory schemes in England and Wales, and in Northern Ireland, lack sufficient safeguards to ensure that proportionately is adequately assessed;

2.45.2 The existence of alternative, nuanced schemes for filtering and disclosing past criminal records support the conclusion that the current statutory scheme is not necessary in a democratic society because (a) less restrictive alternatives indicate that the current scheme goes further than is necessary to achieve its stated objective, and (b) that in turn demonstrates that a fair balance has not been struck between the rights of the individual and the interests of the wider community.

2.46 It is submitted that numerous alternative methods for filtering and disclosing historical criminal records are available which provide a more calibrated regime than the specified conviction rule and the multiple offence rule. These include:

2.46.1 Requiring an automatic filter of multiple convictions and more offence categories;[44]

[44] Ibid, p.4.

2.46.2 Establishing a discretionary filtering process with a review mechanism for convictions and cautions not eligible for automatic filtering because of the nature of the offence or the sentence received;[45]

2.46.3 Removing the application of the serious offence rule to spent convictions. Current convictions and cautions would remain disclosable, while spent convictions could be reviewed, either automatically or on application by the affected individual. This would not involve individual review in every case, but rather an alteration to the bright line rule so as to rebalance the harshness of its consequences;

2.46.4 Reducing the list of offences which are always disclosable and can never be subject to filtering. Again, this would not involve individual review in every case; it would involve shifting the location of the existing bright line;

2.46.5 Imposing a time limit / ceiling on the automatic disclosure of convictions and cautions currently subject to the multiple and serious conviction rules, including different time limits for those who were children when the incident(s) occurred. This would allow greater calibration without a requirement for individual, case-by-case review. This could also be further calibrated to make disclosure at the expiry of the time limit a presumption, subject to review in individual cases;

2.46.6 Allowing an entitlement to request a review of information subject to automatic disclosure after a set period of time. This would allow consideration to be given to, *inter alia*, the ongoing relevance of the information, the development of the individual, and whether multiple convictions demonstrated any relevant pattern of behaviour, without a requirement for automatic review, i.e. it would operate as an opt-in scheme;

2.46.7 Creating a separate, more nuanced system for the disclosure of cautions so as to treat them differently from convictions given the basis on which a caution is issued (requiring an admission of guilt and an assessment that the case is suitable for an out of court disposal and that it is in the public interest to caution rather than charge).

2.47 The current filtering and disclosure scheme in England and Wales has been recognised as particularly punitive. For example, in its March 2016 report the Standing Committee for Youth Justice compared the current scheme in England and Wales to the schemes for childhood criminal records in 15 other jurisdictions.

[45] Ibid, p.4.

The English and Welsh system was described as *"one of the most punitive"*[46] and *"the most punitive…in terms of the extent to which it ties children to their past"*.[47]

2.48 The multiple adverse consequences of the current statutory scheme can be substantially tempered or removed altogether with alternative, calibrated approaches to filtering and disclosure of criminal records. This is not a theoretical exercise; effective, functioning alternative schemes exist across Europe and more widely. The following comparative jurisdictions provide examples of alternative, calibrated schemes designed to ensure public protection without the startling negative consequences for affected individuals that arise from the current statutory schemes being considered in these appeals:

2.48.1 France. The French system separates offences into three categories: 'crimes' (for the most serious offences, including homicide, rape and serious drug trafficking), 'delits' (including offences such as theft, robbery, assault and sexual assault), and 'contraventions' (for minor offences such as common assault and traffic offences).[48] The French National Criminal Records Office ('CJN') is responsible for criminal records and produces three types of criminal record certificates, referred to as 'bulletins'.[49] The bulletin no.1 ('B1') certificate contains all criminal records information and is highly restricted, being seen by judges, courts and prisons.[50] B2 certificates contain most convictions, but not suspended sentences, juvenile records or contraventions.[51] The B2 is principally used by administrators and when applying for roles such as teachers, solicitors and social workers. It can be obtained online by a prospective employer.[52] It can therefore be seen that the B2 certificate, used by employers when considering applications for posts involving public protection issues, excludes criminal records accrued as a juvenile and more minor offences (whether based on the method of disposal (suspended sentence) or the categorisation of the offence as relatively minor (a contravention)). The B3 shows only prison sentences of over 2 years that have not been suspended. The B3 can be requested by an employer and provided by the applicant as a copy of their relevant criminal record.[53] This results in disclosure to prospective employers that is more nuanced and calibrated, on grounds of age, disposal / severity and relevance, than in the current statutory scheme in England and Wales and Northern Ireland. In addition to the limits placed on initial disclosure to

[46] Standing Committee for Youth Justice *'Growing Up, Moving On: The International Treatment of Childhood Criminal Records'* (March 2016), p.5.
[47] Ibid, p.7.
[48] Unlock & Winston Churchill Memorial Trust, *'Rehabilitation & Desistance vs Disclosure. Criminal Records: Learning from Europe'* (April 2015), p.6.
[49] Ibid, p.6.
[50] Ibid, p.6.
[51] Ibid, p.6.
[52] Ibid, p.6.
[53] Ibid, p.6.

employers, the French system also includes automatic and discretionary processes whereby past criminal records are removed, allowing individuals to move beyond their prior offending. First, a process of 'legal rehabilitation' exists which automatically filters individuals' criminal records for offences below the least serious categories. This automatic filtering occurs where the individual has refrained from further offending for a specified period of time. The period of time before 'rehabilitation' takes place depends on the length of the prison sentence that was served. As a result, certificates are automatically amended after the passage of time without further offending, so that prison sentences for a number of offences, including robbery, assault and sexual assault (including where there have been multiple prison sentences up to 5 years in length), will automatically not appear on a B2 or B3 disclosure certificate, i.e. the certificates that go to prospective employers.[54] Records for 'crimes' remain disclosable, to ensure public protection, and the system therefore incorporates rehabilitation over time and the amount of time that has passed since the offence(s) in question. Second, an offender can apply to the sentencing court, or at a later stage when seeking release, to have their B2 and B3 certificates cleared. The application is based on merit; the court is entitled to consider the relevance of the criminal record(s) to the applicant's intended future employment.[55] Third, the French system incorporates a discretionary 'judicial rehabilitation' process. It applies to all types of sentences, including prison sentences, and all types of offences, including 'crimes'. An applicant can apply after a certain period of time, depending on the type of offences on their record (1 year for a contravention, 3 years for a delit (6 years if the applicant subsequently reoffended), and 5 years for a crime (10 years if there has been reoffending)). Applicants apply to the district prosecutor, who seeks the opinion of the post-sentencing judge. Official documents are sought and reviewed, an investigation is conducted, a hearing is held to consider the application, and the final decision is reached by a court. If successful, an applicant's criminal record in totality is rehabilitated, although the court can also choose to amend only the B2 and B3 certificates. Unsurprisingly, the standard to be met is a high one, requiring the applicant to have ceased any form of offending, paid off any damages or fines, accepted responsibility for their offending, and become a 'near perfect citizen' who has 'behaved irreproachably'.[56] Such a process is of real significance: those who, for example, have committed offences in childhood or during mental health crises, but who have subsequently lived law-abiding lives, can be freed from the stigma, shame and negative consequences that an ongoing criminal record can otherwise cause; an incentive to rehabilitation is provided; affected individuals, and wider society, are afforded a clear, fair and independent process for formal rehabilitation which takes account of the risk to the wider

[54] Ibid, p.17.
[55] Ibid, p.18.
[56] Ibid, pp.18-19.

public, individual circumstances and the improved conduct of the individual within society; and affected individuals may be encouraged to ongoing rehabilitation by the recognition that a successful application confers;

2.48.2 Spain. The National Conviction Register ('NCR') holds conviction information. This does not include lesser information, including cautions,[57] which is therefore filtered out and not disclosed to prospective employers. Certain positions involving public trust and authority, including public sector roles in the army, and employment as a teacher, judge or doctor, require a clean record.[58] For certain roles this requires the absence of any convictions (police officers, firemen, central bank officials); for others a person is only prevented from gaining a position if the sentencing court specifically imposes a 'professional disqualification' order as part of the sentence.[59] This is significant: it brings the question of the future ramification of criminal records into the judicial sphere, requiring a positive determination from a court that the offending is relevant to future employment, rather than requiring disclosure of prior offending to employers and allowing them to determine its relevance. In addition to this calibrated approach, the Spanish system also includes a 'cancelling' scheme. An affected individual can apply to the Ministry of Justice under Article 136 of the Spanish Criminal Procedure to have a criminal record 'cancelled', meaning that the record is not erased, and remains accessible to judges, but is 'sealed' and not disclosed. The process can also be initiated by the NCR itself, where the relevant criteria apply. The cancellation process is a calibrated one, balancing public protection with the right to rehabilitation over time. An individual can apply for cancellation where civil compensation has been paid, no further offending has taken place, and a fixed period of time has passed (6 months for minor offences resulting in a sentence of up to 6 months, 3 years for sentences of up to 5 years in prison, and 5 years for sentences of more than 5 years in prison). If cancellation takes place, the individual's certificate shows them as having no criminal record. This is significant as Spanish employers commonly ask for a clean record to allow an appointment, rather than asking whether the applicant has ever been convicted;[60]

2.48.3 Sweden. The Records Division of the Swedish National Police Board (NPB) manages national criminal records.[61] It is mandatory to check the criminal records of those seeking employment in a range of areas, including working with children, working in residential homes, acting as an insurance intermediary, and those seeking to live and work abroad. Significantly, however, the

[57] Ibid, p.8.
[58] Ibid, p.8.
[59] Ibid, p.9.
[60] Ibid, pp.20-21.
[61] Ibid, p.9.

extent of the record that must be disclosed, including the types of offences that must be disclosed, varies depending on the employment being sought and the relevance of the offence to the particular job being sought.[62] This incorporates a relevance filter into the automatic disclosure provisions. In addition, the Swedish system includes an automatic 'weeding' process which removes criminal records over time, depending on their severity, the age of the offender at the time of the offence, and whether the individual has refrained from further offending. In general, fines and suspended sentences / Probation for those under 18 are automatically weeded after 5 years, other offences are weeded after 10 years, and the maximum length for a sentence to remain in the Swedish criminal records system is 20 years. Once a criminal record is weeded from the system it is not disclosed on a certificate provided to prospective employers;[63]

2.48.4 Netherlands. Rather than disclosing criminal records, in the Netherlands 'certificates of conduct' are issued to employers which are, in effect, 'clearance checks' for working in particular occupations. The issuance of a certificate is based on a 'close nexus' test between the type of conviction and the occupation in question. The certificates are explained by the Dutch Ministry of Justice as follows: *"A certificate of conduct (Verklaring Omtrent het Gedrag, VOG) is a document by which the Dutch State Secretary for Justice and Security declares that the applicant did not commit any criminal offences that are relevant to the performance of his or her duties. For example, a taxi driver who has been convicted several times of drunken driving, or an accountant convicted of fraud are unlikely to be issued with a certificate. Obviously, an accountant who has been convicted of drunken driving may well be granted a certificate."*[64] The effect of this approach is to remove from the employer the responsibility to assess the relevance of an applicant's criminal records. This is significant; in Unlock's experience it is common for employers to presume that anything disclosed to them is by definition relevant *because it has been disclosed*. This of course is not the case, even on the Appellants' own cases; their suggestion is that it is for the employer to assess relevance. The approach in the Netherlands avoids this issue altogether, for the benefit of applicants, employers and the wider public.

2.48.5 Canada. Under the Canadian system, convictions acquired during childhood are subject to defined access periods, after which the record can no longer be disclosed to anyone, including on a vulnerable sector check conducted when seeking employment with vulnerable persons. The length of the access period reflects the severity of the offence and the form of disposal, and the access

[62] Ibid, p.10.
[63] Ibid, pp.21-22.
[64] https://www.justis.nl/producten/vog/certificate-of-conduct/

period is extended where the individual subsequently reoffends. Public protection is maintained by providing that the most serious offences result in indefinite retention and stipulating that a youth who receives an adult sentence shall have his / her record treated as an adult criminal record. In addition to this filtering approach, applicants can apply to the Parole Board for Canada for a 'record suspension'. If successful, this requires the Canadian Police Information Service to keep information about the criminal record separate and not disclose it on a criminal record check. The application process is calibrated so that sufficient time must have passed before an application can be made (5 years after a sentence for a summary offence, 10 years after a sentence for an indictable offence), and public protection is incorporated by restrictions on who can apply (those convicted of child sex offences are not entitled to apply, nor are those who have been sentenced to imprisonment of 2 or more years on three or more separate occasions);[65]

2.48.6 Germany. Criminal records arising from childhood conduct are generally kept on the Educative Measures Register ('EMR'), a sub-register of the Federal Central Criminal Register ('FCCR'), with access to the EMR tightly restricted. The German system involves different background disclosure certificates. A private certificate of conduct is only sent to the affected individual and contains convictions held on the FCCR, but not the EMR. This means that childhood records are not included. An extended certificate of employment must be provided by employees for public sector posts which involve contact with children. The certificate does not include ERM details and includes all convictions for sexual offences. Significantly, however, the process incorporates a substantial relevance filter: employers must provide details of the job that the check relates to and the certificate will only include details of relevant sexual convictions; the details of non-relevant and non-sexual convictions are removed from the disclosure. Alongside the calibrated measures summarised above, records accrued during childhood are subject to graded removal procedures. All entries on the ERM must be removed when the person turns 24 unless he / she has been imprisoned and has a criminal record on the FCCR. There is then a graduated system of deadlines when convictions cease to be included on a certificate of conduct, and are then expunged from the FCCR. These removal periods are referred to as 're-socialisation periods'.[66]

2.49 The examples summarised above stand in contrast to the current statutory schemes being considered in these appeals. They involve, *inter alia*, greater calibration as to what is disclosed to employers, consideration of relevance at that initial disclosure stage, automatic and discretionary filtering mechanisms, significantly

[65] Standing Committee for Youth Justice *'Growing Up, Moving On: The International Treatment of Childhood Criminal Records'* (March 2016), pp.24-27.
[66] Ibid, pp.45-47.

shorter periods of time within which criminal records can be expunged or rehabilitated, and a wider range of offences and sentences that can be expunged or rehabilitated.

2.50 In addition to the more calibrated schemes identified above, a number of the inadequacies in the current statutory schemes are addressed in other jurisdictions. For example:

2.50.1 Multiple minor convictions for children. Under the current statutory schemes, where two minor convictions are accrued in childhood they will remain subject to disclosure under an ECRC for the rest of the person's life. This is in stark contrast to the approach in other jurisdictions. For example, in New Zealand an out of court disposal would generally be used, resulting in no criminal record and no appearance on any future checks. Similarly, in Germany a second conviction for a minor offence would normally result in the educational or disciplinary measure being included on a sub-register of the criminal register. The offence would not be included in criminal records checks, including for work with vulnerable people, and would be deleted from the database when the person reached 24, provided he / she had not been convicted of a serious offence or been subject to a term of imprisonment;[67]

2.50.2 Childhood convictions or cautions. In addition to how Canada and Germany approach this issue, summarised above, many other jurisdictions have special protections for childhood adjudications, e.g. in New York employers are prohibited from inquiring about or discriminating against applicants based upon an 'adjudication as a youthful defender,' regardless of whether or not the adjudication has been sealed (a process under New York Criminal Procedure Law §160.59 whereby individuals may by application have a number of criminal convictions sealed, thereby permanently preventing access to the details from most persons and entities, including private and most public employers);

2.50.3 Independent review. In the short time available between Clan Childlaw ('Clan') receiving permission to intervene and the deadline for filing of Unlock's intervention, it has not been possible to engage in detailed discussion regarding Clan's submissions. Nonetheless, Unlock understands that Clan will provide details of the Scottish scheme for filtering and disclosure in its submissions. For that reason Unlock does not seek to make detailed submissions on the Scottish scheme save to note that in September 2015 a filtering system was introduced for old / minor convictions. An applicant can now apply to a Sheriff in respect of a spent conviction and ask that it be removed from

[67] Ibid, p.11.

their disclosure certificate if they consider that it is not relevant to the role for which they have asked for the disclosure.[68]

## 3. CONCLUSION

3.1 For the above reasons, Unlock asks the Supreme Court to dismiss these appeals and uphold the Orders of the Court of Appeal and the Northern Ireland Court of Appeal.

**CAOILFHIONN GALLAGHER QC**
**JESSE NICHOLLS**
**Doughty Street Chambers**

**28th May 2018**

[68] Unlock, *'A life sentence for young people: a report into the impact of criminal records acquired in childhood and early adulthood'* (May 2018), p.7.