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‘TOO WELL-TRAVELLED’, NOT WELL-FORMED? THE REFORM OF ‘CRIMINALITY INFORMATION SHARING’ IN THE UK

The UK Supreme Court will eventually have to pass judgment on the compliance of the legal and policy framework for ‘criminality information sharing’ with the stipulations of Article 8 of the European Convention on Human Rights, and perhaps in relation to more than one area of practice within public protection work. Parliament should recognise that there is a groundswell of judicial (and academic) opinion which suggests that, if the current legal framework regulating the sharing of information for the purposes of public protection is lawful, even in the face of criticism from the European Court of Human Rights, then an intolerable level of uncertainty as to the issue of that legality has now been reached.

This paper addresses the root causes of this legal uncertainty, and argues for statutory reform to revisit even recent tinkering with the law in this area. In an overview of both a body of common law, in the form of a series of key decisions from the courts, as well as the tensions between two tracts of legislation, promoting public protection and human rights values occasionally at odds with one another, this piece examines the crucial issue of the retention of criminality information and the idea of individual (offender) consultation over its use in public protection work.

Keywords: Information, criminality, public protection, law, human rights, policy, judicial review

Introduction: The Issue of Stigmatisation

The Court of Appeal has recently scrutinised, and criticised, the manner in which the criminal justice system can ‘silo’ information about individuals and their past bad behaviour – convictions, cautions, prosecutions and arrests, etc. – and how some of this information is shared outside the criminal justice system, e.g. with potential employers, even when that information is relatively ‘historic’ or ‘trivial’ in terms of its currency or seriousness.¹

The Supreme Court will perhaps offer up another indictment of the way that the aims of the Rehabilitation of Offenders Act 1974 is frustrated in certain employment, or ‘public protection’, contexts. Lord Dyson, Master of the Rolls, has gone so far as to note (extra-judicially) that the government needs to ‘pull its finger out and introduce legislation’ to address the way the criminal justice system does nothing to address long-term, inappropriate stigmatisation of some individuals.² But how have we reached such a controversial position from the courts?

This paper is an overview of the way that the law relating to ‘criminality information sharing’ (CIS) for public protection purposes has developed in a piecemeal fashion. It is also a call for systemic reform of the law in this arena of public responsibility. This is because unacceptable stigmatisation can result for some individuals from the permanency of indefinitely retained ‘criminality information’ which is in reality only ‘quasi-criminal’, such as the details of allegations of criminality, as well as other peripheral categories.

Criminality information sharing in England and Wales is a conflicted issue in need of a more certain and transparent legal ‘framework’ or ‘landscape’ (Thomas & Walport, 2008). The competing interests are those of individual personal privacy (and corresponding freedom from subjective privacy harms) (Calo, 2011) and the wider issues of public protection.³ It has been acknowledged in sociological research that individuals try to reduce their own levels of stigmatisation through deliberate steps (Goffman, 1968).

The Context of Criminality Information Sharing (CIS) Across Institutions in England and Wales

As well as the disclosure of criminal convictions and other ‘police intelligence’ stigmatising offenders in the employment context, personal privacy issues arise from the processes of personal information *sharing* across the criminal justice system in England and Wales, which can involve information being shared in prosecutions, for example where personal information is used as evidence in criminal trials, potentially as items of hearsay evidence⁴ and bad character evidence.⁵ Both hearsay evidence and bad character evidence in criminal trials are regulated by a codified statutory framework in the form of provisions of the Criminal Justice Act 2003.⁶ This framework has seen recent judicial approval, while in comparison the framework for criminality information sharing has been much criticised as unobtrusive.⁷

The courts have recently had many occasions on which to scrutinise personal information *sharing* within a diverse array of public authorities in the context of health and social care, as well as other types of employers, by the police and other criminal justice agencies⁸ in England and Wales.

This sharing takes place chiefly to further the aims of public protection.⁹ Information sharing also occurs across the criminal justice system in relation to the aims of probation organisations,¹⁰ and prison authorities, as well as a growing European dimension to information sharing across criminal justice systems,¹¹ including England and Wales.

Association of Chief Police Officers (ACPO) guidance uses the idea of sharing ‘public protection information’ to represent a professional and institutional ethos concerning public protection for policing authorities.¹²

Indeed, Sir Ian Magee,¹³ has it that the timely and appropriate sharing of information about ‘risky’ individuals across and outwith the criminal justice system creates ‘public protection networks’ (PPNs) (Magee, 2008: 14). Magee also describes this ‘police intelligence’ as ‘criminality information’,¹⁴ though in the light of the legal framework, which uses terms like ‘personal data’,¹⁵ and ‘sensitive personal data’,¹⁶ as well as ‘personal information’,¹⁷ this is a further vagary of terminology, which demonstrates a difference in attitude, perhaps, between lawyers’ approaches to criminality information sharing and those of public protection professionals.

The Context of a Call for Reform of ‘Criminality Information Sharing’

This paper is concerned with the extent to which the European Convention on Human Rights requires the involvement of an individual on a practicable basis when information about their criminality, or alleged criminality, is being shared for public protection purposes. Since the organisations that make up the array of components within Magee’s ‘public protection networks’ (PPNs) (Magee, 2008: 14) are public authorities for the purposes of the Human Rights Act 1998, they must look to uphold the ‘right to respect for private life’ possessed by members of the public, which they are owed under Article 8 of the European Convention on Human Rights. Gross LJ has observed that ‘Art. 8 is now a well-travelled area of our law, perhaps too well-travelled’¹⁸ – but this well-travelled road has not brought the process of CIS to a place of clarity.

The law is unclear and recent statutory reforms have failed to add clarity to the law on the issue of individual consultation.

ACPO's recommended 'checklist' approach in CIS decision-making (ACPO, 2010b) laid out in their guidance, which is followed by senior police officers in justifying the decisions they take to share 'criminality information', features assumptions about the identity of an individual as an 'offender', but recent cases heard in the High Court and Court of Appeal have featured the sharing of allegations, not convictions, in contexts that are then highly stigmatising for individuals seeking or trying to retain employment in sensitive arenas such as childcare, health-care, education and social care, etc.¹⁹

Regardless of the terminology used in relation to 'criminality information' or 'intelligence' sharing, or the exact decision-making process concerned in a particular case of information sharing, there is a consistent and considerable stigma which may be attached to those individuals about whom the information is shared in an 'employability' context. The individual may perhaps not even have been charged with particularly stigmatising offences, let alone tried for or convicted of them. From an individualistic, 'rights-based' view, such as that required by the Human Rights Act 1998, as opposed to a purely societal one, this raises considerable (legal) difficulties.

For example, we can look to the case of *R (W) v Chief Constable of Warwickshire Police* [2012] EWHC 406 (Admin) for the sort of circumstance concerned. This case involved a school teacher of 'considerable experience' seeking work as a supply teacher, who will be effectively unemployable with a number of *unproven* serious allegations concerning his conduct recorded on the Police National Database – given their inclusion by a police authority on the Enhanced Criminal Record Certificate he needs to present as effectively 'clean' in order to find employment as a schoolteacher.²⁰ In dismissing the claim brought by W, having found that the decision to disclose the serious allegations in the ECRC had struck the right balance, Judge Gilbart QC did note that:

one must consider the serious effect which disclosure has upon his prospects of obtaining employment as a teacher of children, which should not be underestimated. I have no doubt that it has had a serious effect on him to pursue his career, not least because teaching was his chosen vocation. Disclosure does not prevent him obtaining employment, nor from obtaining employment in education, but it will prevent

him from doing so in situations where children or vulnerable adults are involved, and that may effectively exclude him from anything but adult education.²¹

But there are cases brought where allegations, and convictions, for far less serious incidents, relatively speaking, are denying people employment connected to their 'vocation' in a way that the Court of Appeal has now recently deemed unlawful.²²

State Surveillance, Databases and Public Protection

Dr Lindsay Clutterbuck has outlined the way that developing new intelligence gathering techniques within the Metropolitan Police was a 19th-century reaction to a threat, perceived or otherwise, posed by Irish nationalist extremists and other terrorist organisations of the day (Clutterbuck, 2002: 242–244). Today, electronic governance and 'dataveillance' (Clarke, 1988) depend on the effective deployment of information technology systems across operational organisations, boundaries and even legal jurisdictions.²³

The Police National Computer (PNC) and the Violent and Sexual Offenders Register (ViSOR) are two examples of multi-databases which are used operationally to provide 'police intelligence' on individuals that is used to affect decision-making that concerns those individuals, chiefly in the detection, investigation, prosecution and punishment of crimes, as well as parole and probation practices and decisions, and the wider employment vetting context (Pitt-Payne, 2009). Further, some databases, and risk assessment software that draws on databases, form part of the wider criminal justice e-governance context (for example, the Electronic Offender Assessment System, or e-OASys,²⁴ is used to 'process' 'personal data' and 'sensitive personal data' in a human rights-sensitive probationary context).

Enhanced Criminal Record Certificates (ECRCs) are, by the measure of the number of judicial review cases which target them as a disclosure method, the most contested instances of personal information sharing in the sense of the work of the criminal justice system (Pitt-Payne, 2009) and, specifically, the role of the police in divulging information to employers and volunteering co-ordinators in the vetting process, where children and vulnerable adults must be 'safeguarded'.

Timothy Pitt-Payne tells us that CIS may involve:

information about acquittals, or allegations that have never been the subject of the trial, or even about matters other than allegations of criminal conduct . . . In 2008-09, a total of

274,877 enhanced disclosures were given; and 21,045 of them disclosed soft intelligence (Pitt-Payne, 2009).

Kennedy LJ in *Woolgar v Chief Constable of Sussex Police* [1999] 3 All ER 604 asked how tensions between respect for private life, the issue of stigmatisation, and the importance of public protection as a policy issue might be resolved, noting:

Even if there is no request from the regulatory body, it seems to me that if the police come into possession of confidential information which, in their reasonable view, in the interests of public health or safety, should be considered by a professional or regulatory body, then the police are free to pass that information to the relevant regulatory body for its consideration.²⁵

For those individuals about whom stigmatising criminality information is shared, though, the law today, is both reassuringly and perplexingly more complex.

A key consideration in this issue, from the perspective of the individual, is the existence of the right to respect for private and family life contained in Art. 8 of the European Convention on Human Rights (1950),²⁶ and the interpretive jurisprudence of the European Court of Human Rights in Strasbourg.

This set of Europeanised, and Europeanising, privacy values has effect in UK law through the provisions of the Human Rights Act 1998, though the Human Rights Act 1998 will potentially be amended by a UK Bill of Rights²⁷ – perhaps losing some of the linking and ‘interpretive’ role between the courts in the UK and the European Convention on Human Rights, and hence Article 8 of the ECHR and the right to respect for a private life, as well as Strasbourg jurisprudence on privacy issues.²⁸

As for the issue of criminal records stigmatising convicted offenders, the former Minister for Justice, Ken Clarke, has announced proposed reforms to the Rehabilitation of Offenders Act 1974 framework – generally looking to reduce the time offenders must declare their criminal convictions as unspent, although not with regard to offenders who were imprisoned for lengthier prison sentences, starting at the level of four years’ imprisonment (Travis & Bowcott, 2012). The legal context to personal information (or ‘personal data’) sharing across the public sector, just as across the private sector, is also regulated by the provisions of the Data Protection Act 1998.

The notion of confidentiality and the legal action, or tort, known as the ‘misuse of private information’, as well as the doctrines of defamation, are grounds used to broadly protect personal privacy that have evolved in our courts. Suffice to say that when a public authority sharing information as part of a ‘PPN’ looks to its duties under statute, then these wider legal concerns fall away in circumstances where the public authority has shared personal information across the public sector. Such is the authority of statutory provisions when considered as legal duties or powers that further the aim of public protection. Importantly, there is a ‘public interest’ type of defence available with regard to any actions for breach of confidence, and the courts will always look to the common law police power to share information on the basis of a ‘pressing need’ even when there might be said to be a breach of confidentiality involved, given a situation of sufficient gravity.²⁹ The Court of Appeal has noted the impossibility of extending a tortious duty of care to the CIS process conducted by police authorities on a public policy basis.³⁰

One pertinent example of the different qualities of ‘criminality information’ versus more general ‘police intelligence’ is the operation of s. 115 of the Crime and Disorder Act 1998, which enables public authorities to share personal information with the police or another body, such as a local authority, when it is requested in connection with an application for an anti-social behaviour order.³¹ With regard to what can more certainly be described as ‘criminality information’ rather than mere ‘police intelligence’, specific statutory provisions in relation personal information sharing for criminal justice purposes in England and Wales includes those that underpin the Child Sex Offender Disclosure Scheme (Criminal Justice Act 2003 s. 327A).³²

The Police Act 1997 as amended, for example, includes provisions in s. 113B that govern the use of ‘police intelligence’, also known as ‘soft intelligence’, by police authorities in disclosing personal information as part of the compilation of Enhanced Criminal Record Certificates (ECRCs). This process is then governed by which information is ‘relevant’ to a particular employment vetting scenario and a consideration of what ‘ought to be included’ in an ECRC. Given the nature of this dual test as one based on both factual relevancy and a consideration of what is proportionate to disclose, and in the light of the extreme sensitivity of the ‘soft intelligence’ concerned, it is no surprise that the interpretations of these provisions by police authorities has been regularly contested in the courts.

A Critical Analysis of the Law of ‘Criminality Information Sharing’

The key right, freedom or legitimate interest at stake, since we are concerned with personal information sharing by a public authority for the purposes of the Human Rights Act 1998, is the Art. 8 ECHR right to respect for private life enjoyed by every data subject when their personal data is shared, as acknowledged by the leading case of *R (L) v Commissioner of Police of the Metropolis* [2009] UKSC 3. The right to respect for private life is ‘engaged’ by the sharing itself, and will be unlawfully ‘infringed’ (entailing an actionable breach of Human Rights Act 1998 s. 6(1)) unless that infringement is *legitimate, proportionate and necessary in a democratic society*.

Plainly, the sharing of personal data with the kinds of criminal justice, taxation and immigration agencies envisaged by the scope of this report is *necessary* in a democratic society – the Magee Report, as noted above, spoke in 2008 of the creation in the UK information society of ‘Public Protection Networks’ and emphasised their importance in safeguarding the public (Magee, 2008: 14).

The Data Protection Act 1998, with its implied powers to share information for public authorities, ensures a public authority is plainly acting legitimately as long as it accounts for the second schedule processing rule in relation to non-consensual sharing in terms of public protection responsibilities and interests in the avoidance of harm – which brings us to the notion of sharing information *proportionately*.

Proportionality or the lack thereof is a ground of judicial review of the actions and decisions of UK public authorities. It relies as a test of lawfulness on a measurement of the balancing exercise the relevant public authority has undertaken when deliberating the impact and harms on an individual or group of individuals when taking some action or decision with a particular motivation or purpose. *L* is a superb example of how this balancing exercise must be free of presumptions. It cannot be said, following *L*, that the safeguarding of children or vulnerable adults is a priority over the right to respect for private life an individual enjoys. Each potential personal data sharing decision must be analysed on its merits. To this end, the factual relevancy of the personal data that may be shared to the aims and outcomes of that sharing must be fully and demonstrably taken into account in any kind of ‘checklist’ approach to decision-making, as noted above. ‘Relevancy’ then, as a key notion within a test for proportionality, does not exist solely as a single leg of the

dual test in s. 113B of the Police Act 1997 in the ECRC ‘soft intelligence’ context, but in all personal information sharing contexts connected with the criminal justice system in England and Wales.

R (L) v Commissioner of the Police of the Metropolis [2009] UKSC 3 is the leading case in the area of ‘criminality information’ sharing (CIS) across the public sector, and emphasises that a truly balanced approach to decision-making must be taken to accord with the notion of proportionality, since Art. 8 ECHR rights of data subjects are engaged in this situation. There is also a requirement in the common law, now stemming from this leading precedent, that the subject of what we can term ‘criminality information’ be consulted where appropriate before information is shared.³³

H & L v A City Council [2011] EWCA Civ 403 demonstrates that the approach to sharing personal data in a context which sees Art. 8 ECHR rights engaged must be fair, balanced and proportionate. *H & L* was a case involving the proactive sharing by a local authority of information relating to criminal convictions – and in this case the Court of Appeal held that this required that the local authority in sharing the information should have sought to consult the data subject, H, before the sharing took place. However, in this case there was an acknowledged lack of factual relevance in the sharing of the sensitive personal data (i.e. no link between the role H was involved in and the nature of his convictions), and the case involved the proactive information sharing context, making consultation practically more feasible.

Lord Kennedy noted the importance of the consultation of the individual about whom the criminality information may be shared, saying: ‘Obviously in each case a balance has to be struck between competing public interests, and at least arguably in some cases the reasonableness of the police view [with regard to the disclosure of the information] may be open to challenge.’³⁴

In the contemporary context, Lord Munby gave an excellent summation of Article 8’s procedural requirements in *H & L*, noting that in information sharing cases there are: ‘standards of procedural fairness mandated in circumstances such as this both by the common law and by Article 8’.³⁵

Further, it could be implied that, in the context of sharing ‘personal data’, where the second schedule processing rules in the Data Protection Act 1998 (still of key concern in the s. 29 exemption for ‘crime and taxation’ context) include specific

consent-based processing options such as contractual agreements etc., as well as the additional option of processing (here, ‘sharing’) personal data because it is necessary to protect the vital interests of the ‘data subject’ – or necessary given the legitimate interests of the third party with which the personal data is shared (e.g. the police), though never where the processing is ‘unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject’ – that some processing and therefore sharing of personal data will be non-consensual and therefore occur without consulting the data subject concerned.³⁶ Of course, ‘proportionality’ will still be a vital factor in this rationale for non-consensual disclosure, given the ‘interpretive’ provisions of s. 3 of the Human Rights Act 1998, where in our particular information sharing contexts Art. 8 ECHR rights are engaged and therefore ‘read into’ statutory provisions by the UK courts.³⁷

In terms of more ‘organic’ criminality information sharing, away from the ECRC context, the case of *R (A) v B* [2010] EWHC 2361 (Admin) shows that it is unlawful for the police to share information with the employers of an individual, outside the ECRC process, where there is no evidence of a criminal act by the individual, only evidence of unusual (non-criminal) sexual behaviour. This case would suggest that the public authorities should only share evidence of particular offences/convictions where this would be done to protect the ‘vital interests’ of another person, in the safeguarding/public protection sense, rather than simply morally questionable behaviour. The Court of Appeal case of *R (C) v Secretary of State for Justice & Another* [2011] EWCA Civ 175 showed that some allegations will be relevant in sharing information to protect the public/safeguard children or vulnerable people, though again, proportionality is key. Proportionality and factual relevancy, as mentioned above, are the two legal tests from s. 113B of the Police Act 1997, the statutory provisions relevant in *C* since this is a ‘soft intelligence’ case involving the ECRC process. The emphasis on the core issue of ‘proportionality’ is unmistakable.

The requirement of consultation with subjects of ‘criminality information’ before the information itself is shared is thus an emerging requirement in the common law.

But, according to Wilson LJ we needn’t be too concerned ‘on behalf of Chief Constables’ as the common law ‘suggests the impracticability of any substantial degree of consultation between Chief Constables and applicants prior to issue of [Enhanced Criminal Record Certificates]’ since this requires

only, in Wilson LJ's view, 'a degree of consultation'³⁸ per Neuberger LJ in *R (L) v Commissioner of the Police of the Metropolis* [2009] UKSC 3 at para. 82.

Munby LJ highlights the key issue however, saying: 'Article 8 . . . has an important procedural component.'³⁹

The issue then is that there is no specific statutory guidance, or rather express statutory language, as to what an appropriate degree of consultation, to satisfy the proportionality requirement in CIS, might be in particular circumstances – and this is perhaps where statutory codification, or better, perhaps, a truly high degree of statutory specificity and protection of individuals' procedural rights to consultation, would be of real and meaningful assistance to Chief Constables and others responsible for the sharing of 'criminality information' across the public sector.

It is argued that there is only some limited procedural protection from severe stigmatisation in employment and other contexts because of a requirement of consultation with regard to the disclosure of unproven allegation and other 'soft intelligence' about individuals.⁴⁰

In the UKSC decision in *L*, it seems that Lord Neuberger (at para. 76) makes a distinction between 'public' criminality information, such as conviction data, and 'soft' or 'police' 'intelligence', which is best regarded as 'public protection information'. Lord Neuberger then notes that: 'Whether as a result of a conviction or a caution (which involves the person concerned having admitted committing the offence in question), there can be little doubt that the information in question will be accurate, and will have been sufficiently grave as to amount to a crime.'⁴¹

Following binding precedent set in *L*, Kenneth Parker J in *R (Thomas) v Chief Constable of Greater Manchester Police* [2012] EWHC 147 (Admin) says (at para. 47), in relation to the lack of discretion with regard to 'blanket' sharing convictions and cautions or warnings in an Enhanced Criminal Records Certificate (ECRC) under provisions of the Police Act 1997, that if he 'had not been so constrained' he 'would have found that the present system that allows no exceptions and provides no mechanism for review was disproportionate and not compatible with Article 8 . . .'⁴²

In his judgment Kenneth Parker J also notes the impact of the *Five Forces*⁴³ decision in enabling the indefinite retention of convictions, cautions or warnings, and other categories of 'unproven' criminality information.⁴⁴ Kenneth Parker J also

notes the calls made by Sunita Mason and others in relation to introducing a potentially more complex screening approach, which would then entail a less stigmatising approach for use by the public protection networks concerned with CIS.⁴⁵

Kenneth Parker J's comments in *obiter* though (at para. 35) are enlightened, and enlightening, as he said: 'A system that permitted exceptions would probably be more prone to error, but only marginally so if the criteria for review were themselves conservative and risk averse. The consequential improvement to the protection of Article 8 rights, on the other hand, would be likely to be substantial.'⁴⁶

Even with Kenneth Parker J giving permission to appeal to the unsuccessful applicant, Thomas, it is expected that we will see the kind of non-result demonstrated in *R (GC & C) v Commissioner of Police of the Metropolis* [2011] UKSC 21, concerning the lawfulness of the indefinite retention of information on the National DNA Database, where statutory provisions could not be successfully challenged, given the important doctrinal effect of Parliamentary sovereignty, though statutory guidance can be deemed unlawful and incompatible with Art. 8 ECHR, as it was in *GC & C*.⁴⁷

The Questionable Impact of the Protection of Freedoms Act 2012

The relevant reforming provisions of the Protection of Freedoms Act 2012 have recently been brought into force, but are not the final word in the debate over the appropriateness of a consultation requirement in the criminality information sharing (CIS) process.

There has been no introduction of an exclusionary principle relating to information based on the increasing age or relative triviality of information such as a 'spent' conviction, a more minor offence by category such as property or dishonesty-type offences (rather than violent or dishonesty offences), or cautions, warnings or even unproven allegations or unsuccessful prosecutions as 'soft intelligence' (which would still remain the concern of Kenneth Parker J in *T*, as above, therefore).

So our general conclusion, as above, is that there is a general duty to consult where practicable on an authority like a police body engaged in CIS, even through the ECRC creation process, because of developments in the common law under the influence of Art. 8 ECHR.

However, s. 79 PoFA 2012 abolishes the requirement for an ECRC to be sent to the 'registered person'. So the ECRC will

first be sent only to the individual it describes, rather than simultaneously to their prospective employer. An individual can then apply to an independent monitor for a review of the content of the ECRC as to the relevance of the information therein, and whether it ought to have been included (Police Act 1997 s. 117A as amended by PoFA 2012 s. 82).

The independent monitor must then ask the chief officer of the relevant police authority to review the stance they had on the relevance of the information, and whether it ought to have been included (Police Act 1997 s. 117A as amended by PoFA 2012 s. 82).

When this new process is inevitably tested in the courts, how will the common law consultation requirement created by the courts drawing on Art. 8 ECHR be seen in the light of these statutory reforms? This author suggests there are numerous ways to imply consultation or notification duties on policing authorities as possible options for a figurative High Court judge to consider in relation to the operation of the new statutory process. However, the most sensible in terms of practicality, efficacy and Art. 8 ECHR and Art. 6 ECHR compliance might be to place a consultation duty on the Independent Monitor at the ECRC review stage, and a separate requirement to consult on the police at the ECRC creation stage, and a duty on the police only to ensure the 'giving of reasons' at the ECRC review stage.

It remains to be seen how ACPO and statutory guidance on CIS will be amended in the light of the new statutory framework with regard to the creation, and now review, of ECRCs.

Remedying a Breach of Procedural Art. 8 ECHR Rights in Retrospect?

In the case of *Regina (Royal College of Nursing and others) v Secretary of State for the Home Department* [2010] EWHC 2761 (Admin), Wyn Williams J determined that a lack of prompt individual consultation in the barring process relating to individuals perceived as a risk to the public in the nursing professions was a breach of Art. 6 ECHR and potentially Art. 8 ECHR rights under the HRA 1998. Wyn Williams J suggested that:

I consider that it is the (often irreversible) detrimental effect of the inclusion in the list that makes the breach of Article 6 at the first stage of the process incurable by any of the measures later in the process which are designed to afford

a sufficiency of procedural protection to the person concerned.⁴⁸

But in some CIS cases, such as *R (B) v The Chief Constable of Derbyshire Constabulary* [2011] EWHC 2362 (Admin), there can be an acknowledgment from the judge in their *ratio* that procedural rights of consultation, afforded by the HRA 1998 and developed in the common law, can be breached but then also protected by some form of ‘consultation in retrospect’, or the recording of protest at the CIS process, though ultimately this is not something of great importance given the judge’s ultimate aim of upholding the legitimacy of a decision to share criminality information in order to protect the public.

It remains to be seen exactly how the kind of statutory provisions argued for here could be enacted, and how the courts might interpret these new practices, but there are still remaining concerns over the lack of genuine limiting principle on disclosure of criminal records, and the lack of an express *statutory* consultation requirement on police authorities.

The Issue of the Indefinite Retention of ‘Criminality Information’

In the Court of Appeal decision known as *Five Forces*,⁴⁹ five Chief Constables succeeded in arguing that the model of indefinitely retaining conviction data and ‘soft intelligence’ on the Police National was lawful despite arguments as to the curtailment of data protection rights and the human right to a private life. The Information Commissioner was unsuccessful in establishing that an earlier decision of the Information Tribunal was correct in declaring the PNC operation unlawful because of the indefinite retention of personal data of the most sensitive kind, known commonly and variously as ‘criminal records’, ‘criminality information’, ‘police intelligence’ or ‘conviction data’.

According to the Court of Appeal, the legislative basis of the national records system was such that the Data Protection Act 1998 and its interaction with other statutes enabling police ‘operational purposes’ afforded the notion of lawful operation to this system. Furthermore, the Court found that Article 8 of the European Court of Human Rights was not engaged with respect to the indefinite retention of the records concerned.⁵⁰

This point as to the (non-) engagement of Art. 8 ECHR rights through the retention of criminality information on a database of some kind is supported in *R (Catt) v Commissioner of Police of the Metropolis* [2012] EWHC 1471 (Admin).

In that more recent case, *Gross LJ*, in refusing the application for judicial review brought by the claimant, determined that it was possible to distinguish the retention of text-based information, namely the personal data describing Catt, recorded by police officers attending an anti-armaments industry protest, from the retention of photographs of protestors taken covertly by plain-clothes police officers, as in *Wood*.⁵¹ In *Catt*, *Gross LJ* was adamant that the retention of data recorded about a public event might comprise personal data for the purposes of the Data Protection Act 1998, but that its indefinite retention was allowed for by s.29 of the DPA, and that Art. 8 ECHR was not engaged by that indefinite retention, since the event was indeed public and the data gathered using visible policing methods, i.e. overt surveillance of a demonstration or protest. *Gross LJ* was also certain that if it *could* be said Art. 8 ECHR was engaged by the indefinite retention of such material on the databases of the National Domestic Extremism Unit, this retention was justified by the fact that the organising group which motivated the protest was one which included individuals who had committed criminal offences at protests and demonstrations, and thus the retention of the personal data was necessary for intelligence purposes. It is notable, however, that Catt, just like Wood, was not arrested, let alone prosecuted or convicted, in relation to any events at the protests or demonstrations concerned. As noted above, *Gross LJ* also cynically observed that, ‘Art. 8 is now a well-travelled area of our law, perhaps too well-travelled.’⁵²

It would be interesting to know what *Gross LJ* would make of the comments of Eady J in *R (T and R) v Commissioner of Police of the Metropolis* [2012] EWHC 1115 (Admin). T received a harassment notice from the police after she allegedly made a homophobic comment to the friend of a neighbour. R received a similar notice following a complaint from a woman, Ms A, whom he had previously had a relationship with, who alleged that he was causing her distress by calling her on the telephone.

Although dismissing the application for judicial reviewing, denying the two claimants the ability to have the records of their harassment notices deleted, on the basis that their retention was justified, Eady J was confident that Art. 8 ECHR was engaged, noting that ‘the reach of Article 8 is significantly broader than its wording would suggest if taken literally . . .’ and therefore, he thought, encompassed the retention of such quasi-criminality information.⁵³

What were the relevant paragraphs of a decision by the European Court of Human Rights in *S v UK* (2009) 48 EHRR 50 that led Eady J to determine so assuredly that the retention of data by the police would engage Art. 8 ECHR rights, when Gross LJ was equally certain in *Catt* that it did not? We must turn to *S v UK* (2009) 48 EHRR 50 in paragraphs at [66]–[67], where the European Court of Human Rights emphasised that: ‘the concept of “private life” is a broad term not susceptible to exhaustive definition . . .’ and to learn that Art. 8 ECHR:

. . . covers the physical and psychological integrity of a person. It can therefore embrace multiple aspects of the person’s physical and social identity... The mere storing of data relating to the private life of an individual amounts to an interference within the meaning of Art. 8. The subsequent use of the stored information has no bearing on that finding. However, in determining whether the personal information retained by the authorities involves any of the private-life aspects mentioned above, the Court will have due regard to the specific context in which the information at issue has been recorded and retained, the nature of the records, the way in which these records are used and processed and the results that may be obtained.

This author predicts that in the future the UK Supreme Court will have to deal with a judicial review case which seeks to determine the issue of whether retention of personal data by a police authority engages Art. 8 ECHR or not.

It is certainly noteworthy that in his judgment in *Catt*, Gross LJ did not refer to *S v UK* (2009) 48 EHRR 50, as Eady J did in *T and R*. This author feels a UKSC judgment on the issue of Art. 8 ECHR ‘engagement’ by the retention by the police of personal data could not be wilfully or mistakenly ignored by the High Court.

Furthermore, in some judgments since *Five Forces*, the accuracy of the data held on the PNC has been challenged in the context of its being shared.

In the case of *C v Chief Constable of Greater Manchester* [2010] EWHC 1601, the High Court judge presiding, Langstaff J, noted approvingly that the wording of the applicant’s data on the PNC had been amended to make it more accurate, and less distorting of the allegations made against C; though the primary

issue in the case was the (un)lawfulness of the allegations about C being shared.⁵⁴ This High Court decision was admittedly overturned in the appeal case of *C v Chief Constable of Greater Manchester* [2011] EWCA Civ 175, where the Court of Appeal determined that the allegations could in fact be shared lawfully, but there was no suggestion by the Court of Appeal that the amendment of the language of the entry on the PNC was an incorrect adjustment of the police records.⁵⁵

Furthermore, cases decided by the European Court of Human Rights have suggested that Article 8 ECHR is violated where an individual is incorrectly labelled as an offender in police records when they are not actually convicted or they have not even undergone prosecution.⁵⁶ This demonstrates that it can be argued that the retention of police records or ‘criminality information’ in some form will engage Article 8 ECHR rights to a private life for an individual, even if this is only where the retention of the data might perpetuate some inaccuracy or ongoing or lasting unfairness.

Conclusion

It is suggested that statutory (re)codification of the principles developed by the High Court, Court of Appeal and so forth on issues of personal information sharing across criminal justice organisations in England and Wales would allow for a greater raising of awareness amongst police authorities, rather than the steady progression of common law interpretations of a contested set of statutory provisions. To this end, it is also suggested that the part-reform of the relevant provisions in the Police Act 1997, given the introduction of the Protection of Freedoms Act 2012, will not be an entire, comprehensive solution to this lack of clarity. As noted at the outset of this piece, the Court of Appeal has very recently determined that the amended provisions of the Police Act 1997 are incompatible with Article 8 of the European Convention on Human Rights – which would lend a particular urgency to reform of the 1997 Act should the Supreme Court confirm this stance.⁵⁷

Better than the current framework for inclusion of information on ECRCs etc., on a potentially sweeping basis, would be the kind of semi-rigid, contextualisable frameworks or ‘gateways’ that would allow for the exemption and inclusion of certain kinds of category of information to be shared in certain contexts,⁵⁸ as seen in relation to hearsay and bad character evidence in the Criminal Justice Act 2003, which provide far

greater specificity and inherent guidance in statutory interpretation, as noted by Kenneth Parker J, for one.⁵⁹

Acknowledgment

The author is very grateful to the anonymous peer reviewers for their thoughtful comments on this piece in draft, as well as fellow members of the Society of Legal Scholars who suggested ideas for the piece at the Society's Annual Conference in Bristol in 2012.

Notes

1. See *R (T and JB) v Secretary of State for Justice* [2013] EWCA Civ 25.
2. See [Online] <<http://www.guardian.co.uk/law/2013/jan/29/criminal-record-checks-human-rights>> (29 January 13).
3. Public protection is a duty that falls upon any number of government agencies in myriad fields – and the work of public authorities in enhancing levels of public protection is usefully described in the complex mapping exercise conducted as empirical research in Bellamy *et al.*, 2008. The everyday co-ordination of CIS across the UK in the employment 'safeguarding' context is assisted by the Disclosure and Barring Service (DBS), a statutory body created by the Protection of Freedoms Act 2012.
4. See *R v Ibrahim* [2010] EWCA Crim 1176.
5. See *R v Hamer* [2010] EWCA Crim 2053.
6. For example, see the 'bad character' 'gateways' of Criminal Justice Act 2003 s. 101, or the provisions outlining the possible extent of hearsay evidence admissible in the 'interests of justice', set out in Criminal Justice Act 2003 s. 114.
7. See Kenneth Parker J in *R (Thomas) v Chief Constable of Greater Manchester Police* [2012] EWHC 147 (Admin) at para. 31.
8. See across the range of: *R v Chief Constable of the North Wales Police and Others, Ex parte Thorpe and Another* [1998] 3 WLR 57; *R v Local Authority in the Midlands Ex p. LM* 1999 WL 1579630; *R (X) v Chief Constable of the West Midlands Police* [2004] EWCA Civ 1068; *R (on the application of Pinnington) v Chief Constable of Thames Valley* [2008] EWHC 1870 (Admin); *W v Chief Constable of Northumbria* [2009] EWHC 747 (Admin); *R (L) v Commissioner of Police of the Metropolis* [2009] UKSC 3; *N v A Local Authority* [2010] EWHC 3602 (Admin); *C v Chief Constable of Greater Manchester* [2010] EWHC 1601 (Admin); *C v Chief Constable of Greater Manchester* [2011] EWCA Civ 175; *H and L v A City Council* [2010] EWHC 466 (Admin); *H and L v A City Council* [2011] EWCA Civ 403 and *R (on the application of S) v Chief Constable of West Mercia* [2008] EWHC 2811 (Admin); Official Transcript; QBD (Admin).

9. Public protection values are sometimes conflated narrowly with values of human rights protection with regard to the suffering of victims of crime (see Uthmani *et al.*, 2011), even though the human right to respect for private life is also at stake for offenders and, most importantly, alleged offenders.
10. *R (Ahmed) v Secretary of State for Justice* [2011] EWHC 1332 (Admin).
11. See *Rotaru v Romania* (28341/95) 8 BHRC 449 and *Segerstedt-Wiberg v Sweden* 62332/00 (2007) 44 EHRR 2.
12. See ACPO (2010a). See also ACPO (2010b); Appendix 6 has a template information sharing agreement for police use with different kinds of public authorities.
13. Sir Ian is a former senior civil servant and a Senior Fellow of the Institute for Government: see <<http://www.instituteforgovernment.org.uk/about-us/our-people>> for a short biography.
14. 'I define criminality information as any information which is, or may be, relevant to the prevention, investigation, prosecution or penalising of crime.' Magee (2008: 4)
15. Data Protection Act 1998 s. 1.
16. *Ibid.*
17. Freedom of Information Act 2000 s. 40.
18. Gross LJ in *R (Catt) v Commissioner of Police of the Metropolis* [2012] EWHC 1471 (Admin) at para. 23.
19. See *R (B) v The Chief Constable of Derbyshire Constabulary* [2011] EWHC 2362 (Admin); *(W) v Chief Constable of Warwickshire Police* [2012] EWHC 406 (Admin); *Regina (Royal College of Nursing and others) v Secretary of State for the Home Department* [2010] EWHC 2761 (Admin); *N v A Local Authority* [2010] EWHC 3602 (Admin); *R (J) v Chief Constable of Devon and Cornwall* [2012] EWHC 2996 (Admin); *C v Chief Constable of Greater Manchester* [2011] EWCA Civ 175; *X v Chief Constable of South Yorkshire* [2012] EWHC 2954 (Admin); *In the Matter of An Application by JR59 for Judicial Review* [2012] NIQB 66; *R (J) v Commissioner of Police of the Metropolis* [2012] EWHC 1681 (Admin); *The Queen on the Application of V v Commissioner of Police for the City of London* [2012] EWHC 3430 (Admin); *In the Matter of an Application by Fergus Gaughran for Judicial Review* [2012] NIQB 88.
20. See also *Mark Richardson v The Chief Constable of West Midlands Police* [2011] EWHC 773 (QB) where even a record of an unlawful arrest entails the same difficulties, etc.
21. *R (W) v Chief Constable of Warwickshire Police* [2012] EWHC 406 at para. 59.
22. See *R (T and JB) v Secretary of State for Justice* [2013] EWCA Civ 25.
23. For example, with regard to the implementation of a European Arrest Warrant scheme.

24. See *R (Ahmed) v Secretary of State for Justice* [2011] EWHC 1332 (Admin), described below.
25. See *Woolgar v Chief Constable of Sussex Police* [1999] 3 All ER 604, s. 6.
26. Art. 8 ECHR states:
 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
 2. There shall be no interference by a public authority with the exercise of this right 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.
27. The notion of a British Bill of Rights is being explored by a Commission on a Bill of Rights, see <<http://www.justice.gov.uk/about/cbr/index.htm>> (12 July 2011).
28. For an overview of the expected stances from members of the Commission on a Bill of Rights, see <<http://www.guardian.co.uk/law/2011/mar/18/british-bill-of-rights-faces-deadlock>> (12 July 2011).
29. See the overview of these developing ideas given by Langstaff J in *R (A) v B* [2010] EWHC 2361.
30. See *Desmond v Chief Constable of Nottinghamshire Police* [2011] EWCA Civ 3.
31. Though empirical research by Bellamy *et al.* suggests that police and other public authorities have believed that the information sharing powers under s. 115 of the 1998 Act are in fact much broader than this. This is an example of the potential benefits of the socio-legal methodology in this particular context. See Bellamy *et al.* (2008). In truth the courts are often disparaging when the ‘non-lawyers’ of a local authority misrepresent the law, or legal processes: see *N v A Local Authority* [2010] EWHC 3602 (Admin).
32. It is interesting to note that while the Labour government last in office saw fit to give a statutory underpinning to the Child Sex Offender Disclosure Scheme, the Violent Offender Disclosure Scheme currently being piloted in response to a call for the introduction of ‘Clare’s Law’, in the context of a campaign against the horrors of (sometimes murderous) domestic violence perpetrated by ‘known’ offenders, required only normal common law powers of criminality information sharing in the view of the current Coalition government in office. See Home Office (2011).
33. Neuberger LJ in *R (L) v Commissioner of the Police of the Metropolis* [2009] UKSC 3 at para. 82.
34. See *Woolgar v Chief Constable of Sussex Police* [1999] 3 All ER 604, s. 9.
35. Munby LJ in *H & L v A City Council* [2011] EWCA Civ 403 at paras 50–52. Interestingly, when it comes to the limited right in

Art. 8 ECHR, and though he is critical of this perception, David Mead highlights that such ECHR-based proportionality need not include a procedural element to it in some circumstances, suggesting this is in those circumstances ‘set in stone’ by the ‘triptych’ of House of Lords cases in *R (Begum) v Governors of Denbigh High School* [2006] UKHL 15, *Belfast City Council v Miss Behavin’ Ltd* [2007] UKHL 19, and *R (on the application of Nasseri) v Secretary of State for the Home Department* [2009] UKHL 23, where for the purposes of the proportionality test, ‘outcome is all’. See Mead (2012).

36. Or even decisions made where Art. 8 ECHR is engaged but the public authority concerned could not have had full regard to the ECHR rights to be consulted of a data subject because of overriding public policy/public protection grounds: after all, Lord Hoffman said in *Miss Behavin’* [2007] UKHL 19 at [13]: ‘What was the council supposed to have said? “We have thought very seriously about your Convention rights but we think that the appropriate number of sex shops in the locality is nil”? Or: “Taking into account article 10 and article 1 of the First Protocol and doing the best we can, we think that the appropriate number is nil”? Would it have been sufficient to say that they had taken Convention rights into account, or would they have had to specify the right ones?’ See Mead (2012).
37. ‘So procedural fairness is something mandated not merely by Article 6, but also by Article 8.’ Munby J, *Re G (Care: Challenge to Local Authority’s Decision)* [2003] EWHC 551 (FAM) [34]. See also *W v UK* (1987) 10 EHRR 29; *McMichael v UK* (1995) 20 EHRR 205, [87]; *R (S) v Plymouth City Council* [2002] 1 WLR 583, [48]; *Connors v UK* (2005) 40 EHRR 9; *R (B) v Crown Court at Stafford* [2006] EWHC 1645 (Admin) [23]; and, the recent Scottish case of *South Lanarkshire Council v Ellen McKenna* [2012] CSIH 78, [Para 13].
38. Wilson LJ in *R (C) v Secretary of State for Justice & Another* [2011] EWCA Civ 175 at para. 25.
39. Munby LJ in *H & L v A City Council* [2011] EWCA Civ 403 at paras 50–52. See n 32 above.
40. See Munby LJ at paras 49–62 in *H and L v A City Council* [2011] EWCA Civ 403.
41. Here Lord Neuberger could be said to be overlooking the fact that, perhaps rashly, some individuals will have accepted a caution out of desperation to bring a matter involving the police to a close, despite doubt in their mind as to their actual guilt. See Slapper (2010).
42. Kenneth Parker J acknowledges the ‘powerful argument’ made against the stigmatising effect of inflexibility in criminal justice matters in interaction with civil society in the UKSC ‘unanimous decision of the Supreme Court in *R(F) v Justice Secretary* [2010] UKSC 17; [2011] 1 AC 331’. See paras 19–24.

43. Formally known as *Chief Constable of Humberside Police v Information Commissioner* [2009] EWCA Civ 1079.
44. At para. 2: ‘The warning [in question in *T*] had previously been “stepped down” in 2009 under procedures then operated but had been later reinstated following the decision of the Court of Appeal in *Chief Constable of Humberside Police v Information Commissioner* [2009] EWCA Civ 1079 [2010] 1WLR 1136.’
45. See Kenneth Parker J’s comments on *Breaking the Cycle: Effective Punishment, Rehabilitation and Sentencing of Offenders* (CM 7972, December 2010) at para. 43, Mason (2011) and Mason (2010) at paras 26–32.
46. Interestingly, Kenneth Parker J does draw our attention to the useful comparison we can make with bad character evidence in relation to the concept of ‘criminality information’ or ‘public protection information’. See *R (Thomas) v Chief Constable of Greater Manchester Police* [2012] EWHC 147 (Admin) at para. 31.
47. As happened in the recent successful challenge through judicial review of the construction of guidance on individual consultation processes in relation to the operation of the statutory Child Sex Offender Disclosure Scheme: see *R (X) v Chief Constable of South Yorkshire Police* [2012] EWHC 2954 (Admin).
48. *R (Royal College of Nursing and others) v Secretary of State for the Home Department* [2010] EWHC 2761 at para. 57.
49. *Chief Constable of Humberside Police and others v Information Commissioner* [2009] EWCA Civ 1079.
50. *Ibid.*
51. *R (Wood) v Commissioner of Police for the Metropolis* [2010] 1 WLR 123.
52. Gross LJ in *R (Catt) v Commissioner of Police of the Metropolis* [2012] EWHC 1471 (Admin), at para 23.
53. See Eady J in *R (T and R) v Commissioner of Police of the Metropolis* [2012] EWHC 1115 (Admin).
54. Langstaff J in *C v Chief Constable of Greater Manchester* [2010] EWHC 1601 at para. 43.
55. The importance of *Five Forces* can be seen in *Mark Richardson v The Chief Constable of West Midlands Police* [2011] EWHC 773 (QB), where a remedy was available for unlawful arrest in the form of damages but not in the form of expunction of the actual record of arrest from the PNC.
56. See *Mikolajova v. Slovaki* [2011] (4479/03) and *Khelili v. Switzerland* [2011] (16188/07).
57. See *R (T and JB) v Secretary of State for Justice* [2013] EWCA Civ 25.
58. As the European Court of Human Rights noted in *MM v UK* in November 2012 (at para. 199), ‘there may be a need for a comprehensive record of all cautions, conviction, warnings, reprimands, acquittals and even other information of the nature

currently disclosed pursuant to section 113B(4) of the 1997 Act. However, the indiscriminate and open-ended collection of criminal record data is unlikely to comply with the requirements of Article 8 in the absence of clear and detailed statutory regulations clarifying the safeguards applicable and setting out the rules governing, *inter alia*, the circumstances in which data can be collected, the duration of their storage, the use to which they can be put and the circumstances in which they may be destroyed.’

59. See *R (Thomas) v Chief Constable of Greater Manchester Police* [2012] EWHC 147 (Admin) at para. 31.

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