

**Old convictions never die, they just fade away : the permanency of convictions and cautions for criminal offences in the UK**

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# COMMENT

## *Old Convictions Never Die, They Just Fade Away: The Permanency of Convictions and Cautions for Criminal Offences in the UK*

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Criminality information sharing in the UK can take place in many contexts and with many motivations (although the latter are mostly concerned with public protection, or the prosecution process following the commission of an (alleged) offence by an individual who is then the subject of the criminality information itself). Criminality information can be broadly defined to include categories such as allegations,<sup>1</sup> records of arrest and/or charge and/or prosecution, statements by witnesses and (alleged) offenders themselves, cautions, convictions, records of penalty notices for disorder, sentencing reports, tax and/or benefit investigations, the placement of individuals on barring lists, and covert or overt police surveillance intelligence—as well as more peripheral ‘intelligence’ such as anti-social behaviour orders and reports of anti-social behaviour itself (despite the seemingly non-criminal nature of this behaviour by its very definition).

This Comment focuses on recent stances of the UK courts, as well as legislative reforms, with regard to the sharing of criminality information as part of creating an enhanced criminal record certificate (ECRC), which individuals will need to present to employers if they (wish to) work in a role that puts them in contact with, for example, children or vulnerable adults.<sup>2</sup>

The decision of the Court of Appeal in *R (on the application of T) v Chief Constable of Greater Manchester*<sup>3</sup> was such that the blanket framework in the UK for the potential disclosure of all convictions or cautions (no matter how trivial or ancient) in the process of compiling an ECRC was deemed incompatible with Article 8 of the European Convention on Human Rights and the right to respect for private life contained therein.<sup>4</sup>

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1 See *R (on the application of C) v Chief Constable of Greater Manchester* [2011] EWCA Civ 175, [2011] 2 FLR 383.

2 For an example of the difficulties in seeking employment this can create, even in the event of only unproven allegations appearing on an ECRC, see *R (on the application of W) v Chief Constable of Warwickshire* [2012] EWHC 406 (Admin).

3 *R (on the application of T) v Chief Constable of Greater Manchester* [2013] EWCA Civ 25, [2013] 1 WLR 2515.

4 Article 8 ECHR states:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right

In *R (on the application of Catt and T) v ACPO and Metropolitan Police*,<sup>5</sup> Moore-Bick LJ noted:

Even information of a public nature, such as a conviction, may become private over the course of time as memories fade, thereby enabling people to put their past behind them ...<sup>6</sup>

Moore-Bick LJ was making a suggestion in relation to a criminal conviction as an item of criminality information that, although convictions are secured publicly by prosecutors in the courts, they are not well known unless made notorious by the press, etc. Indeed, Moore-Bick LJ concluded that:

... the storage and use of personal information that has been gathered from open sources (e.g. public observation, media reports etc.) may involve an infringement of a person's rights under article 8(1) if it amounts to an unjustified interference with his personal privacy.<sup>7</sup>

Notably, in *R (on the application of TD) v Commissioner of Police of the Metropolis*,<sup>8</sup> the Administrative Court held that records of arrest for an (unproven, i.e. not charged and untried) allegation of rape could not be deleted from the Police National Computer, as the allegations were only nine years old. However, Moses LJ, in criticising the Metropolitan Police for putting in place a policy whereby such arrest information would not be reviewed for possible deletion after the passage of a period of time, of any length, said:

As [Strasbourg jurisprudence] teaches, such retention should be subject to review. No provision for any review has been made. This seems to me a significant flaw in the policy. There must be provided an opportunity for review in the light of the lapse of time without any use to which the record might be put.<sup>9</sup>

In the same case, Burnett J noted that: 'The domestic and Strasbourg case law has been fast developing. Public authorities are catching up with the jurisprudence'.<sup>10</sup> This Comment sets out, in part, to suggest that without a stable, universal set of guiding principles to underpin the practices of criminality information sharing in the public protection context, public authorities will never be able to 'catch up', as the case law will continue to develop in a relatively piecemeal fashion with contextual factors driving the outcome of the new cases, despite the recent leaps and gains made in consistency of the domestic jurisprudence. Such developments have not quite been enough. It remains to be seen whether a forthcoming judgment from the Supreme Court following on from *T* will recommend such a principled approach in *obiter*—the main task of the court in addressing the

except such as is 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, or for the protection of the rights and freedoms of others.

<sup>5</sup> [2013] EWCA Civ 192, [2013] 1 WLR 3305.

<sup>6</sup> *Ibid.* at [7].

<sup>7</sup> *Ibid.*

<sup>8</sup> [2013] EWHC 2231 (Admin).

<sup>9</sup> *Ibid.* at [17].

<sup>10</sup> *Ibid.* at [19].

appeal will be determining whether reforms across 2013 to the ‘filtering rules’ for criminality information sharing were sufficient to avoid maintaining that prior declaration of incompatibility.

## **Criminality information sharing**

The sharing of an item of criminality information, broadly defined, in the contents of an ECRC, must be *relevant* and *proportionate*, in accordance with s. 113B of the Police Act 1997, as amended, and given the views of the UK Supreme Court in *R (on the application of L) v Commissioner of Police of the Metropolis*.<sup>11</sup>

As with so many doctrinal disputes over the notion of proportionality as regards the engagement of Article 8 of the European Convention on Human Rights, the decision in *T*<sup>12</sup> turned on the extent to which the possibility of *any* criminality information having been deemed relevant and proportionate for disclosure by the police on an ECRC could itself be said to be proportionate. In effect, the current system has no ‘filtering’ system of the kind called for as a result of the decision by the Court of Appeal in *T* above—and in the earlier judgment of Kenneth Parker J in the Administrative Court.

T had made an application to the Administrative Court for judicial review of the issuing of an ECRC which disclosed a warning given when he was aged 11 in relation to the theft of two bicycles. In refusing the application, Kenneth Parker J commented favourably on a particular submission by counsel for the claimant, T, noting that the point to consider was that:

In a particular case disclosure of, for example, a warning given for a relatively trivial offence committed many years ago by a child who has not subsequently re-offended would be likely to have no, or at least no more than negligible, relevance to the decision whether, say, that person (now an adult) could, even on the highest standards of protection, be safely employed to work with children. However, under the 1997 Act there is no mechanism at all for reviewing whether the information relating to a warning given in the circumstances outlined continues to serve any useful purpose in terms of the relevant public policy. Disclosure of such information would, therefore, simply interfere with Article 8 rights without advancing any legitimate public interest. In the absence of any review mechanism that would enable information, no longer relevant, to be withheld, and that would prevent the unjustified interference with Article 8 rights, the legislation cannot be proportionate.<sup>13</sup>

Ultimately, the Court of Appeal agreed with counsel for T on this point. In the Administrative Court, Kenneth Parker J also commented:

For the purposes of the bad character provisions of the Criminal Justice Act 2003 experienced criminal judges regularly ‘filter’ ancient convictions as having no relevance to, or as having potentially a disproportionately prejudicial effect

11 [2009] UKSC 3, [2010] 1 AC 410.

12 *R (on the application of T) v Chief Constable of Greater Manchester* [2013] EWCA Civ 25, [2013] 1 WLR 2515.

13 *R (on the application of T) v Chief Constable of Greater Manchester* [2012] EWHC 147 (Admin), [2012] 2 Cr App R 3 at [23].

on, the resolution of any relevant issue in the trial. Indeed, the prosecution often does its own ‘sifting’ and makes no application for the admission of the material. This is particularly so if the offence in question was committed when the accused was a child. In relation to the ‘dangerousness’ provisions of the 2003 Act (when *ex hypothesi* the defendant has committed a serious specified sexual or violent offence), the Court of Appeal has repeatedly stressed that children develop and mature, and that it is important to be particularly careful and cautious in seeking in the case of children to make adverse predictions of future behaviour.<sup>14</sup>

The claimant in *T* was ultimately successful in establishing that the lack of any filtering mechanism was not a proportionate engagement of his Article 8 right. As a response by the Home Office to the Court of Appeal decision in *T*, and despite an early indication of the prospect of an appeal to the Supreme Court, the Disclosure and Barring Service advised its ‘service users’ of the Police Act 1997 (Criminal Record Certificates: Relevant Matters) (Amendment) (England and Wales) Order 2013 (SI 2013 No. 1200) and the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 (Amendment) (England and Wales) Order 2013 (SI 2013 No. 1198). Both orders came into effect on 29 May 2013 and introduce new ‘filtering’ rules which affect the policy and operations of the Disclosure and Barring Service.

The combined effect of the changes enforced by the 2013 orders, as the Disclosure and Barring Service noted in an e-mail to its newsletter subscribers on 26 March 2013, is as follows:

An adult conviction will be removed from a criminal record certificate if:

- (i) 11 years have elapsed since the date of conviction
- (ii) it is the person’s only offence and
- (iii) it did not result in a custodial sentence.

Even then, it will only be removed if it does not appear on the list of specified offences. If a person has more than one offence, then details of all their convictions will always be included.

An adult caution will be removed after 6 years have elapsed since the date of the caution—and if it does not appear on the list of specified offences.

For those under 18 at the time of the offence:

A conviction received as a young person would become eligible for filtering after 5.5 years—unless it is on the list of specified offences, a custodial sentence was received or the individual has more than one conviction.

A caution administered to a young person will not be disclosed if 2 years have elapsed since the date of issue—but only if it does not appear on the list of specified offences.

Clearly, these changes apply only to the ECRC/CRC sharing of criminality information, in the employment and vetting contexts. They do not address ‘organic’ or ‘common law’ proactive criminality information-sharing issues, or any other statutory types of criminality information sharing. The scope of this Comment only concerns the ECRC/CRC creation process, but it is important to note that reactive/proactive criminality information sharing also engages Article 8 rights and personal privacy concerns, and that it can potentially stigmatise individuals unfairly in the name of public

<sup>14</sup> *Ibid.* at [31].

protection<sup>15</sup> and has been burdensome for the courts to address.<sup>16</sup> Added to this, the public protection disclosure of information can stigmatise or otherwise harm the interests of witnesses and victims. Oswald has concluded that:

... there are no easy solutions when it comes to balancing sometimes conflicting private and public interests, and a robust and nuanced assessment will be required. However, in order to protect the vulnerable or to ensure appropriate scrutiny and debate, it is often the case that data relating to the vulnerable must be shared or disclosed.<sup>17</sup>

The recent reforms are as 'light touch' as possible with regard to current policy and practice, in the sense of Article 8 compliance, and they are clearly formulated to draw on the notion of the 'margin of appreciation' under the European Convention on Human Rights. However, they link well, in terms of compliance with Article 8, with reforms under the Protection of Freedoms Act 2012 introducing a right to challenge the contents of an ECRC by way of an appeal to an independent tribunal, rather than only having an application for judicial review as the sole recourse to a potential remedy.

In another sense, in relation to the recent reforms to ECRC 'filtering' rules, there is a thematic similarity with reforms introduced following the decision of the Supreme Court in *R (on the application of F) v Secretary of State for the Home Department*<sup>18</sup> that the indefinite 'registration' of sexual offenders and the indefinite imposition, therefore, of notification requirements upon them, was unlawful. Sex offenders may no longer be indefinitely subject to notification, but could be subject to notification requirements for decades or, depending on their rehabilitation, permanently, as appropriate.<sup>19</sup>

The principle of proportionality loathes blanket provisions, as the European Court of Human Rights strongly noted in *S and Marper v United Kingdom*.<sup>20</sup> In relation to the unlawful operation of a National DNA Database, the court commented that:

... the blanket and indiscriminate nature of the powers of retention of the fingerprints, cellular samples and DNA profiles of persons suspected but not convicted of offences ... fails to strike a fair balance between the competing public and private interests and that the respondent State has overstepped any acceptable margin of appreciation in this regard. Accordingly, the retention at issue constitutes a disproportionate interference with the applicants' right to

15 The work of the family courts typically sees a balancing of the need for anonymity and respect for private and family life, despite the all-important policy concerns of the need for public protection measures and interventions. See M. Oswald, 'Disclosure of Personal Data Relating to Children and Vulnerable Adults—Balancing Public and Private Interests' (2013) 9(3) *Freedom of Information* 6.

16 See J. Grace, "'Too Well-travelled", Not Well-formed? The Reform of "Criminality Information Sharing" in England and Wales' (2013) 86 *Police Journal* 29.

17 Oswald, above n. 15 at 8.

18 [2010] UKSC 17, [2011] 1 AC 331.

19 T. Thomas and D. Thompson, 'Applications to Come Off the UK Sex Offender Register: The Posi on after *F and Thompson v. Home Office* 2010' (2012) 51(3) *Howard Journal* 274.

20 (2009) 48 EHRR 50. See C. McCartney, 'Of Weighty Reasons and Indiscriminate Blankets: The Retention of DNA for Forensic Purposes' (2012) 51(3) *Howard Journal* 245.

respect for private life and cannot be regarded as necessary in a democratic society.<sup>21</sup>

Lord Phillips in *F* noted that:

para 68 of *Bouchacourt v France* [a decision of the European Court of Human Rights] suggests that, but for the right to apply for deletion of the data retained, the lengthy registration period [for offenders in France] would have been held disproportionate.<sup>22</sup>

Lord Phillips then continued:

No evidence has been placed before this court or the courts below that demonstrate that it is not possible to identify from among those convicted of serious offences, at any stage in their lives, some at least who pose no significant risk of re-offending. It is equally true that no evidence has been adduced that demonstrates that this is possible. This may well be because the necessary research has not been carried out to enable firm conclusions to be drawn on this topic. If uncertainty exists can this render proportionate the imposition of notification requirements for life *without review* under the precautionary principle? I do not believe that it can.<sup>23</sup>

Additionally, with regard to the recent reforms of the process by which ECRCs are created, the notion that one conviction alone does not make an individual potentially subject to stigma in the employment context, but two convictions automatically would do so, seems somewhat arbitrary. It is not certain that this has created a system of conviction sharing and ‘filtering’ in relation to ECRCs that could sit comfortably within the margin of appreciation which states enjoy under the European Convention on Human Rights.

Marrying this ‘precautionary principle’ with regard to proportionality, as developed by the courts, with the ‘watershed’ second-conviction criterion with regard to permanent possibility of sharing a conviction record, as adopted in the recent reforms, suggests that there will be a particular issue of concern around the continuing potential stigmatisation of juvenile offenders as they grow older, a concern that Janes shares with Kenneth Parker J (as expressed in the Administrative Court decision in *T*).

Janes notes that any potential for indefinite labelling of children as sex offenders within a legal framework that purportedly encourages their rehabilitation and desistance from offending means that ‘child offenders who should also benefit from the protection of these laws and policies may, instead, feel permanently penalised and stigmatised to the extent that the provisions become counterproductive’. Janes continues, saying: ‘Lifelong labels may not achieve the aim of keeping communities safer for children since the practical impact of these legal labels and the very fact of being so labelled may have negative consequences’.<sup>24</sup>

21 *S and Marper v United Kingdom* (2009) 48 EHRR 50 at para. 125.

22 *R (on the application of F) v Secretary of State for the Home Department* [2010] UKSC 17, [2011] 1 AC 331 at [34].

23 *Ibid.* at [56].

24 L. Janes, ‘Children Convicted of Sexual Offences: Do Lifelong Labels Really Help?’ (2011) 50(2) *Howard Journal* 137 at 138.

It is a positive move, however, to see the tentative development of a ‘seriousness’ principle being developed with regard to a listing of ‘specified offences’—convictions for these offences will always have the possibility of being shared on an ECRC and will never be filtered from a criminal record check.<sup>25</sup>

## The thematic typology of criminality information

In terms of a pragmatic view of items of criminality information, as convictions and cautions can be termed,<sup>26</sup> there is a thematic checklist of sorts which can be used to address the typology of criminality information, while special reference can be made to the idea of permanent retention of criminality information or *permanency*, as it is called here. This ‘checklisting’ produces a kind of thematic typology with regard to criminality information.

First, we must consider our objective *certainty* with regard to the nature of an item of criminality information. In essence, are we sure a person committed the offence at all? We could be talking about an item of criminality information that is purely ‘police intelligence’, such as an allegation or witness statement.<sup>27</sup> What about an observation made as part of police surveillance?<sup>28</sup> Has there been an arrest on the basis of reasonable suspicion, which was later not the basis of a lawful arrest?<sup>29</sup> Are we talking about an admission by the offender, i.e. the disposal of the matter with the issue of a caution?<sup>30</sup> Are we talking about an (alleged) offender, being charged, or then prosecuted? Are we talking about an acquittal, or a conviction, if a prosecution occurs? These are all nuanced degrees of certainty that the criminal justice system can express in relation to the commission of an offence by an individual and in the way that criminality information is used and recorded (or shared).

Secondly, we can make some observations with regard to our objective assessment of the *seriousness* of the item of criminality information. Is the (perhaps alleged) offence one of great seriousness, to the extent that it warrants permanency? Or is the offence a more trivial one? Or has society accepted that what was once an offence is no longer an offence?<sup>31</sup> Can we use the sentencing of offenders in the courts as a measure of the seriousness of offences?

25 The DBS list of 752 specified offences comprises mainly violent and sexual offences, and can be found at <https://www.gov.uk/government/publications/dbs-list-of-offences-that-will-never-be-filtered-from-a-criminal-record-check>, accessed at 20 February 2014.

26 Grace, above n. 16.

27 *R (on the application of C) v Chief Constable of Greater Manchester* [2011] EWCA Civ 175, [2011] 2 FLR 383.

28 *R (on the application of Catt and T) v ACPO and Metropolitan Police* [2013] EWCA Civ 192, [2013] 1 WLR 3305.

29 *R (on the application of W) v Chief Constable of Warwickshire* [2012] EWHC 406 (Admin).

30 *R (on the application of T) v Chief Constable of Greater Manchester* [2013] EWCA Civ 25, [2013] 1 WLR 2515.

31 See the discussion below with regard to reforms under the Protection of Freedoms Act 2012 on the way that normative shifts in attitudes in society can result in the debatable shifting of a historical offence from the status of a conviction record to a matter of historical record.



Some items of ‘criminality information’ might be connected to relatively serious offences like a public order offence, and look like criminality information in the way that they are stored on the Police National Database or in court records, etc., but be deemed to be non-criminal in nature, despite the alleged seriousness of the matter concerned. The specific example to bear in mind here is that of a record of when police officers have issued penalty notices for disorder (PNDs) to those individuals whom they ‘have reason to believe’ have ‘committed an offence’, for example, by disorderly conduct contrary to s. 5 of the Public Order Act 1986. This statutory power of police officers to issue PNDs stems from s. 2(1) of the Criminal Justice and Police Act 2001. However, the Court of Appeal has noted that a PND is not to be regarded as the ‘lowest rung’ on the ladder of the criminal justice system and therefore a PND did not mean that the defendant had committed a minor criminal offence. Indeed, ‘the issue of such a notice is not [admissible evidence] of an admission of an offence which would affect the defendant’s good character. It [does] not impugn the good character of the defendant ...’.<sup>32</sup>

Thirdly, we can also pose questions regarding our objective view of *currency* with regard to the item of criminality information. How long ago was the item of criminality information created? Does the age of the item of criminality information matter in and of itself, or must it be understood in connection with the factors of seriousness of the (alleged) offence and the vulnerability of any (potential) future victims? And again, perhaps society no longer deems it an offence at all? The question of currency, or a lack of it, in relation to criminality information being shared, arose in *T*,<sup>33</sup> which prompted the Home Office to introduce the changes to the filtering rules in 2013.

Fourthly, and finally, we can pose further questions on the *relevancy* of sharing a particular item of criminality information for a public protection purpose. What is the context of the information being shared? Is it to protect against a short-term risk, which is more concrete? Is it to flag a general suspicion about the suitability of an individual for a particular role? Or is it only to stigmatise, as would be the case in sharing information relating to an acquittal? This particular potential effect of the use of criminality information raises questions with regard to the presumption of innocence, etc.<sup>34</sup> Perhaps some information will always be relevant, given its seriousness, yet relative uncertainty, as a kind of unresolved matter in respect of which public protection networks need to be actively vigilant?

This ‘checklisting’ of nuances with regard to the nature of items of criminality information has informed the proposed ‘filtering’ question or principle, which is developed further below.

<sup>32</sup> *R v Hamer* [2010] EWCA Crim 2053 at [16], *per* Thomas LJ.

<sup>33</sup> *R (on the application of T) v Chief Constable of Greater Manchester* [2013] EWCA Civ 25, [2013] 1 WLR 2515.

<sup>34</sup> L. Campbell, ‘Criminal Labels, the European Convention on Human Rights and the Presumption of Innocence’ (2013) 76 MLR 681. This area of discussion is, however, beyond the scope of this Comment.

## **The distinction between permanency of retention and the certainty of sharing criminality information for public protection purposes**

At this stage in the discussion we must make it clear that we are dealing are two ‘permanencies’.

First, there is the permanency of retention of items of criminality information. Secondly, there is the permanent certainty that any conviction may be shared for public protection purposes. It is my point that the first permanency is acceptable, but that any system of handling criminality information which produces the second outcome may be unlawful, given trends in the law relating to Article 8 of the European Convention on Human Rights.

Permanency of retention of criminality information, including convictions, is required for all manner of purposes. This Comment stops short of a call for ‘forgetting’ offences and convictions or cautions, etc. It could be that ‘forgetting’ criminality is impossible, both practically and morally, though the framework for criminal information retention and sharing could do more to recall the old adage of wrongs being unforgotten, but forgiven. Convictions may need to remain a matter of historical record because of the need to compile official statistics, to allow offenders to recall details of their own conviction, etc. in line with data protection rights, to produce accurate reports for the purposes of sentencing or parole/probation arrangements, to reflect the need to recall the importance of harm done to victims and victims’ rights, and particularly for the use of criminality information as ‘bad character’ evidence in criminal trials, etc.

However, it cannot be assumed that any convictions will have a permanent *certainty* of being shared in the public protection context, due to the principle of proportionality. Despite the recent reforms with regard to filtering rules for convictions on ECRCs, it is still the case that more than one conviction for an individual will entail all of those two or more convictions being shared—and any convictions for one of 752 specified convictions may result in all convictions being shared. The wording of the Home Office proposal was: ‘If a person has more than one offence, then details of all their convictions will always be included’. This means that for a person with two or more offences, the possibility of his or her conviction being shared has become a certainty, and this is disproportionate. Plainly, what the courts would more readily accept as proportionate would be a ‘filtering’ system where no matter how many convictions or cautions an individual may have, over whatever period of time, and with whatever level of seriousness, they are always assessed one by one in that ‘filtering’ exercise, so that there is not a watershed moment of stigmatisation upon a second conviction, etc. This would be a more logistically burdensome arrangement, of course, but Article 8 compliance would warrant and require it, if that was the opinion of either the UK courts or the European Court of Human Rights. However, the time-consuming nature of a more nuanced approach to the regulation of criminality information sharing would not sit well in a criminal justice policy landscape as regards public

protection where public protection agencies are increasingly becoming bereft of time *and* money.<sup>35</sup>

## **ECRC-based criminality information sharing and a proposed ‘filtering’ system**

Article 8 jurisprudence seems to suggest that it is difficult to assume that a single item of criminality information will have permanency, in the sense of a certainty that there will always be a possibility of the information of being shared for public protection purposes, and that it is difficult to be fully confident of a state remaining within the margin of appreciation required under the European Convention on Human Rights

It is argued here that items of criminality information which have *currency* and *relevancy*, given their *certainty* and *seriousness*, should be deemed to be possible to share, and should be shared if it is proportionate to do so.

The ‘hidden’ difficulty inherent in ensuring proportionality in respect of criminality information sharing is the flexible, context-specific requirement for the police to consult with (alleged) offenders, as the UK courts have consistently, and recently, determined in a range of cases and circumstances.<sup>36</sup>

As a result of this, a particular recommendation is required in terms of the adoption of a suitable test for the use of both common law and statutory powers and duties of criminality information sharing. In order that an item of criminality information is shared for the purposes of public protection, in an ECRC or otherwise, it is suggested that the following question should be answered in the affirmative:

Objectively speaking, is the information indicative of the (alleged) commission of a *sufficiently serious* offence which it is *reasonably certain* was committed by the individual concerned, that is *currently relevant* to the purpose for requiring an ECRC/to the purpose of public protection, and which the individual concerned has had an opportunity to *comment meaningfully* upon (where the information is of an allegation, caution, arrest, charge, or prosecution not resulting in a conviction)?

This principle, framed here as a question, draws on the common law of criminality information sharing, as influenced by the jurisprudence of the European Court of Human Rights on issues relating to Article 8 at the time

<sup>35</sup> M. Nash, ‘Cut Price Public Protection?’ (2012) 51(3) *Howard Journal* 261.

<sup>36</sup> Grace, above n. 16 referring to *R (on the application of B) v Chief Constable of Derbyshire Constabulary* [2011] EWHC 2362 (Admin); *R (on the application of B) (W) v Chief Constable of Warwickshire Police* [2012] EWHC 406 (Admin); *R (on the application of the Royal College of Nursing) v Secretary of State for the Home Department* [2010] EWHC 2761 (Admin), [2011] PTSR 1193; *R (on the application of N) v A Local Authority* [2010] EWHC 3602 (Admin); *R (on the application of J) v Chief Constable of Devon and Cornwall* [2012] EWHC 2996 (Admin); *C v Chief Constable of Greater Manchester* [2011] EWCA Civ 175, [2011] 2 FLR 383; *X v Chief Constable of South Yorkshire* [2012] EWHC 2954 (Admin); *In the Matter of An Application by JR59 for Judicial Review* [2012] NIQB 66; *R (on the application of J) v Commissioner of Police of the Metropolis* [2012] EWHC 1681 (Admin); *R (on the Application of V) v Commissioner of Police for the City of London* [2012] EWHC 3430 (Admin); *In the Matter of an Application by Fergus Gaughran for Judicial Review* [2012] NIQB 88.

of writing. There is one particular comment which should be made, in relation to sharing allegations of the commission of offences. The notion of 'reasonable certainty' means that a police organisation, for example, in sharing an allegation that an individual has committed a sufficiently serious offence, which is currently relevant to the purpose of requiring an ECRC, must be reasonable in its certainty that an offence has been committed, i.e. not irrational in its certainty, which could be the case if irrelevant considerations were taken into account in forming that certainty or if relevant considerations were ignored in forming that certainty.<sup>37</sup> This would mean that the sharing of a serious allegation in the form of a statement made by a victim of an alleged serious sexual offence, even when that allegation was eventually withdrawn by the alleged victim, would still be lawful, where the withdrawal of the allegation by the alleged victim was thought to have occurred under duress of some kind.<sup>38</sup> Certainly though, for the criminal justice system or wider public protection networks to adopt the nuanced principle outlined above with regard to sharing all items of criminality information in the public protection context, a cultural shift would be required in the corpus of public protection professionals and the policy landscape that they navigate.<sup>39</sup> Fenton notes that:

... decisions about risk cannot always be predicted accurately and the 'actuarial fallacy' and related thinking lead to completely unreasonable expectations that social workers can always get it right if they just do their jobs correctly. So, risk has become dominant, essentially linked as it is to public protection, the neoliberal society we live in and the current 'blame culture'. It is not a surprise that workers worry about this. It seems that the task of creating a culture where workers can adopt autonomous and responsive approaches (essential for desistance work) and, thus, live with healthy ontological anxiety (as opposed to crippling, overwhelming anxiety) will depend on the ethical climate of the agency (support or blame) and the acceptance of the inevitability of reoffending.<sup>40</sup>

Fenton also notes that 'it may be that, in reality, we are still a long way from the necessary and explicit acknowledgement that the human rights of the offender are as essential a consideration as risk assessment and public protection'.<sup>41</sup>

## **Issues of forgetting**

We cannot, as noted above, meaningfully *forget* offences, that is to say, convictions.

37 *R (on the application of Charles) v Central Criminal Court* [2012] EWHC 2581 (Admin) at [20], *per Singh J obiter*.

38 As was the case in *R (on the application of C) v Secretary of State for the Home Department* [2011] EWCA Civ 175.

39 For an outline of the difficulties inherent in this sort of transition, see J. Grace, 'Privacy, Stigma and Public Protection: A Socio-Legal Analysis of Criminality Information Practices in the UK' (2013) 41 (4) *International Journal of Law, Crime and Justice* 303.

40 J. Fenton, 'Risk Aversion and Anxiety in Scottish Criminal Justice Social Work: Can Desistance and Human Rights Agendas Have an Impact?' (2013) 52(1) *Howard Journal* 77 at 83.

41 *Ibid.* at 87.

Take, for example, the provisions introduced in s. 92 of the Protection of Freedoms Act 2012, which encapsulate the power of a Secretary of State to disregard convictions or cautions. Section 92 provides:

- (1) A person who has been convicted of, or cautioned for, an offence under—
  - (a) section 12 of the Sexual Offences Act 1956 (buggery),
  - (b) section 13 of that Act (gross indecency between men), or
  - (c) section 61 of the Offences against the Person Act 1861 or section 11 of the Criminal Law Amendment Act 1885 (corresponding earlier offences),may apply to the Secretary of State for the conviction or caution to become a disregarded conviction or caution.
- (2) A conviction or caution becomes a disregarded conviction or caution when conditions A and B are met.
- (3) Condition A is that the Secretary of State decides that it appears that—
  - (a) the other person involved in the conduct constituting the offence consented to it and was aged 16 or over, and
  - (b) any such conduct now would not be an offence under section 71 of the Sexual Offences Act 2003 (sexual activity in a public lavatory).<sup>42</sup>
- (4) Condition B is that—
  - (a) the Secretary of State has given notice of the decision to the applicant under section 94(4)(b), and
  - (b) the period of 14 days beginning with the day on which the notice was given has ended.
- (5) Sections 95 to 98 explain the effect of a conviction or caution becoming a disregarded conviction or caution.

Section 95 of the Protection of Freedoms Act 2012 describes the effect of ‘disregarding’ a conviction under s. 92 of the Act. Section 95(1) states:

- (1) The Secretary of State must by notice direct the relevant data controller to delete details, contained in relevant official records, of a disregarded conviction or caution.

But in s. 95(5) we learn that:

‘delete’, in relation to such relevant official records as may be prescribed, means record with the details of the conviction or caution concerned—

- (a) the fact that it is a disregarded conviction or caution, and
- (b) the effect of it being such a conviction or caution ...

So these reforming provisions of the Protection of Freedoms Act 2012 are more about remodelling an otherwise accurate historical record, reflecting contemporary rather than previous heteronormative social values, rather than truly ‘forgetting’.

As recorded in *Hansard*, the Parliamentary Under-Secretary of State for the Home Department (Lynne Featherstone) said in relation to the practicalities of ‘deletion’ as used here, and compared to the notion of ‘forgetting’, that:

<sup>42</sup> It is interesting to note that the ‘older’ conviction is not ‘replaced’ with a conviction for the offence of sexual activity in a public lavatory, if these were indeed the factual circumstances—and indeed that this should not be the case, given the prohibition of retrospective criminal sanctions under Art. 7 ECHR.

Some records are kept in formats that do not allow for simple deletion, however. Those include court records, which are often kept in bound volumes containing details of thousands of convictions, and records of historical interest such as those kept by the National Archives. One cannot destroy such pages. In such cases—where it is not possible to destroy the physical record, because to do so would mean the destruction of other criminal records or the destruction of documents of historical importance—we have provided for the relevant conviction or caution to be annotated with a statement that it is a disregarded conviction or caution, and that the effect of such a disregard is that the person is to be treated for all purposes in law as though they had not committed the offence. Obviously, if it is an electronic record, it will be deleted.<sup>43</sup>

Presumably, though, if in theory the only historical record of the conviction was electronic in format it could not be deleted, but only annotated, as with paper-based records. The same difficulties would apply in ‘forgetting’, i.e. completely expunging convictions and other types of criminality information, even without the requirement to keep an accurate historical record, due to pressures already noted above to compile official statistics, to allow offenders to recall details of their own conviction, etc. in line with data protection rights under s. 7 of the Data Protection Act 1998, to produce accurate reports for the purposes of sentencing or parole/probation arrangements, to reflect the need to recall the importance of harm done to victims and victims’ rights, and, particularly, for using criminality information as ‘bad character’ evidence in criminal trials.

### **The European Court of Human Rights’ view on the permanent retention and public availability of conviction records**

There is a counter-balancing Grand Chamber decision of the European Court of Human Rights to the influential decision of that same Chamber in *S and Marper v United Kingdom*,<sup>44</sup> which highlights where the pragmatic limits of human rights values in restricting criminality information practices are currently set.

In *Gillberg v Sweden*,<sup>45</sup> the applicant was convicted of destroying research data, which was preserved under the law for access by researchers, journalists and so on, and ‘contended that his moral integrity, his reputation and his honour had been affected by the conviction to a degree falling within the scope of Article 8, and that he had suffered personally, socially, psychologically and economically’.<sup>46</sup>

The European Court of Human Rights noted, drawing on *S and Marper v United Kingdom*, that:

the concept of ‘private life’ is a broad term not susceptible to exhaustive definition. It covers the physical and psychological integrity of a person. It can therefore embrace multiple aspects of the person’s physical and social identity. Article 8 protects in addition a right to personal development, and the right to

43 *Hansard*, HC Public Bill Committee, 17th Sitting, col. 665 (May 12, 2011).

44 (2009) 48 EHRR 50.

45 Application No. 41723/0, 3 April 2012.

46 *Ibid.* at para. 61.

establish and develop relationships with other human beings and the outside world.<sup>47</sup>

However, the court also made it plain, in refusing the application, ‘that Article 8 cannot be relied on in order to complain of a loss of reputation which is the foreseeable consequence of one’s own actions such as, for example, the commission of a criminal offence’.<sup>48</sup>

The court then took pains to reconcile the obvious contrast between these two points, with regard to, first, personal development and relationships and, secondly, the notion of reputation, and stated it:

... observes that the protection of an individual’s moral and psychological integrity is an important aspect of Article 8 of the Convention. It notes, however, that there is no Convention case-law in which the Court has accepted that a criminal conviction in itself constitutes an interference with the convict’s right to respect for private life. The Court does not ignore that such a criminal conviction may entail personal, social, psychological and economic suffering for the convicted person. In the Court’s view, though, such repercussions may be foreseeable consequences of the commission of a criminal offence and can therefore not be relied on in order to complain that a criminal conviction in itself amounts to an interference with the right to respect for ‘private life’ within the meaning of Article 8 of the Convention.<sup>49</sup>

The UK courts may therefore be perceived as starting to move into a territory of their own, in particular with the decision of the Court of Appeal in *T*,<sup>50</sup> by underlining the idea that even if there is no recognition by the European Court of Human Rights of the notion that a criminal conviction is an interference with the right to respect for a private life within the meaning of Article 8, there is a potential stigma created by the record of conviction being shared across public protection networks as part of criminality information practices which engage Article 8, even if the right is not infringed (initially), since the sharing may well be proportionate, but become distinctly less proportionate over a (longer) period of time.

## **Conclusion**

This Comment has been concerned with the notion of permanency attached to the record of criminal convictions, and the stigmatisation created by the sharing of items of criminality information. Two types or constructions of permanency have been addressed above: the permanent retention of items of criminality information and the permanent certainty, potential or possibility for those items of criminality information to be shared.

What is now needed is a recalibration of the notion of a permanent possibility of the sharing of items of criminality information, with the aim of reducing potential stigmatisation of offenders, where that is appropriate.

47 *Ibid.* at para. 66.

48 *Ibid.* at para. 67.

49 *Ibid.* at para. 68.

50 *R (on the application of T) v Chief Constable of Greater Manchester* [2013] EWCA Civ 25, [2013] 1 WLR 2515.

Recent jurisprudence from the UK courts and the European Court of Human Rights, as well as UK government policy and legislative developments, have formed a lens through which the need for a new approach to define the basis for criminality information sharing has been assessed.

A form of wording has also been suggested above for an appropriate question in common law or in statute with regard to an item or items of criminality information which might be shared, and consequently stigmatise an (alleged) offender. The question as framed requires an affirmative answer so as to ensure an item-by-item lawful and proportionate sharing of items of criminality information.

There are cultural barriers across public protection networks to the notion of a changing emphasis as regards a more respectful policy landscape in relation to the rights of offenders, or alleged offenders, as demonstrated by recent academic commentary in the wider literature. However, recent reforms in response to the decision of the Court of Appeal in *T* have been the prompt for a reconsideration of the fundamental nature of criminality information sharing and its exercise, in terms of that information itself.

Upon examination of what in practice constitutes a record of a conviction, a caution or some other category of criminality information, it is difficult to see how convictions can be in any meaningful way 'forgotten', but it might be that on balance many categories of criminality information could be more appropriately, and with greater proportionality shared in public protection contexts.