THE NORTHERN IRELAND COURT OF APPEAL ORDERED that the appellant is granted anonymity. That order continues to apply. No one shall publish or reveal the name or address of the appellant or reveal any information which would be likely to lead to his identification in connection with these proceedings.

Hilary Term
[2025] UKSC 8
On appeal from: [2023] NICA 30

JUDGMENT

In the matter of an application for Judicial Review by JR123 (Appellant) (Northern Ireland)

before

Lord Lloyd-Jones
Lord Sales
Lord Burrows
Lord Stephens
Sir Declan Morgan

JUDGMENT GIVEN ON
6 March 2025

Heard on 23 and 24 October 2024

Appellant
Hugh Southey KC
Steven McQuitty KC
(Instructed by Northern Ireland Human Rights Commission)

Respondent
Tony McGleenan KC
Philip McAteer
(Instructed by Departmental Solicitors Office)

LORD SALES AND SIR DECLAN MORGAN (with whom Lord Lloyd-Jones, Lord Burrows and Lord Stephens agree):

(1) Introduction

1. This appeal is concerned with the compatibility with article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("article 8" and "the Convention", respectively) of the legislative scheme in Northern Ireland for the rehabilitation of offenders set out in the Rehabilitation of Offenders (Northern Ireland) Order 1978 (SI 1978/1908 (NI 27)) ("the Order"). The Order makes provision for the rehabilitation of individuals with criminal convictions by providing them with lawful justification for concealing their convictions from other persons with whom they might have dealings, once the convictions are regarded as "spent", and by forbidding state officials from having regard to those convictions when deciding how to treat them.

2. An equivalent rehabilitation of offenders scheme was introduced in the rest of the United Kingdom by the Rehabilitation of Offenders Act 1974 ("the 1974 Act"), pursuant to recommendations made in 1972 in a report entitled *Living it Down: The Problem of Old Convictions* ("the 1972 report") by a committee chaired by Lord Gardiner ("the Committee") set up by the campaigning organisations Justice, the Howard League for Penal Reform and the National Association for the Care and Resettlement of Offenders. The Order followed the scheme of the 1974 Act. The scheme in the 1974 Act has been amended in certain respects in England and Wales and in Scotland, but the Order has not been amended thus far. We were told that proposals for its amendment are soon to be considered by the Northern Ireland Assembly ("the Assembly").

3. The principal issue in this case concerns the structure adopted for the rehabilitation scheme in the Order. The Order sets out a series of categories of offences ranging from the less serious to the more serious and stipulates for each category a particular period of time, of increasing length as one moves up the categories of seriousness, after which convictions become spent and the rehabilitation effects for which the Order provides apply. For offences in the most serious category, the Order makes no provision for convictions to become spent and for those effects to come into operation. The appellant has previous convictions dating from many years in the past which fall within that category. His complaint is that the law should not preclude the possibility of the application of the relevant rehabilitation effects for any category of offence, including the most serious. Instead, it should include provision for a system involving individual assessments, whereby an appropriate body is able to review from time to time whether an individual who has previous convictions in the most serious category continues to pose a risk to the public and, if they do not, should have power to direct that the convictions should be treated as spent and that the rehabilitation effects set out in the Order should apply to that individual as well. The appellant contends that the failure of the Order to

make such provision for individual assessment in a case like his is in violation of his rights under article 8.

4. The issue, therefore, is whether under article 8 the state is entitled to legislate for a system of rehabilitation based on categories of offences defined by bright line rules, which exclude the application of rehabilitation effects in the most serious category, or whether on the contrary it is obliged to provide for a system of individual reviews on a case-by-case basis, at least for those individuals with offences in the most serious category.

5. Article 8 provides:

> "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 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."

(2) Factual background and the decisions in the High Court and the Court of Appeal

6. The appellant is now aged 66. In 1980, when he was aged 21, he was convicted of arson and of possessing a petrol bomb in suspicious circumstances. He was sentenced to concurrent terms of imprisonment of five years and four years respectively. He was released from prison in 1982.

7. As the sentences imposed on the appellant exceeded 30 months, the effect of article 6(1)(b) of the Order is that they are incapable of becoming spent. This means that the appellant has been required to disclose his convictions in certain circumstances when asked about them by others. As a result he says he found it difficult to secure employment and had to set up a small business of his own instead. In light of disclosure of his convictions he has found it difficult to secure insurance for that business. In various contexts he says he has experienced distress and humiliation when he has felt constrained to reveal his convictions to others.

8. The appellant maintains that he is a fully rehabilitated member of society. He professes shame and regret for his offences. He has been in a stable relationship for 17 years. He attends his local church and engages in charitable activities. He is a skilled tradesman, having obtained a series of qualifications following his release from prison, and earns his own livelihood. The respondent ("the Department") does not seek to dispute this general picture. The appellant contends that he does not represent a risk to the public.

9. The appellant says that to comply with his rights under article 8 it is incumbent on the state to afford him an opportunity to show that, upon consideration of his individual circumstances, his convictions should be treated as spent, in the sense of that term in the Order. Since the Order does not allow for that, the appellant says it is incompatible with his rights under article 8, as applicable in domestic law under the Human Rights Act 1998 ("the HRA").

10. The appellant commenced proceedings in the High Court to claim a declaration of incompatibility under section 4 of the HRA in relation to article 6 of the Order. By a judgment dated 1 November 2021 ([2021] NIQB 97) Colton J upheld the claim. He directed himself primarily by reference to the reasoning in *R (F (A Child)) v Secretary of State for Justice* [2010] UKSC 17; [2011] 1 AC 331 ("*Re F*"), a decision of this court on the compatibility with article 8 rights of indefinite registration in the sex offenders register of individuals convicted of serious sexual offences and their being subject to the notification requirements in sections 82-86 of the Sexual Offences Act 2003 ("the SOA 2003"). In that case it was held there was a violation of article 8 and that the legislation in question was incompatible with article 8 by reason of the absence of any mechanism for review of the claimants' position. This court made a declaration of incompatibility under section 4 of the HRA as a result of which amendments were made to the SOA 2003 to provide for periodic individual assessments of risk on a case-by-case basis. In Colton J's view, article 8 requires that a similar scheme of individual assessment should be introduced into the scheme for rehabilitation under the Order.

11. The submissions before Colton J in the present case were made on the assumption on all sides that a declaration of incompatibility under section 4 of the HRA was the correct form of relief. That assumption was incorrect. A declaration of incompatibility under that provision can only be made in respect of primary legislation, as that term is defined in the HRA. The Order is not primary legislation, so a declaration of incompatibility under section 4 of the HRA is not available. This came to be appreciated after the hearing and after Colton J's judgment was handed down, indicating that he would make a section 4 declaration of invalidity. The non-availability of that relief was drawn to his attention by counsel for the appellant, who invited the judge to make what has been described as a common law declaration of invalidity instead. This was not contested by the Department. The judge therefore made a declaration in the following terms:

> "It is declared that article 6(1) of [the Order] is incompatible with article 8 of [the Convention] by reason of a failure to provide a mechanism by which the Applicant can apply to have his conviction considered to be spent, irrespective of the passage of time and his personal circumstances."

12. The judge also gave directions for the hearing of further argument on the question whether damages should be paid to the appellant under section 8 of the HRA. By a judgment dated 9 June 2022 ("the damages decision") he dismissed the appellant's claim for damages, applying section 8(3) of the HRA and holding that such an award was not necessary to afford just satisfaction to the appellant: [2022] NIQB 42.

13. The Department appealed in relation to the declaration made by the judge. The appellant cross-appealed in relation to the damages decision. By a judgment of the court dated 3 May 2023 ([2023] NICA 30; [2024] NI 15) the Court of Appeal (McCloskey and Horner LJJ and Scoffield J) allowed the Department's appeal and dismissed the cross-appeal. In summary, the Court of Appeal reasoned as follows:

(i) It reviewed the judgment of Colton J in order to determine whether he had misdirected himself, rather than making its own assessment of proportionality and the compatibility of the Order with Convention rights: paras 67-70. It decided that he had: paras 71-73. The principal guidance concerning the approach to the compatibility with article 8 of the rehabilitation scheme in the Order was to be found in a later judgment of this court, in *R (P) v Secretary of State for Justice* [2019] UKSC 3; [2020] AC 185 ("*Re P*"). That related to the operation of the 1974 Act and the Order in so far as they did not exempt individuals from having to disclose convictions or police reprimands (which were otherwise to be treated as spent) when applying for jobs with children or vulnerable adults and required disclosure of such convictions and reprimands in any criminal record certificate or enhanced record certificate in respect of those individuals, which would generally be required when applying for such jobs. That guidance was materially different from that derived from *Re F* as applied by the judge.

(ii) As an authority on the application of article 8 in the circumstances of a scheme like that in the Order, *Re F* had been overtaken by subsequent guidance given by the European Court of Human Rights ("the European Court"), in particular in *Animal Defenders International v United Kingdom* (2013) 57 EHRR 21 ("*Animal Defenders*"), and by this court in *Re P*. Applying the guidance in these authorities, a critical question to ask relates to the ambit of the margin of appreciation to be afforded to the state in devising the scheme in question. The margin of appreciation in the present context was of a sufficient ambit as to allow the state, acting compatibly with article 8, to adopt a system reflecting a category-based approach involving bright line rules. Under that system the questions

whether a past conviction could be treated as spent and when that was taken to occur would depend on the category of seriousness in which it was placed, rather than on any individual assessment on a case-by-case basis, and it was permissible to choose to adopt a category of seriousness of offence in respect of which no conviction within that category could ever be treated as spent. Accordingly, article 6(1) of the Order was not incompatible with article 8: paras 23-66.

(iii) The challenge to the compatibility of article 6 of the Order with article 8 was an ab ante (ie prospective) challenge to a legal rule in relation to which the test to be applied to justify the grant of a declaration of incompatibility was that specified in *Christian Institute v Lord Advocate* [2016] UKSC 51; 2017 SC (UKSC) 29 ("*Christian Institute*") and *In re Abortion Services (Safe Access Zones) (Northern Ireland) Bill* [2022] UKSC 32; [2023] AC 505 ("*Safe Access Zones*"), namely that such a declaration would only be granted if it was found that the rule in question gives rise to an unjustified interference with Convention rights in all or almost all cases in which it applies. That could not be said of article 6(1) of the Order so, applying that test, the claim for a declaration of incompatibility had to be rejected for that reason as well: paras 74-86.

(iv) As regards the damages decision and the cross-appeal, the judge had properly taken into account the impact of article 6(1) of the Order on the appellant and had not committed any error of principle in arriving at his conclusion that the finding of incompatibility in his judgment constituted appropriate just satisfaction in the circumstances of the case, so that no damages should be awarded pursuant to section 8 of the HRA. Accordingly, there was no sound basis for the Court of Appeal to interfere with that ruling: paras 88-99.

(3) The issues in the appeal

14. The appellant appeals to this court in relation to the Court of Appeal's finding at (ii) above that article 6(1) of the Order is compatible with article 8; its ruling at (iii) above regarding the test to be applied in relation to the grant of a declaration of incompatibility; and its endorsement at (iv) above of the judge's refusal in his damages decision to award any damages. In the light of the judgment of this court in *Safe Access Zones*, we also consider it is appropriate to examine whether the Court of Appeal's approach to the role of an appellate court at (i) above was correct.

15. Mr Hugh Southey KC for the appellant submits that the appellant's rights under article 8 are breached by the application of article 6 of the Order in his case. He says that it is not compatible with article 8 for the state to impose by a general measure an obligation on an offender lasting their whole lifetime to disclose their convictions whenever they are asked for, without the possibility of individualised review of the

circumstances of their case, where there is no reason to believe that many of those affected (including, he says, the appellant) will pose any greater risk of re-offending than the general population. Mr Southey maintains that it is not compatible with an offender's rights under article 8 for there not to be any mechanism allowing for the possibility of an individualised assessment of risk, perhaps after an interval of time. The state cannot operate a rehabilitation regime like that in the 1974 Act or the Order in which certain serious offences are placed in a category in which they cannot become spent. To do so is disproportionate to the objective of such a regime, which is to allow for rehabilitation of an offender who can show that they do not represent a risk to society.

16. In our analysis below it is convenient to address the issues arising in the following order:

(i) Analysis under article 8 and the role of an appellate court: paras 35-37;

(ii) The compatibility of article 6(1) of the Order with article 8: paras 38-86;

(iii) The test for grant of a declaration of incompatibility: paras 87-92;

(iv) The availability of a common law declaration of incompatibility and the devolution context: paras 93-101;

(v) The challenge to the damages decision: para 102.

(4) The introduction and development of the rehabilitation legislation in England and Wales, Scotland and Northern Ireland

(a) The 1972 Report and the 1974 Act

17. In the 1972 Report the Committee recommended a major reform of the law in the interests of the rehabilitation of offenders. It addressed the position of people who offend once, or a few times, pay the penalty which the courts impose on them, and then settle down to become hardworking and respectable citizens. The Committee concluded that those rehabilitated persons still faced great difficulties, especially in the fields of employment, insurance and the courts and the report contained examples of jobs lost, characters assailed in courts and small businesses refused insurance as a result of the disclosure of long past convictions.

18. The 1972 Report recommended two guiding principles to address this issue. First, certain persons who had been convicted of criminal offences should be classified as rehabilitated persons if they had not been re-convicted for a number of years and secondly, rehabilitated persons should be treated in law as if they had not been convicted, by making inadmissible any evidence tending to show that they had committed the relevant offence, or been charged with it, or convicted of it, or sentenced for it.

19. In order to implement those principles it was necessary to draw a line related to the gravity of the offence to determine those who should benefit. The Committee concluded that the sentence imposed in respect of the offence should be the yardstick for seriousness and the more serious the offence the longer it would take before one could be reasonably sure that the offender had reformed. Although a strong case could be made out that at some stage all offenders should be entitled to have their criminal past buried it was considered too radical to go that far. The recommendations were made for the benefit of those whose past offences had not been so grave as to arouse really strong punitive reactions.

20. The 1972 Report did not recommend an individualised system such as that which Mr Southey contends is required. It is significant that the Committee was set up by non-governmental organisations with expertise and interest in promoting reform and offender rights in the area of penal policy. Even though these were bodies with an interest in promoting the rights of offenders, they did not recommend a system for individualised assessment such as that for which Mr Southey contends. Rather, they recommended a category-based approach to identifying convictions which could be treated as spent, with the categories defined in terms of seriousness by reference to the length of the sentence imposed. That being their recommendation, they noted that a line needed to be drawn somewhere, by reference to the gravity of the particular offence in all the circumstances of the individual case; and since the sentence imposed by a court was precisely directed to reflect such an assessment, this made it the appropriate yardstick to use (1972 Report, para 33). The Committee recommended a sentence of two years imprisonment as the maximum for which rehabilitation should be possible (1972 Report, para 36). The 1972 Report explained (para 34):

> "Clearly, the more serious the offence, the longer it will be before one can be reasonably sure that the offender has reformed. There should therefore be a scale of 'rehabilitation periods' geared to the original sentence imposed: the longer the sentence, the longer the period before the offender is treated as rehabilitated. At the same time, the system must be simple and certain if it is to be workable: both the offender, and anyone else concerned in the matter, must know when the rehabilitation period is at an end, without having to have recourse to an electronic calculator."

The Committee was also concerned that the scheme should be reasonably equitable between different offenders in its operation and that the scale of rehabilitation periods should constitute a practical solution, balancing the need for simplicity and for equity between prisoners (1972 Report, para 35).

21. The Committee recommended sentences which should be exempt from disclosure to employers, insurance companies and the like after completion of a rehabilitation period and could not after that point be relied upon by an employer to justify dismissal. For those subject to a fine the rehabilitation period was five years, for those on whom a sentence of imprisonment up to six months (the limit of the jurisdiction of the Magistrates' Court) was imposed a period of seven years was appropriate and for those subject to a sentence of imprisonment of between six months and two years (the maximum sentence that could be suspended) a period of ten years was appropriate for rehabilitation. All periods ran from the date of conviction. No option for rehabilitation was recommended for those who were subject to a sentence of imprisonment of more than two years although the 1972 Report recommended a review of these periods in light of experience.

22. The 1972 Report was debated in Parliament and its recommendations were broadly accepted. The outer limit for rehabilitation was extended from two years to 30 months and the 1974 Act was passed. That Act applied to England and Wales and Scotland. It did not apply to Northern Ireland but the provisions were effectively replicated in the Order. Although there are a number of exceptions to the application of the 1974 Act and the Order dealing with certain occupations involving vulnerable people, public safety and national security ("excepted employment"), none of those are relevant to the issues in this appeal.

(b) The Order

23. The Order makes provision for the rehabilitation of offenders in Northern Ireland. Article 3 provides that once the rehabilitation period has been served in respect of any offence the person shall be treated as a rehabilitated person and the conviction treated as spent. The general rule providing for the effect of rehabilitation, which is subject to certain qualifications, is set out in article 5(1)-(3) as follows:

> "5.—(1) Subject to Articles 8 and 9, a person who has become a rehabilitated person for the purposes of this Order in respect of a conviction shall be treated for all purposes in law as a person who has not committed or been charged with or prosecuted for or convicted of or sentenced for the offence or offences which were the subject of that conviction; and, notwithstanding the provisions of any other statutory provision or rule of law to the contrary, but subject as aforesaid-

(a) no evidence shall be admissible in any proceedings before a judicial authority exercising its functions in Northern Ireland to prove that any such person has committed or been charged with or prosecuted for or convicted of or sentenced for any offence which was the subject of a spent conviction; and

(b) a person shall not, in any such proceedings, be asked, and, if asked, shall not be required to answer, any question relating to his past which cannot be answered without acknowledging or referring to a spent conviction or spent convictions or any circumstances ancillary thereto.

(2) Subject to the provisions of any order made under paragraph (4), where a question seeking information with respect to a person's previous convictions, offences, conduct or circumstances is put to him or to any person otherwise than in proceedings before a judicial authority-

(a) the question shall be treated as not relating to spent convictions or to any circumstances ancillary to spent convictions, and the answer thereto may be framed accordingly; and

(b) the person questioned shall not be subjected to any liability or otherwise prejudiced in law by reason of any failure to acknowledge or disclose a spent conviction or any circumstances ancillary to a spent conviction in his answer to the question.

(3) Subject to the provisions of any order made under paragraph (4)-

(a) any obligation imposed on any person by any rule of law or by the provisions of any agreement or arrangement to disclose any matters to any other person shall not extend to requiring him to disclose a spent conviction or any circumstances ancillary to a spent conviction (whether the conviction is his own or another's); and

(b) a conviction which has become spent or any circumstances ancillary thereto or any failure to disclose a spent conviction or

> any such circumstances, shall not be a proper ground for dismissing or excluding a person from any office, profession, occupation or employment, or for prejudicing him in any way in any occupation or employment. …"

24. Article 6(1) provides that certain sentences are excluded from rehabilitation under the Order. These include "(a) a sentence of imprisonment for life; (b) a sentence of imprisonment or corrective training for a term exceeding thirty months; (c) a sentence of preventive detention" and certain others.

25. Article 6(2) lays down the rehabilitation periods applicable to sentences not falling within article 6(1) by reference to Tables A and B, which specify different periods depending on whether the person convicted was an adult, a person under 18 or a young offender and the length of the sentence imposed. For example, for an adult the rehabilitation period for a sentence of imprisonment exceeding six months but not exceeding 30 months is ten years from the date of sentencing; and for a sentence of imprisonment not exceeding six months it is seven years. Both these periods are subject to a reduction of half if the person was under 18 when sentenced.

26. For present purposes four points should be made about the scheme of rehabilitation periods in article 6 of the Order: (i) it is based on categories of seriousness according to the length of sentence rather than a system of individual case-by-case assessment; (ii) for cases in the most serious category there is no rehabilitation period after which the offence can be treated as spent; (iii) the scheme provides for an element of individualisation, in that its application depends on the sentence given to the individual in question and also on whether the individual was under 18 at the relevant time; and (iv) the scheme is designed to ensure that there is a relationship of proportionality between the sentence imposed and the availability or otherwise of the rehabilitation effects provided for in article 5, according to a category-based rather than individualised approach.

(c) Subsequent developments

27. Although the provisions of the Order continue to govern the position in Northern Ireland there has been further policy consideration in all parts of the United Kingdom and legislative intervention in England and Wales and Scotland. In 2001 the Home Secretary initiated a fundamental review of the 1974 Act and the resulting report entitled *Breaking the Circle* was published for consultation in July 2002. It recommended that after a period consisting of the fixed term of a custodial sentence plus two years with no further offending there would be no further obligation on the subject of the sentence to disclose the conviction other than in applications for excepted employment. A consultation on proposals for a similar scheme took place in Northern Ireland in 2005. However, nothing

came of these proposals as the government focused instead on vetting and barring arrangements in relation to sensitive areas of employment.

28. Further consultation in England and Wales in 2010 led to the rehabilitation arrangements being extended to sentences of imprisonment of up to four years by amendments made by the Legal Aid, Sentencing and Punishment of Offenders Act 2012 to the 1974 Act as it applied to England and Wales. More recently the position in England and Wales has been affected by the Police, Crime, Sentencing and Courts Act 2022 ("the 2022 Act") which amends the 1974 Act further to allow for rehabilitation for any fixed term sentence other than certain serious violent, sexual and terrorist offences specified in Schedule 18 to the Sentencing Code (set out in the Sentencing Act 2020) ("Schedule 18") where a sentence of more than four years imprisonment was imposed. One of those offences is arson.

29. As we have noted, the appellant was sentenced to a period of five years imprisonment for arson. Therefore, if the amended 1974 Act were to be applied to a person in his position in England and Wales, they would not be entitled to treat that offence as spent.

30. In Scotland, sentencing is not a reserved matter. The Scottish Parliament has made provision allowing for the Scottish Ministers to extend the rehabilitation scheme in the 1974 Act by making regulations to allow a person on whom "a relevant sentence" was imposed in respect of a conviction to apply to be treated as a protected person in respect of the conviction for the purposes of the 1974 Act and for the conviction to be treated as spent for the purposes of the 1974 Act: section 33 of the Management of Offenders (Scotland) Act 2019 ("the 2019 Scottish Act"), which came into force on 1 December 2020. "Relevant sentence" is defined in section 33(3). The concept includes a sentence of imprisonment imposed for an offence specified in Schedule 18 for a term exceeding four years, but does not include a sentence of imprisonment for life. Section 33(4)-(5) of the 2019 Scottish Act states that any regulations made under that Act must contain certain provisions, including excluding someone subject to notification requirements under Part 2 of the SOA 2003 from making an application and preventing an application from being made until the expiry of "the appropriate period" (which, in the case of an individual who was aged 18 or more at the date of conviction, is the term of the sentence imposed plus six years).

31. To date, the Scottish Ministers have not exercised their power under section 33 to make regulations. The existing regime under the 1974 Act continues to apply.

32. In 2010 responsibility for policing and justice in Northern Ireland was devolved to the Assembly and the Department took the lead on policy development. The affidavit evidence filed by the Department asserts that there was no time available to address

legislative change in rehabilitation arrangements between April 2010 and the end of 2016 because of a busy legislative programme. The Assembly was suspended between January 2017 and January 2020. In 2020 the Department conducted a consultation on increasing the sentencing periods that could benefit from the non-disclosure arrangements under the rehabilitation scheme. However, the Assembly was again dissolved in March 2022 before any proposal was brought forward.

33. The Assembly began sitting again in February 2024. We were advised at the hearing by Mr McGleenan KC that it was the intention of the Minister to bring forward a proposal at the consideration stage of a Justice Bill at present in the Assembly extending the period of certain terms of imprisonment which would be capable of being treated as spent under the rehabilitation regime and introducing a process for individuals whose sentences were in excess of those terms to apply for those sentences to be treated as spent, having regard to the particular circumstances of their cases and the risk which they might pose. After the hearing it was explained that the Minister's proposal in relation to adult offenders is to extend the period specified in article 6(1)(b) of the Order from thirty months to ten years. In addition, in relation to sentences of imprisonment exceeding ten years, it is proposed that a general power should be conferred on the Department to make regulations which would allow applications case-by-case for an order that the conviction be treated as spent. No detail has been provided about whether, when or how that power might be exercised, nor about precisely which convictions would be brought within the ambit of that regime. The legislative proposals are currently out for consultation before being considered by the Assembly, which will decide whether to enact them or not.

34. In summary, it remains the case that at present in each part of the United Kingdom a line has been drawn identifying those sentences of imprisonment in relation to which the conviction is to be treated as spent and which the offender can choose not to disclose, while leaving other offences with sentences which fall on the wrong side of the line outside that rehabilitation regime. For offences in the latter category there is no mechanism available to the offender to apply for an individualised assessment to have them treated as spent for the purposes of the 1974 Act.

(5) Analysis under article 8 and the role of an appellate court

35. In a case like the present a first instance court and an appellate court each has a responsibility to assess whether there is a breach of article 8, including in particular by reference to the issue of proportionality of a measure having regard to its legitimate aim. The question whether a measure is proportionate so as to satisfy the requirements of article 8 is a question of law calling for assessment in the light of the facts of the case: *Safe Access Zones*, paras 30-34 and 66. As Lord Reed put it in *Safe Access Zones*, para 30, "[i]t involves the application, in a factual context … of the series of legal tests [set out in relevant authority: see para 41 below], together with a sophisticated body of case law …".

36. The type of measure in relation to which the question of proportionality may arise is very wide, ranging from individual action by a state official to provisions of general law enacted by the legislature. The factual contexts in which a question of proportionality may arise also vary widely. Where a first instance court has made an assessment of proportionality the question for an appellate court is whether that court's assessment is wrong: *R (Z) v Hackney London Borough Council* [2020] UKSC 40; [2020] 1 WLR 4327, para 74; *Safe Access Zones,* para 33. This is a standard which is capable of being applied flexibly, depending on the nature of the measure and the circumstances of the case: *Safe Access Zones*, para 33, referring to *Director of Public Prosecutions v Ziegler* [2022] AC 408, paras 102-103 (Lady Arden) and paras 129-140 (Lord Sales). Sometimes – in particular when a one-off decision is in issue which only affects persons involved in the proceedings, there is no controversy about the content and Convention compatibility of the general law which is applicable and the case turns essentially on a factual assessment of the circumstances which the lower court was particularly well placed to make – it will be appropriate for the appellate court to adopt an approach according to which it asks whether the lower court directed itself correctly and has had due regard to relevant matters, without any need to second guess that court's proportionality assessment if it has. But in other situations – in particular where matters of general principle are in issue or the question concerns the Convention compatibility and proportionality of general rules set out in legislation – it is the proper function of the appellate court to determine the question of proportionality for itself without deferring to the assessment made by the lower court, even if that court has directed itself correctly and its decision cannot be said to be unreasonable. Only by adopting this approach can the appellate court fulfil its function of providing general guidance on the law. For commentary, see P Daly, "Appellate Standard of Review in Public Law Cases" [2021] Public Law 334; P Sales, "Proportionality Review in Appellate Courts" (2021) 26 Judicial Review 40.

37. The proportionality assessment which is called for in the present case clearly involves a situation of the second type. In our view, therefore, the Court of Appeal erred in its approach. It should have made its own assessment of the proportionality of article 6 of the Order and its compatibility with the Convention without confining itself to examination of whether the judge had directed himself correctly and had reached a reasonable conclusion. However, as we explain below, that error of approach did not have a material effect on the proper outcome of the appeal.

(6) The compatibility of article 6(1) of the Order with article 8

(a) Negative and positive obligations under article 8

38. The appellant relies on his right to respect for his private life under article 8. Mr Southey's submission proceeded on the basis that the Order interfered with this aspect of the appellant's rights under article 8 in a disproportionate way because it imposed an

obligation on him, lasting his lifetime without the possibility of review, to disclose his criminal convictions whenever he is asked about them.

39. In our view, however, this is not an accurate statement of the effect of the Order; nor is the analysis proposed by Mr Southey in terms of the negative obligation on the state imposed by article 8 not to take steps which interfere with private life apposite. The Order does not impose any obligation on the appellant to disclose his convictions when he seeks employment or insurance. It is the general law which sets out the entitlement of employers and insurers to ask questions which they consider are relevant to any decision to be made by them whether to enter into contractual relations with an individual and which in the case of insurance contracts imposes on the person seeking insurance an obligation of utmost good faith and a duty to disclose information relevant to the risk. And it is the general law which forbids that individual from lying or giving a false impression when answering such questions or providing information with a view to obtaining a contract and attaches serious consequences in terms of both civil liability and criminal liability if they do. Similarly, if an individual gives evidence in court, the general law of perjury forbids them from giving false answers to questions they are asked.

40. The effect of the Order, when it applies in relation to a spent conviction, like the effect of the 1974 Act, is to disapply these general legal rules. The essence of the appellant's case is that the Order does not go far enough in providing a rehabilitation regime which disapplies the general law, in that it does not extend to cover his criminal convictions and so does not permit him to conceal them or give inaccurate answers when he deals with third parties, courts or public officials. In our view, therefore, on proper analysis, the complaint is more accurately analysed as one that the state has failed to comply with a positive obligation said to arise under article 8 to take steps to allow the appellant and other offenders in a similar position to omit to provide information about their criminal convictions when asked about them or to allow them to give inaccurate information about them to such persons and bodies, with the object of promoting their rehabilitation and re-integration into society.

(b) The approach to assessment of proportionality

41. Proportionality analysis in relation to the negative obligation under article 8 not to interfere with the right to respect for private life involves the four stages identified in *Huang v Secretary of State for the Home Department* [2007] 2 AC 167, para 19 (Lord Bingham of Cornhill), *R (Aguilar Quila) v Secretary of State for the Home Department* [2011] UKSC 45; [2012] 1 AC 621, para 45 (Lord Wilson), and *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 39; [2014] AC 700, 771, 791, para 20 (Lord Sumption) and para 74 (Lord Reed), among many other authorities, affirmed recently in *R (AM (Belarus)) v Secretary of State for the Home Department* [2024] UKSC 13; [2024] 2 WLR 1075 ("*AM (Belarus)*"), para 53, as follows: (i) is the aim sufficiently important to justify interference with a fundamental right? (ii) is there a rational connection between the

means chosen and the aim in view? (iii) was there a less intrusive measure which could have been used without compromising the achievement of that aim? (iv) has a fair balance been struck between the rights of the individual and the general interest of the community, including the rights of others?

42. In relation to each of these stages, a significant question may arise regarding the margin of appreciation to be afforded to the state or, in this case, the legislator in respect of the Order, in making the relevant judgment about what measure is appropriate to deal with the particular matter of concern being addressed. We return to this below.

43. Whether the appellant's claim in these proceedings is analysed in terms of positive or negative obligations may not be decisive, but it has some bearing on the matter: see paras 55-57 below. In both cases the legitimate aims identified in article 8(2) are relevant: see *Rees v United Kingdom* (1986) 9 EHRR 56, para 37; *Hämäläinen v Finland* (2014) 37 BHRC 55; Reports of Judgments and Decisions 2014-IV, p 369, Grand Chamber ("*Hämäläinen*"), para 65 (followed and applied in *R (Elan-Cane) v Secretary of State for the Home Department* [2021] UKSC 56; [2023] AC 559 – "*Elan-Cane*"); and *AM (Belarus)*, para 55. But wider considerations also come into play in relation to whether a positive obligation should be implied, in that a positive obligation will not be found to exist if it would impose a disproportionate or unreasonable burden on the state: *Hämäläinen*, para 66. In relation to both positive and negative obligations the ultimate question is whether a fair balance has been struck between the relevant competing interests in issue: *Dickson v United Kingdom* (2007) 46 EHRR 41, Grand Chamber ("*Dickson*"), paras 70-71 (discussion in the context of a claim by a prisoner to have access to artificial insemination facilities to have a baby with his wife); *Evans v United Kingdom* (2007) 46 EHRR 34, Grand Chamber ("*Evans*"), paras 75-76; *Hämäläinen*, paras 65-67; and see, in relation to analysis of positive obligations under article 8 in the immigration context, *Ali v Secretary of State for the Home Department* [2016] UKSC 60; [2016] 1 WLR 4799, para 32, and *AM (Belarus)*, para 55.

44. A proper understanding of how the Order operates is important to identify what the competing interests are in the present context so as to be able to assess whether a fair balance has been struck between them. It is clear from the 1972 Report (paras 17-21 above) that the rehabilitation scheme was devised so as to take into account and give significant weight to a range of factors: the gravity of the particular offence in the individual circumstances of the case; acceptability to the public of the degree of rehabilitation to be provided for, having regard to the gravity of the offence; the need for equity (and the perception of equity) as between offenders; and the need for the scheme to be reasonably simple and practical and well understood in its operation.

45. In terms of the legitimate aims set out in article 8(2), the balance to be struck by Parliament in the 1974 Act and by the legislator for the Order necessarily and most relevantly had to take into account the aim of "the protection of the rights and freedoms

of others", including those persons with whom an offender like the appellant seeks to enter into employment or a contract of insurance and the rights of other offenders to be treated equitably by comparison. Also relevant is the aim of "the prevention of disorder or crime", in that the less the extent of the rehabilitation scheme under which convictions can be treated as spent the more the deterrent effect will be in terms of potential offenders appreciating that serious consequences as to how they will be able to live their lives in future will be attached to their offending.

46. The major impact upon third parties of a conviction becoming spent under the rehabilitation regime, and the detrimental impact upon their rights and freedoms, should be emphasised. The basic principles of freedom of contract and the right of a person to make decisions for themselves about how to use their property and how to conduct their affairs are undermined when an offender is entitled to treat their conviction as spent. Where someone chooses whom to employ, ordinarily they are entitled to seek full information about the potential employee and to make their own decision whether they wish to engage them, including making their own assessment about whether they can be trusted and whether they might pose any kind of risk to the employer's business or property. Similarly, when an insurer is deciding whether to take on a particular risk they are entitled to seek to obtain whatever information they think is relevant and to make an informed assessment for themselves whether they wish to issue the insurance policy and put their own property on the line in that way. Yet where a conviction is spent, the offender is given the right to deny that he has committed an offence or withhold information about it, and thereby to that extent prevent the employer or the insurer from being able to proceed on an informed basis.

47. The Convention rights of employers and insurers under article 1 of Protocol 1 to the Convention (protection of property) are also engaged, in that the rehabilitation regime interferes with their right to decide how to use their property (to pay wages or to agree to meet insurance claims) and how to protect their assets on a fully informed basis.

(c) The margin of appreciation

48. There is a wide margin of appreciation for the legislator in the present context, in light of a number of relevant factors.

49. First, whether a rehabilitation regime of the kind set out in the 1974 Act and the Order should be adopted at all and, if it is, the extent to which the ordinary rights and freedoms of third parties should be qualified as they are under that regime in the interests of promoting the rehabilitation of offenders are difficult and sensitive questions. They call for judgments to be made about social policy, involving questions of moral and political judgment, which is very much the province of the legislature and in relation to which the margin of appreciation is wide: see, eg, *R (A) v Criminal Injuries Compensation*

Authority [2021] UKSC 27; [2021] 1 WLR 3746, para 83; *Evans*, para 77 ("where the case raises sensitive moral or ethical issues, the margin will be wider"); *Dickson*, para 78 (the margin of appreciation is wide where "complex issues and choices of social strategy" are in issue); *Hämäläinen*, para 67; *R (SC) v Secretary of State for Work and Pensions* [2021] UKSC 26; [2022] AC 223 ("*SC*"), paras 115(2), 118, 129(2) and 159.

50. Secondly, "where … there is no consensus within the Member States of the Council of Europe, either as to the relative importance of the interest at stake or as to how best to protect it, the margin will be wider": *Dickson*, para 78; *Evans*, para 77; *Animal Defenders*, para 123; *Hämäläinen*, para 67; *SC*, paras 115(3) and 129(3); *Elan-Cane*, paras 58-59 and 62. Mr Southey could point to no consensus among Member States that offenders who have committed very serious criminal offences should in all cases have the right to apply to have them forgotten, nor that the means of protection should take the form chosen in the 1974 Act and the Order (indeed, it appears that only the United Kingdom has chosen such means), nor that there must be an individualised approach adopted for every offender as opposed to a category-based approach of the kind used in the 1974 Act and the Order.

51. Mr Southey attempted to get around this problem by suggesting that there was an emerging consensus within the nations of the United Kingdom that a more generous rehabilitation regime than that in the Order should be adopted. He pointed to the developments in the law of England and Wales and Scotland referred to at paras 27-34 above. That argument is flawed: (i) common practice within the nations of the United Kingdom does not show that there is a consensus among Member States of the Council of Europe, which is the relevant factor affecting the width of the margin of appreciation; and (ii) in any event, there is no common practice among the nations of the United Kingdom which supports Mr Southey's contention in this case that article 8 requires that every offender, no matter how serious their offence, should be able to apply for an individualised risk assessment to determine whether their conviction should be treated as spent under the rehabilitation regime.

52. In fact, all the systems currently in place in the United Kingdom operate on the basis of categories of offence rather than on the basis of individualised assessments, albeit there has been some adjustment under the 1974 Act regarding where the lines dividing the categories should be drawn. That will also be the case in relation to any regulations which might eventually be introduced pursuant to section 33 of the 2019 Scottish Act (since life sentences are excluded from the regulation-making power: para 30 above); in any case, it remains to be seen whether and how the Scottish Ministers will exercise that power (they will have to decide what resources should be devoted to operating it and are able to choose a system based on categories of seriousness of offending to define which offenders should be entitled to apply for an individualised assessment).

53. Generally, there is no requirement pursuant to article 8 that the different nations of the United Kingdom should adopt the same approach to the issue of the rehabilitation. The relevant margin of appreciation applies to each legislature or legislator in those distinct nations which has to make the relevant choices as how to frame the rehabilitation regime which will apply in their jurisdiction. The point of analysing compliance with article 8 in terms of a margin of appreciation is that it allows for the adoption of different approaches, all and any of which can be compatible with article 8: see *Hatton v United Kingdom* (2003) 37 EHRR 28, Grand Chamber ("*Hatton*"), para 123; *Evans*, paras 91-92. Article 8 contemplates that different legislative solutions may be adopted in different jurisdictions, provided that each solution falls within the parameters of the relevant margin of appreciation. Also, "in areas of evolving rights, where there is no established consensus, a wide margin has been allowed in the timing of legislative changes": *SC*, para 115(4). In any event, although one could debate whether the lines defining the categories for convictions to become spent ought to be moved, that is not the challenge which the appellant has brought. His case throughout these proceedings has been that article 8 requires an individualised case-by-case assessment system. This contention is not sustainable.

54. Thirdly, "[t]here will also usually be a wide margin if the State is required to strike a balance between competing private and public interests or Convention rights": *Evans*, para 77; *Dickson*, para 78; *Hämäläinen*, para 67. As explained above, the need to strike such a balance is a central feature of the rehabilitation regime under the 1974 Act and the Order: see paras 45-47 above.

55. Fourthly, factors of particular relevance in the context of an allegation that it is implicit in article 8 that the state is subject to a positive obligation to introduce a different regime involving a new administrative process are the desirability of maintaining "the coherence of the administrative and legal practices within the domestic system" and the impact of the alleged positive obligation on the state, including consideration of "whether the alleged obligation is narrow and precise or broad and indeterminate, or about the extent of any burden the obligation would impose on the state"; *Hämäläinen*, para 66; *Elan-Cane*, paras 34 and 51-55. In that regard, an aspect of the public interest which is relevant to the assessment whether a fair balance has been struck between the rights of individuals and the interests of the general community is the need to maintain public confidence in the criminal justice system, on which the rehabilitation regime has a bearing, and in the fairness of the regime itself: the 1972 Report fairly took these matters into account. Mr Southey's submission is that article 8 imposes an obligation on the state to introduce a different regime based on a new and much more elaborate, burdensome and costly administrative system to enable any offender, no matter how serious their offence, to apply for periodic individualised reviews to determine the level of risk they pose and whether their convictions should be treated as spent.

56. A relevant objective in devising the rehabilitation regime, and one which featured prominently in the 1972 Report, was that it should operate in as clear, simple and practical

a manner as possible. The use of a category-based approach, having regard to the gravity of the individual offence as reflected in the sentence passed, was designed to achieve this. It "served to promote legal certainty and to avoid the problems of arbitrariness and inconsistency inherent in weighing, on a case by case basis", and a general interest of this sort pursued by the legislation in question is "legitimate and consistent with article 8": *Evans*, para 89; *Animal Defenders*, para 108; *Murphy v Ireland* (2003) 38 EHRR 13, para 77; *MC v United Kingdom* (2021) 74 EHRR 24 ("*MC*"), concerning the compatibility with article 8 of the disclosure by state authorities of an individual's previous convictions under the excepted employment provisions of the rehabilitation regime, para 53 ("General measures in this field are … likely to help to avoid arbitrary outcomes which could occur were disclosure to be decided on a case-by-case basis, necessarily leaving some discretion to individual decision-makers"); see also the discussion of the legitimacy of adopting clear or bright-line rules in appropriate contexts in the judgment of Lord Sumption and Lord Reed in *R (Tigere) v Secretary of State for Business, Innovation and Skills* [2015] UKSC 57; [2015] 1 WLR 3820, paras 88-91 (although this was a dissenting judgment as to the result in that case, the general points made in these paragraphs are valid and of general significance: *R (Z) v Hackney London Borough Council*, para 85). These are matters which are directly relevant to maintaining public confidence in the rehabilitation regime, so that it is not discredited and liable to come under public pressure to be withdrawn. They are also directly relevant to ensuring fair treatment within the class of previous offenders and maintaining their confidence in the system, which are also legitimate public policy objectives relevant to the assessment of the fair balance which is the ultimate test for compliance with article 8.

57. In our view, avoidance of arbitrariness and inconsistency is a factor of significant weight in the present context. The assessment on an individualised basis of the current risk posed by an offender who may have been released from prison many years, perhaps decades, previously would be very difficult and would carry a high risk of arbitrariness and inconsistency as between offenders with apparently similar cases. What would be the evidence presented? How could it be tested? Outcomes would be likely to depend on the random chance of whom in the community an offender might be able to persuade to provide references for them regarding the general conduct of their lives after release from prison. Such an assessment of risk would be likely to be far more difficult, and pose a greater risk of arbitrariness, than an assessment of risk by the Parole Commissioners, which takes place on the basis of evidence compiled after close scrutiny of an individual while in detention. Also, the cost and the administrative burden of setting up and operating a risk assessment body to handle what would be likely to be a stream of applications from released offenders would potentially be high. These matters were treated as significant considerations by the European Court in the *MC* case, para 52 ("… it is of importance whether a case-by-case examination would give rise to a risk of significant uncertainty, litigation, expense, delay, discrimination or arbitrariness") and para 53.

58. Fifthly, there has been careful policy consideration of how the rehabilitation regime should be structured, taking into account all the competing interests and relevant considerations: see the 1972 Report, which was considered in Parliament and led to the

1974 Act and the Order. The margin of appreciation is narrowed where legislation is introduced with no consideration of the relevant issues: *Hirst v United Kingdom (No 2)* (2005) 42 EHRR 41, Grand Chamber, para 82, and *Dickson*, paras 79 and 82-85. The absence of consideration of a policy in Parliament may also have a tendency to narrow the margin of appreciation: see *Dickson*, para 83 ("since the policy was not embodied in primary legislation, the various competing interests were never weighed, nor were issues of proportionality ever assessed, by Parliament"). Conversely, where there has been careful policy consideration of the competing interests, particularly if accompanied by consideration in Parliament, the margin of appreciation is widened: *Hatton*, paras 123 and 125-128; *Evans*, para 86; *MC*, paras 52 and 54; SC, paras 180-185. In this case the legislature has actively sought to create a system which operates in a proportionate manner, having regard to the various interests at stake: see paras 17-22 above, and compare *MC*, para 55.

59. Although the 1972 Report and the legislative response to it were produced many years ago and there has been social change since then, the nature of the issues and the competing interests to be taken into account have not changed in any essential respect. There has been consideration of the operation of the rehabilitation regime from time to time in parts of the United Kingdom leading to comparatively small adjustments, but no fundamental change to its basic structure has been introduced (see paras 27-34 above). In particular, in no jurisdiction has it been thought right to introduce an individualised assessment system which Mr Southey submits is required.

60. Sixthly, the margin of appreciation will tend to be narrowed "where a particularly important facet of an individual's existence or identity is at stake": *Evans*, para 77; *Hämäläinen*, paras 66-67; *Dickson*, para 78. In *Dickson*, the ability to beget a child fell into this category, with the result that, along with other factors, the margin of appreciation was narrowed and there was found to be a violation of article 8: see paras 72 and 85. However, the appellant's situation is not within this category. His complaint is about how his relations with others are affected in the employment and insurance markets, not about a particularly important facet of his existence or identity being at stake; and see the *MC* case, concerning the same employment-related context, in which the European Court did not identify the individual interest in issue as being of this type. Further, when it is borne in mind that the ultimate question in terms of compliance with article 8 is whether a fair balance has been struck between relevant competing interests, it is highly relevant that the appellant was responsible for committing the serious offences of which he has been convicted and was thus responsible for placing himself into a position where potential employers and insurers might well be reluctant to deal with him. It is far from obvious that the state is subject to an obligation arising under article 8 to step in to protect the appellant from the natural consequences of his own actions.

(d) Fair balance and application of the approach in *Animal Defenders*

61. Mr Southey submitted that application of the proportionality test in para 41 above, in particular stage (iii), must lead to the conclusion that the interference with the appellant's private life which is produced by the application of article 6 of the Order in his case is not compatible with his rights under article 8, since an alternative regime could have been devised involving a right for the appellant to apply for an individualised assessment of the risk he poses to the public and this would have involved a less restrictive approach to interference with his rights under article 8. We do not agree. There are two difficulties with this submission.

62. In the first place, the proportionality test in para 41 above has been formulated specifically for cases where negative obligations under article 8 restraining the state from interfering with the rights in the provision are concerned. It cannot be applied in the same way and with the same rigour where the question is whether the state is subject to a positive obligation to take steps to assist an individual to enjoy those rights. Although, as the authorities explain, the ultimate question in both cases is whether a fair balance has been struck between the rights of the individual and the rights of others and the interests of the general community, where it is asserted that a positive obligation exists that question is addressed in a more general and less formalised way. For the reasons we have given, on proper analysis the appellant's case is that he is owed a positive obligation by the state to adopt a different rehabilitation regime from which he would be capable of benefiting.

63. In our judgment, having regard to the context, the extensive and onerous nature of the positive obligation for which the appellant contends, the appellant's own responsibility for the situation in which he finds himself and the wide margin of appreciation which is applicable, it cannot be said that the 1974 Act or the Order struck a balance which was unfair.

64. The second difficulty with Mr Southey's submission is that, even if the case fell to be analysed in terms of a negative obligation on the state under article 8, application of the proportionality test in para 41 above would not lead to the conclusion that the Order is incompatible with the appellant's rights under article 8. The submission is unsustainable in the light of the guidance given by the European Court in its important judgment in *Animal Defenders*. In that judgment the Grand Chamber recognised the need to accord a measure of discretion to the legislator when considering the proportionality of general rules in legislation.

65. *Animal Defenders* was concerned with the prohibition on political advertising in United Kingdom legislation. The applicant contended that this was incompatible with its right to freedom of expression under article 10 of the Convention. The United Kingdom submitted that although there was an interference with the applicant's rights the prohibition was a proportionate response to promote legitimate aims. The Grand Chamber held that in principle the state was only to be accorded a narrow margin of appreciation

in relation to restrictions on debates on questions of public interest such as the proposed subject matter of advertisements which the applicant wished to broadcast: paras 102-104. Nonetheless, it dismissed the complaint.

66. The Grand Chamber reasoned that a state can, consistently with the Convention, adopt "general measures which apply to pre-defined situations regardless of the individual facts of each case even if this might result in individual hard cases", distinguishing these from a prior restraint imposed on an individual act of expression: para 106. The case law of the European Court indicated that "in order to determine the proportionality of a general measure, the Court must primarily assess the legislative choices underlying it. The quality of the parliamentary and judicial review of the necessity of the measure is of particular importance in this respect, including to the operation of the relevant margin of appreciation …": para 108. It is primarily for the state to assess whether a general measure meets its aims; "[a] general measure has been found to be a more feasible means of achieving the legitimate aim than a provision allowing a case-by-case examination, when the latter would give rise to a risk of significant uncertainty, or litigation, expense and delay as well as of discrimination and arbitrariness. The application of the general measure to the facts of the case remains, however, illustrative of its impact in practice and is thus material to its proportionality": para 108 (omitting references). However, "the more convincing the general justifications for the general measure are, the less importance the Court will attach to its impact in the particular case": para 109. Then the Court said (para 110, omitting references):

> "The central question as regards such measures is not, as the applicant suggested, whether less restrictive rules should have been adopted or, indeed, whether the state could prove that, without the prohibition, the legitimate aim would not be achieved. Rather the core issue is whether, in adopting the general measure and striking the balance it did, the legislature acted within the margin of appreciation afforded to it."

67. In *Animal Defenders* it was legitimate for the state to seek to regulate political advertising by means of general rules enacted in advance. Even though the context indicated that in principle the margin of appreciation should be narrow, other factors applied to widen it. There had been a careful examination of the regime prior to legislating and approval of it in Parliament: paras 114-115 and 116. The prohibition was specifically devised to minimise the impairment of the right of expression in a minimum and proportionate way: para 117. The state had a rational concern that a system based on case-by-case examination could lead to uncertainty, litigation, expense and delay as well as to allegations of discrimination and arbitrariness, "these being reasons which can justify a general measure": para 122. There was no European consensus, so that broadened the margin of appreciation: para 123. The Grand Chamber did not consider that the impact of the prohibition upon the applicant in the particular case outweighed "the convincing justifications" it had referred to for the general measure: para 124.

68. In our view, the rehabilitation of offenders is obviously a context in which it is legitimate for a state to enact a regime in the form of a general measure, announcing in advance clear, generally applicable rules to cover all cases. It is desirable that society as a whole and offenders themselves should be able to understand clearly how the rehabilitation regime operates and that the scope for arbitrariness in its application should be minimised. Furthermore, unlike in *Animal Defenders*, the starting point is not in principle one involving a narrow margin of appreciation. The margin of appreciation in the present context is wide: see paras 48-60 above. The reasons for adoption of the legislation were carefully examined and are rational and persuasive. Since the complaint about the legislation in *Animal Defenders* was rejected in a context where there was a starting point of a narrow margin of appreciation, still more must it follow in the present case that the complaint regarding the legislation's incompatibility with article 8 should be rejected. The Court of Appeal was right so to hold.

69. The approach in *Animal Defenders* has been affirmed by the Grand Chamber in other judgments: *Lekić v Slovenia* (Application No 36480/07) judgment of 11 December 2018, Grand Chamber, paras 109 and 118; *Correia De Matos v Portugal*, (2018) 44 BHRC 319, Grand Chamber, paras 117 and 129. It is an established feature of the clear and constant jurisprudence of the European Court, affirmed at the highest level. It was applied by the European Court in the context of review of the rehabilitation regime under the 1974 Act and the Order in the *MC* case, paras 49-57. It has similarly been affirmed and followed at the highest level in domestic law: *Re P*, paras 48-61, and *Safe Access Zones*, paras 34-39.

70. Accordingly, in light of the guidance in *Animal Defenders*, in particular at para 110, in relation to the general measures at issue in these proceedings, it is not sufficient to argue that it might have been possible to devise an alternative rehabilitation regime based on a system of individual case-by-case assessments which would have allowed greater scope for the appellant to exercise or enjoy his rights under article 8. There were good and sufficient reasons for adopting the general measures contained in the 1974 Act as originally enacted and carried into the Order. The adoption of those measures fell well within the state's margin of appreciation and they are not incompatible with the appellant's rights under article 8.

71. In answer to this analysis based on *Animal Defenders* Mr Southey sought to rely on the Grand Chamber judgment in *LB v Hungary* (2023) 77 EHRR 1. That case concerned Hungarian legislation which required the tax authorities to publish the identity and address details of taxpayers with tax arrears, with a view to shaming them into paying their taxes. The applicant complained that this violated his right to respect for private life under article 8, in that it damaged his reputation. The legislative scheme provided for mandatory publication and did not allow for any discretion on the part of the tax authorities to review whether it was necessary, so that it was not possible to have an individualised proportionality assessment to weigh up the competing individual and public interests. The Grand Chamber affirmed that the approach in *Animal Defenders* was

applicable: the central question was not whether less restrictive rules should have been adopted, but whether the legislature acted within the margin of appreciation afforded to it in adopting the general measure and striking the balance it did: para 126 (citing and affirming para 110 of *Animal Defenders*, quoted at para 66 above); see also paras 128 and 130. The consideration by the legislature had not addressed the relevant issues and was defective: paras 131-135. The state had not demonstrated that the legislature sought to strike a fair balance between the relevant competing individual and public interests with a view to ensuring the proportionality of the interference: paras 136-138. The legislation therefore did not fall within the applicable margin of appreciation and constituted a violation of article 8: paras 139-140.

72. In our view, this judgment does not assist the appellant. The case was concerned with negative obligations under article 8, whereas the present case falls to be analysed in terms of whether there was an implied positive obligation in article 8 that the legislation should have enacted more generous protection for the appellant. In so far as the present case falls to be analysed in terms of negative obligations under article 8, *LB v Hungary* is an authority against the appellant, since it affirms that the correct approach to be applied is that in *Animal Defenders* and the critical question is whether the legislative solution falls within the margin of appreciation to be afforded to the legislator. The scope and operation of the margin of appreciation was central to the determination by the Grand Chamber: paras 118-140. Applying that approach in the present case, it is clear for the reasons set out above that the legislative regime is compatible with article 8.

(e) *Re F* and *Re P*

73. The analysis set out above is supported by the judgment of this court in *Re P* and is not undermined by *Re F*. The judgment in *Re F*, on which Colton J relied in his decision in these proceedings, was handed down in 2010, before the Grand Chamber promulgated its judgment in *Animal Defenders* and before many of the other important judgments of the European Court considered in our analysis above.

74. *Re F* was concerned with a complaint that the SOA 2003 was incompatible with the article 8 rights of a person who had committed certain sexual offences in that it imposed on him for an unlimited period certain obligations to notify the police of matters such as his travel plans. The complainant maintained that these obligations constituted a significant interference with his rights under article 8; that there was no justification for this if he no longer posed a significant risk of committing further offences; and that provision should be made for a system which allowed for periodic review of an individual's case. This court upheld the complaint and made a declaration of incompatibility under section 4 of the HRA. The SOA 2003 was then amended.

75. Lord Phillips of Worth Matravers gave the lead judgment. His analysis on the question of proportionality was based (para 17) on the three stage test set out by the Privy Council in *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69, 80, although he also made reference to *Huang*, para 19. He emphasised the narrowness of the issue the court understood it had to decide: para 41. In terms of the proportionality analysis, the court simply asked how valuable the notification requirements were in achieving the legitimate aims of the system and to what extent would that value be eroded if they were made subject to review? This is a narrower framing of the relevant inquiry than the later mature jurisprudence of the European Court, in particular *Animal Defenders*, indicates is appropriate. Lord Phillips did not analyse the position with reference to the ambit of the margin of appreciation, as the Strasbourg jurisprudence now makes clear is a critical consideration.

76. In our view, *Re F* does not provide assistance in the resolution of the present case and the Court of Appeal was right so to hold. The relevant analysis has to proceed with reference to the relevant and up-to-date Strasbourg jurisprudence, as set out above, and with proper consideration of the margin of appreciation. Moreover, *Re F* was analysed as a case concerned with the negative obligations on the state under article 8, whereas the present case is properly analysed as being concerned with an alleged positive obligation on the state.

77. *Re P* was concerned with the rehabilitation regime in the 1974 Act and the Order, and in particular the operation of the excepted employment provisions. The claimants submitted that the requirement to provide information to prospective employers pursuant to those provisions was in breach of their rights to respect for their private life under article 8 in that the provisions were too uncertain in their effect to satisfy the "in accordance with the law" requirement in article 8(2) and that they were disproportionate in their effect, in that they did not provide a mechanism for the independent review of whether disclosure was required. In this court the leading judgment was given by Lord Sumption. The court analysed the case as one involving negative obligations under article 8, there being no submission that analysis in terms of a positive obligation might be more apposite. The court held that the legislation satisfied the tests of accessibility and foreseeability implicit in the "in accordance with the law" requirement and at paras 48-61 applied *Animal Defenders* to conclude that in its essential features (and subject to two exceptions referred to at paras 62-64) the legislative scheme was proportionate in its effects and compatible with the claimants' rights under article 8. Lord Sumption's reasoning was subject to careful review by the European Court in the *MC* case and was approved.

78. At para 50 Lord Sumption said that "the legislative schemes governing the disclosure of criminal records in England and Wales and Northern Ireland provide as good an example as one could find of a case where legislation by reference to pre-defined categories is justified." We agree. Lord Sumption proceeded to give four main reasons for taking that view, not all of which apply or apply with equal force in the present context.

But his basic underlying point that legislation of this kind can legitimately be framed by reference to categories rather than providing for a system of case-by-case reviews is surely correct. We have analysed the position above.

79. The first reason given by Lord Sumption was that it is appropriate that the final decision about the relevance of a conviction to an individual's suitability for some occupations should be that of the employer, and "it cannot be right to say that as a matter of law the United Kingdom must have a scheme of disclosure which depends on an examination of the circumstances of individual cases by someone other [than] the employer": para 51. Lord Sumption's focus was on consideration for employment in those occupations covered by the excepted employment provisions, but the point has wider significance as well: see paras 45-47 and 54 above.

80. Lord Sumption's second reason (para 52) related to the responsible approach to employment decisions likely to be adopted by public sector employers and is specific to the issue before the court in *Re P,* but he concluded that even there "for as long as the employer has the ultimate right to decide … the risk that some employers may take too absolute a line is inescapable", in other words it is an acceptable price to pay for having a clear and practically workable scheme.

81. The third reason (para 53) was that "in this context, the value of certainty is particularly high". This accords with the consideration given to the proposed regime in the 1972 Report and, as Lord Sumption put it (para 54) "goes to the whole purpose of the scheme", including "to enable candidates [for employment] themselves to know what is disclosable, in the first instance by themselves". We agree that the value of certainty is high in the present context, as did the European Court in *MC*, para 53. More importantly, however, the legislator for the 1974 Act and the Order could rationally and legitimately take that view; see *MC*, para 54. Where the value of certainty is high, adoption of a legislative regime based on clear pre-defined categories of the kind discussed in *Animal Defenders* is bound to be a natural approach which the legislator is likely to consider.

82. Lord Sumption's fourth reason (para 54) was that important issues regarding the practical workability of the scheme indicated that a category-based approach was legitimate; and see *MC*, para 53. A system of individual assessment would pose significant difficulties in terms of assessment of the evidence which would be adduced. This is a significant factor in the present context as well: paras 55-57 above.

83. Since a category-based regime was found to be justifiable in *Re P*, the question then became one of where the relevant category-based lines should be drawn. Lord Sumption applied the principles set out in *Animal Defenders*, taking account of the relevant margin of appreciation in light of the quality of the consideration of the legislative scheme and the absence of consensus where the lines should be drawn: para

60. As we have explained, both these factors are relevant in the present case, indicating that a wide margin of appreciation is to be afforded to the legislator. The choices which the legislator had made fell within the margin of judgment or appreciation allowed to the legislator: para 61, endorsed in *MC* at para 54.

84. The approach of Lord Sumption in *Re P*, approved by the European Court in *MC*, is in line with and supports that which we have set out above. The Court of Appeal was right to conclude that *Re P* indicates that the article 8 complaint in the present proceedings should also be dismissed.

(f) Conclusion on the compatibility of the Order with article 8

85. For the reasons we have given, the regime in the Order strikes a fair balance between the rights of the appellant, the rights and freedoms of others and the interest of the general community. Adoption and application of the regime falls within the margin of appreciation which is applicable in this context. Accordingly, the Order is not incompatible with article 8 and the Court of Appeal was right so to hold.

86. We would add that acceptance of the appellant's complaint under article 8 would go well beyond the existing case law of the European Court. Therefore, even though our view above does not depend on this, the complaint also falls to be dismissed by this court because we can have no confidence that the European Court would find that it was made out. As was explained in *R (AB) v Secretary of State for Justice* [2021] UKSC 28; [2022] AC 487, para 59, it is open to domestic courts to develop the law in relation to Convention rights beyond the limits of the Strasbourg case law, on the basis of the principles established in that law. They should not, however, go further than they can be confident that the European court would go: para 57. That test is far from being satisfied in this case.

(7) The test for grant of a declaration of incompatibility

87. Although the overall conclusion arrived at by the Court of Appeal is correct, we would not endorse the part of their reasoning based on what it called the ab ante (ie prospective) nature of the challenge and the judgment of this court in *Christian Institute*. With respect to the Court of Appeal, they have elided two very different issues.

88. The issue in *Christian Institute* concerned the test to be applied in relation to the legislative competence of the Scottish Parliament to enact legislation which is said at the time of enactment to be incompatible with Convention rights. The Scottish Parliament is not able to enact legislation which violates Convention rights. Where complaint is made at the time of enactment that the legislation is outside competence, this is a true ab ante

challenge in which it is said that the relevant law must be struck down in its entirety. In such a case the judgment regarding the validity of the law has to be made looking forwards and having regard to the whole range of cases in which it may fall to be applied. To strike it down on the basis that it might violate Convention rights in some cases but not others would involve a major interference with the legislative competence granted to the Scottish Parliament, since ex hypothesi the legislation would be valid in relation to the latter category of cases and there would be other remedial options available to deal with any incompatibility with Convention rights in the former category, including by reading down the legislation pursuant to section 3 of the HRA (see *R (Z) v Hackney London Borough Council*, para 114) or simply disapplying it in any such case. Accordingly, in *Christian Institute* this court stated that the relevant test is that a provision of devolved legislation enacted by the Scottish Parliament can only be said to be beyond legislative competence on the ground that it is a disproportionate interference with a Convention right if it would always, or almost always, have that effect, ie across the whole range of cases in which it will apply. As is clear, this is a test which supports and gives substance to the legislative competence of the Scottish Parliament. It is not to be caught out and its legislation deprived of all effect just because there may be some group of cases in which it might be said its impact would be disproportionate.

89. The same issue arises in relation to an ab ante (prospective) challenge to legislation passed by the Assembly which is said to be outside its competence on grounds of incompatibility with Convention rights. The relevant test to be applied was discussed in *In re McLaughlin* [2018] UKSC 48; [2018] 1 WLR 4250; [2019] NI 66. In that case, a different formulation was proposed, according to which it is sufficient for the complainant to show that the relevant law will inevitably operate incompatibly in a legally significant number of cases. Application of this test would undermine the validity of devolved legislation and hence interfere with the legislative competence of the devolved legislature to a much greater degree than by application of the test in *Christian Institute*.

90. This court examined the two formulations in *Safe Access Zones* and ruled that the proper test is that stated in *Christian Institute*: paras 12-19. As we have explained in para 88 above, this test recognises and gives substance to the intention of the UK Parliament in passing the devolution legislation that the devolved legislatures should have full legislative competence in all cases save to the extent that it is clearly established that the legislation they pass violates Convention rights.

91. However, the important point for present purposes is that the nature of the challenge to the legislation in this case is quite different. The Order was promulgated before the Assembly was established in 1998 as part of the devolution arrangements put in place at that time. Accordingly, the Order was not legislation passed by the Assembly and the question whether it is within its legislative competence does not arise. In this case, it is said that application of the Order to the appellant violates his rights under article 8, not potentially in the future but now and in the past. It is said that a declaration to that

effect should be granted. This is not an ab ante challenge to the legislation in the proper sense of that term.

92. If, contrary to our judgment, the appellant had made out his complaint of incompatibility, a distinct question would have arisen regarding what form of declaration should be granted: should it just address the specifics of the appellant's case or should it declare that article 6(b) of the Order is incompatible with the Convention rights of any offender? If, at the point of granting a remedy, the court can see that the Convention rights of any individual who is in the same class of persons as the individual claimant must inevitably be violated by the same provision which has been applied to the claimant, it may be appropriate to grant a declaration that the provision is generally incompatible with Convention rights of that whole class rather than limiting the declaration to say that it is incompatible with the Convention rights of the claimant in the particular circumstances of the case. Compare, for example, the discussion in *R (Bibi) v Secretary of State for the Home Department* [2015] UKSC 68; [2015] 1 WLR 5055, paras 60, 76 and 101-104. This is a question regarding the appropriate remedy in relation to an established breach of Convention rights in an individual case. An assessment to support a wider form of declaration would involve looking across the whole range of cases in which the provision would fall to be applied, including in future, and in that limited sense it has an ab ante aspect. But it does not follow from this that the test of whether the provision is incompatible with the Convention rights of the claimant is the highly deferential test applied in *Christian Institute*, as the Court of Appeal thought was applicable in this case. The test applicable in this case to identify whether the Order is incompatible with the appellant's rights under article 8 is the conventional test (or tests) addressed above.

(8) The availability of a common law declaration of incompatibility and the devolution context

93. The United Kingdom Parliament and the three devolved legislatures in Northern Ireland, Scotland and Wales are continuously involved in the development, revision and amendment of legislation. Although in each case an application may be made to the court for a ruling that a piece of existing or proposed legislation is incompatible with the Convention rights set out in the HRA, the relevant statutory provisions in play and the consequences of a successful challenge differ.

94. In the case of Parliament dealing with primary legislation, section 4 of the HRA provides for a declaration of incompatibility by the court. Section 6(1) states that it is unlawful for a public authority to act in a way which is incompatible with a Convention right but section 6(2) preserves the sovereignty of Parliament by excluding section 6(1) if the authority is required to act incompatibly because of primary legislation. Section 10(2) empowers a Minister to make a remedial order to address the incompatibility if a declaration of incompatibility has been granted.

95. It is not unusual to find that litigation concerning the substance of a Bill is ongoing while the Bill is being drafted or debated in Parliament. The responsible Minister may have concluded that the Bill is compatible with the Convention or that the Bill should become law despite any incompatibility. If a declaration of incompatibility is then made after the Bill has been enacted, the Minister will want to consider the reasons for the incompatibility and has the option of a remedial order if it is decided that the incompatibility should be remedied. The process is designed to facilitate the effective operation of Parliament by avoiding the delay that would be incurred if primary legislation had to be amended by means of new primary legislation.

96. We are not dealing with a case in which a declaration of incompatibility can be granted under section 4 of the HRA. But, as with the United Kingdom Parliament, there will be cases where legislative proposals are under consideration in one of the devolved legislatures while challenges to the compatibility of existing laws are ongoing. If the court hearing such a challenge reaches a conclusion that the existing law is incompatible with Convention rights there is no good reason why it should not make that clear in its judgment; and, indeed, it may assist the legislature in its consideration of the matter before it to know what the court's view is.

97. However, the issuing of a formal "declaration of incompatibility" other than under section 4 of the HRA served no proper purpose in the present case. A declaration is a discretionary remedy and the exercise of the discretion whether to grant one should accord with general principles. As explained above, a declaration made under section 4 has a legal function as a trigger for the operation of the powers under section 10, but what has been described as a common law declaration in the present case does not have that function or effect. A formal declaration issued by a court is a declaration of rights under domestic law. However, if section 3 of the HRA does not authorise a conforming interpretation of a provision of domestic law, if section 6 of the HRA does not apply to make conduct of a public authority which is incompatible with Convention rights unlawful in domestic law and if no issue regarding validity of action under the devolution legislation arises then properly speaking the Convention rights play no role in domestic law. For a court to issue a formal declaration pronouncing on certain rights which do not apply and have no role in domestic law would ordinarily be inappropriate. We note that the position may be different where a declaration is issued as a fall back in circumstances where some other relief might otherwise be appropriate in relation to the application of Convention rights as rights in domestic law: see *Re P*, paras 66 and 67. See the discussion in *R (T) v Chief Constable of Greater Manchester Police* [2014] UKSC 35; [2015] AC 49, paras 54-66 (Lord Wilson) and 146-157 (Lord Reed): further consideration of this issue may be required in an appropriate case. In *Re P* the declarations were granted as they would assist in the practical implementation of the scheme in certain respects. But that is not this case. Mr Southey did not indicate any practical purpose which would be served by a "common law declaration". It is sought simply as a hypothetical advisory opinion from the court, which is not the function of a declaration. In our view, the judge was wrong to grant such a declaration in the circumstances of this case.

98. By contrast, there is an appropriate procedural mechanism to test the Convention compatibility of devolved legislation. Acts of the Assembly, like those of the Scottish Parliament and Welsh Senedd, are secondary legislation. The legislative competence of these bodies is defined in the governing statutes, in this case the Northern Ireland Act 1998 ("the NIA"), and as we have mentioned above legislation is outside legislative competence of each of the devolved institutions if it is incompatible with any of the Convention rights.

99. Section 11 of the NIA provides for scrutiny of the legislative competence of a devolved Bill by the Supreme Court if it is referred by the Advocate General or Attorney General within four weeks of the passing of the Bill and there are similar provisions in respect of each of the devolved legislatures. Where section 11 of the NIA is engaged there is a measure of delay, but if the Supreme Court concludes that there is an incompatibility the Bill is returned to the Assembly and can be promptly remedied.

100. Where, as here, there is a judicial review challenge on human rights incompatibility grounds to a piece of legislation which a devolved Minister is considering for amendment the Department suggested that the process of enactment of devolved legislation was likely to be unduly delayed by the litigation. It is undoubtedly true that if a Bill were passed without reference to the Supreme Court under section 11 and there was a subsequent finding of incompatibility it would be necessary to return to the Assembly with an amendment Bill and delay would be the result. On the other hand, if the proposed Bill is submitted to the Assembly by a Minister who believes the proposal to be Convention compliant and is passed while the litigation is ongoing, the section 11 process would be available to the law officers and a direct route to the Supreme Court achieved, potentially avoiding further stages of litigation.

101. Although there is a measure of increased complication in these arrangements, for those engaged in the process of law making there are many exercises of discretionary judgement which inform the pace of legislative reform. This is but one example of the issues that may need to be addressed.

(9) The challenge to the damages decision

102. Since in our judgment the application of the Order to the appellant does not violate his Convention rights, it is not necessary to consider what damages (if any) should be awarded if it did. Nor do we think it would be helpful or appropriate to do so.

(10) Conclusion

103. For the reasons we have given, which differ in certain respects from those given by the Court of Appeal, we would dismiss this appeal.