England and Wales High Court (Administrative Court) Decisions

Neutral Citation Number: [2010] EWHC 2761 (Admin)
Case No: CO/8027/2010

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL
10/11/2010

B e f o r e :

MR JUSTICE WYN WILLIAMS

Between:

R (On the application of) ROYAL COLLEGE OF NURSING (1) **OO (2)** **CW (3)** **AA (4)** **ER (5)**	**Claimants**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant**
- and -	
INDEPENDENT SAFEGUARDING AUTHORITY ((ISA)	**Interested Party**

Mr Ian Wise QC & Mr Stephen Broach (instructed by First Claimant's Legal Services Directorate) for the Claimants
Mr Sam Grodzinski (instructed by Treasury Solicitors) for the Defendant
The Interested Party did not appear and was not represented
Hearing dates: 12th & 13th October 2010

HTML VERSION OF JUDGMENT

Mr Justice Wyn Williams:

Introduction

1. In these proceedings the Claimants challenge the lawfulness of a scheme established under the Safeguarding Vulnerable Groups Act 2006 which prohibits those placed on lists established under the scheme from working with children and/or vulnerable adults. The First Claimant is concerned about the scheme because of its impact and potential impact upon its members. The Second, Third and Fourth Claimants are aggrieved because the Interested Party placed them upon lists established under the scheme (although they have all now been removed). The Fifth Claimant has been joined to these proceedings because the Interested Party is currently considering whether to place her upon a list.

2. All the Claimants allege that the scheme is unlawful in four specific respects. Each claims relief; the relief sought is dependant upon which aspects of the Claimants' case I find proved. Before identifying and discussing the grounds upon which the scheme is said to be unlawful (and the relief sought) it is necessary to set out the relevant statutory provisions and the facts relevant to each of the Individual Claimants.

The Safeguarding Vulnerable Groups Act 2006 and the Regulations made thereunder

3. Section 1 of the Safeguarding Vulnerable Groups Act 2006 (hereinafter referred to either as "the Act" or "the 2006 Act") establishes the Independent Safeguarding Authority, the Interested Party in these proceedings. In accordance with section 2 of the Act the Interested Party must establish and maintain two lists; the children's barred list and the adults' barred list. Section 2 also provides that Part 1 of Schedule 3 of the Act will apply for the purpose of determining whether an individual is included in the children's barred list and Part 2 of that Schedule will apply for the purpose of determining whether an individual is included in the adults' barred list.

4. The effect of being placed upon one of the lists is specified in section 3 of the Act. Section 3(2) provides that a person is barred from regulated activity relating to children if he is included in the children's barred list and subsection (3) provides that a person is barred from regulated activity relating to vulnerable adults if he is included in the adults' barred list. Regulated activity relating to children and vulnerable adults is defined in Parts 1 and Parts 2 respectively of Schedule 4 to the Act. In summary, regulated activity constitutes working with children or vulnerable adults either in employment or voluntarily. The prohibition on engaging in regulated activity is enforced by criminal sanctions. Section 7 of the Act provides that an individual commits an offence if he seeks to engage in regulated activity from which he is barred; offers to engage in regulated activity from which he is barred; or engages in regulated activity from which he is barred. The offences created by this section are triable both upon

indictment and summarily. If the offence is tried upon indictment and the alleged offender is convicted he faces a maximum term of imprisonment of 5 years.

5. As I have said, whether a person is to be included upon a barred list is governed by Schedule 3 of the Act. Part 1 of Schedule 3 relates to the children's barred list; Part 2 relates to the adults' barred list. For all intents and purposes the criteria are identical; accordingly I set out below only those provisions which relate to the adults' barred list. They are in the following terms:-

> "7(1) This paragraph applies to a person if any of the criteria prescribed for the purposes of this paragraph is satisfied in relation to the person.
>
> (2) If ISA is satisfied that this paragraph applies to the person it must include the person in the adults' barred list.
>
> 8(1) This paragraph applies to a person if any of the criteria prescribed for the purposes of this paragraph is satisfied in relation to the person.
>
> (2) If ISA is satisfied that this paragraph applies to the person, it must:-
>
> a) include the person in the adults' barred list, and
>
> b) give the person an opportunity to make representations as to why the person should be removed from the adults' barred list.
>
> (3) If it appears to ISA that it is not appropriate for the person to be included in the list, it must remove him from the list.
>
> 9(1) This paragraph applies to a person if –
>
> a) it appears to ISA that the person has (at any time) engaged in relevant conduct, and
>
> b) ISA proposes to include him in the adults' barred list.
>
> (2) ISA must give the person the opportunity to make representations as to why he should not be included in the adults' barred list.
>
> (3) ISA must include the person in the adults' barred list if –
>
> a) it is satisfied that the person has engaged in relevant conduct, and
>
> b) it appears to ISA that it is appropriate to include the person in the list.
>
> 11(1) This paragraph applies to a person if –
>
> a) it appears to ISA that the person falls within sub-paragraph (4), and
>
> b) ISA proposes to include him in the adults' barred list.

(2) ISA must give the person the opportunity to make representations as to why he should not be included in the adults' barred list.

(3) ISA must include the person in the adults' barred list if –

a) it is satisfied that the person falls within sub-paragraph (4), and

b) it appears to ISA that it is appropriate to include the person in that list.

(4) A person falls within this sub-paragraph if he may –

a) harm a vulnerable adult,

b) cause a vulnerable adult to be harmed,

c) put a vulnerable adult at risk of harm,

d) attempt to harm a vulnerable adult,

e) incite another to harm a vulnerable adult."

Paragraph 10 contains a detailed definition of relevant conduct for the purposes of paragraph 9.

6. The criteria prescribed for the purposes of paragraph 7 and 8 of Schedule 3 are to be found in the Safeguarding Vulnerable Groups Act 2006 (Prescribed Criteria and Miscellaneous Provisions) Regulations 2009 (The 2009 Regulations). Regulation 5 provides that the criterion prescribed for the purposes of paragraph 7(1) of Schedule 3 to the 2006 Act is that the person has been convicted of, or cautioned in relation to, an offence specified in paragraph 3 of the Schedule to the Regulations. In England and Wales the offences specified in paragraph 3 are offences contrary to sections 30 to 41 of the Sexual Offences Act 2003 and their equivalent if committed by serving members of the armed forces. All the offences specified are sexual offences against persons with a mental disorder. Regulation 6 provides that the criteria prescribed for the purposes of paragraph 8(1) of the Schedule 3 to the 2006 Act is that the person (a) has been made the subject to a risk of sexual harm order pursuant to section 123 Sexual Offences Act 2003 or (b) has been convicted of or cautioned in relation to offence specified in paragraph 4 of the Schedule to the Regulations. Schedule 4 contains a large number of sexual offences, offences involving violence and offences relating to mistreatment of children. A list of the offences included in Schedule 4 as at 3 September 2010 is set out as an appendix to the first witness statement of Mr. Jonathan Green, a senior legal officer and solicitor employed by the first Claimant. (I am told that the Schedule has been amended recently but nothing turns on that.)

7. A person convicted of or cautioned in respect of any of the offences specified under paragraph 3 of the Schedule to the Regulations is placed upon the relevant list and he has no right to make representations with a view to seeking his removal from the list. A person convicted of or cautioned in relation to any of the offences in paragraph 4 is placed upon the list but has the right to make representations to the effect that he should be removed.

8. An individual who is included in a barred list may appeal to the Upper Tribunal against a decision under paragraph 8 of Schedule 3 of the 2006 Act not to remove him from the adult barred list. He also has a right of appeal to the Upper Tribunal against a decision to include him on the list pursuant to

paragraphs 9 or 11 of the Schedule. (There are equivalent rights of appeal in relation to the children's barred list). The nature of the right of appeal is circumscribed by sub-sections (2) to (4) of section 4 of the 2006 Act. These subsections read as follows:-

> "(2) An appeal under subsection (1) may be made only on the ground that ISA has made a mistake –
>
> a) on any point of law;
>
> b) in any finding of fact which it has made and on which the decision mentioned in that subsection was based.
>
> (3) For the purposes of subsection (2), the decision whether or not it is appropriate for an individual to be included in a barred list is not a question of law or fact.
>
> (4) An appeal under subsection (1) may be made only with the permission of the Upper Tribunal."

9. In the event that an appeal under section 4 takes place before the Upper Tribunal subsections (5) to (7) come into play. They provide:-

> "(5) Unless the Upper Tribunal finds that ISA has made a mistake of law or fact, it must confirm the decision of ISA.
>
> (6) If the Upper Tribunal finds that ISA has made such a mistake it must –
>
> a) direct ISA to remove the person from the list, or
>
> b) remit the matter to ISA for a new decision.
>
> (7) If the Upper Tribunal remits a matter to ISA under subsection (6)(b) –
>
> a) the Upper Tribunal may set out any findings of fact which it has made (on which ISA must base its new decision); and
>
> b) the person must be removed from the list until ISA makes its new decision, unless the Upper Tribunal directs otherwise."

10. In the event that a person is placed on the list and not removed either by ISA or upon appeal a right of review arises. Such a right arises by virtue of paragraph 18 of Schedule 3 to the 2006 Act. The relevant provisions of paragraph 18 are:-

> "(1) A person who is included in a barred list may apply to ISA for a review of his inclusion.
>
> (2) An application for review may be made only with the permission of ISA.
>
> (3) A person may apply for permission only if –
>
> a) the application is made after the end of the minimum barred period, and
>
> b) in the prescribed period ending with the time when he applies for

permission, he has made no other such application.

(4) ISA must not grant permission unless it thinks –

a) that the person's circumstances have changed since he was included in the list or since he last applied for permission (as the case may be) and

b) that the change is such that permission should be granted.

(5) On a review of a person's inclusion, if ISA is satisfied that it is no longer appropriate for him to be included in the list it must remove him from it; otherwise it must dismiss the application.

(6) The minimum barred period is the prescribed period beginning with such of the following as may be prescribed –

a) the date on which the person was first included in the list;

b) the date on which any criterion prescribed for the purposes of paragraph …… 7 or 8 is first satisfied;

c) where the person is included in the list on the grounds that he has been convicted of an offence in respect of which a custodial sentence …… was imposed, the date of his release;

d) the date on which the person made any representations as to why he should not be included in the list."

11. The minimum barring periods are specified in the Safeguarding Vulnerable Groups Act 2006 (Barring Procedure) Regulations 2008 (hereinafter referred to as "the 2008 Regulations"). Paragraph 9 specifies that the minimum barring period in relation to a person who has not reached the age of 18 is 1 year, in relation to a person who has reached the age of 18 but has not reached the age of 25 the minimum barring period is 5 years and in relation to a person of 25 or over the minimum barring period is 10 years.

The facts

12. The information set out in this section of my judgment is taken from the parties' witness statements and certain agreed information provided to me shortly after the oral hearing had concluded. Ms Elizabeth Hunter, the Interested Party's Director of Operations has made a statement dated 4 October 2010. This statement was filed on behalf of the Defendant. Mr Jonathan Green has made two witness statements; one dated 3 September 2010 and a second dated 13 October 2010. I deal first with the information provided by Ms Hunter.

13. Individual Police forces are responsible for recording details of convictions within the area of the force upon the police national computer; cautions administered by a force are also recorded by that force on the computer. Currently, the Interested Party obtains information about relevant convictions or cautions held on the computer from the National Policing Improvement Agency. Once the Interested Party has been made aware that a person has been cautioned or convicted of an offence falling within the prescribed criteria within the 2009 Regulations it is required to place that person on one or both of the barred lists. Thereafter the person will be notified that they have been placed on one or both lists. In

the event that the person is entitled to make representations to the effect that he should be removed from the list the Interested Party will notify him of that right.

14. The person concerned must make representations to the Interested Party within 8 weeks and 2 days of the despatch of the letter which informs him of his inclusion upon a barred list and his right to make representations that he should be removed. However, the time limit may be extended in appropriate circumstances. Following receipt of a person's representations the Interested Party may seek additional information. The information may be sought from a number of sources including the police, the courts service and the probation service. If further information is sought and obtained from such organisations the information is sent to the person under consideration so that he can make further representations. Once this process is complete the Interested Party makes a decision about whether to remove the person from the barred list in question.

15. The decision making process, inevitably, takes some weeks. If the person who has been placed on a barred list does not make his initial representations for some weeks after notification the process stretches into months. During the whole of the period during which the process is ongoing the person concerned remains upon the barred list.

16. According to Ms Hunter the Interested Party has never held an oral hearing prior to reaching a decision about whether a person should be removed from the list. She points out, however, that there is no statutory prohibition upon conducting an oral hearing. She says:-

> "Should the ISA receive a request to make oral representations from a person under consideration and the ISA considers that it is necessary to receive oral representations to protect that person's Convention rights, or in the interests of fairness and equality, the ISA would make arrangements to hear those representations."

17. Ms Hunter's statement also describes the decision making process when a person is referred to the Interested Party not by virtue of a conviction or caution but by virtue of his conduct or by virtue of a perceived future risk of harm. I quote:-

> "17. At the point that the ISA proposes to include a person on a barred list or lists (also known as 'minded to bar'), the ISA is required to seek representations from the person.… However, the legislation does not set out a process by which the ISA must reach the conclusion that it is minded to bar a person. Accordingly, the ISA's decision making process in respect of discretionary decisions has been developed to ensure all ISA barring decisions are fair, rigorous, consistent, transparent and legitimate. The guidance on the decision making process that is provided to ISA case workers is freely available from the ISA's website and is attached to this statement.…
>
> 18. The decision-making process has five stages. At each stage a decision is required for the case to progress to the next stage. If criteria for the case to progress to the next stage are not met, the case is closed and no further action taken. The first stage is an initial assessment, whereby the ISA determines whether information that has been provided to the ISA is relevant and the allegations are something the ISA should consider. This should ensure that cases which are simply malicious gossip or are not serious enough to warrant further consideration are closed at a very early stage. The second stage is information gathering. The ISA considers all the facts it has on a case and may seek additional material from a range of other sources to ensure it has all known relevant information on the person. The ISA considers all relevant information that may be provided or requested

from employers, the police, personnel providers, and regulatory bodies…..local authorities or the referred person. The information gathered may include relevant cautions, convictions or information from disciplinary proceedings. The ISA will also consider information that it may already have from previous consideration of that person. This could provide evidence of cumulative behaviour indicating a safeguarding risk. When all relevant information is gathered and assessed the ISA determines on the balance of probability whether there has been conduct that has harmed or may harm a child or vulnerable adult. If so, the case progresses to stage three, the Structured Judgment Process ('SJP').

19. The SJP is a risk assessment tool developed and agreed by the ISA board to determine whether, based on all relevant information, there is a future risk of harm to children or vulnerable adults. If, following the SJP, a risk of harm to children or vulnerable adults is determined, the ISA would propose to include the person on a barred list or lists ('minded to bar'). If, on the basis of the information available to the ISA, it is not considered appropriate to bar a person then the case is closed.

20. As stated above where the ISA proposes that a person be included on a barred list or lists, Schedule 3 of the SVGA obliges the ISA to seek representations from that person. The process for seeking representations is as described above in relation to automatic inclusion. The referred person's employment is not restricted at this point in the process.

21. If no representations are received, then the person is barred by the ISA. If representations are received then the case is re-assessed and the final decision is made. If barred, the person is notified in writing including their right to seek an appeal."

18. I should also deal at this stage with one further aspect of Ms Hunter's statement. In paragraph 24 she explains that a person who is included on a barred list may not seek a review of the inclusion unless the minimum barred period has expired. That part of the paragraph is no more than an acknowledgement of the statutory provisions. However, Ms Hunter goes on to say that the legislation does not prohibit the Interested Party from granting permission to apply for a review of its own volition even though the minimum barred period has not expired. She suggests that in exceptional circumstances the Interested Party might adopt that approach. She gives as an example the case of a person who has been convicted of a relevant offence, has been placed on a barred list but, thereafter, has had his conviction quashed by an appeal court.

19. I next deal with the facts which are specific to the individual Claimants. The evidence comes essentially from Mr. Green.

20. The second Claimant is a nurse. Between 2003 and 2 March 2010 (when he was placed on the children's barred list and the adult barred list) he worked as a staff nurse in an acute adult in-patient unit.

21. On 19 May 2009 the Second Claimant accepted a caution from a police officer of the Gwent Police for an offence of doing an act of cruelty to a child or young person under 16 years, contrary to section 1(1) of the Children and Young Persons Act 1933 ("the 1933 Act") . The underlying undisputed facts leading to the administering of the caution were these. During the evening of 18 May 2009 the Second Claimant's wife left their children alone in their home. At that time the Second Claimant was at work. Some time after leaving the children alone the Second Claimant's wife was arrested and detained

overnight. A caution for an offence contrary to section 1(1) of the 1933 Act was administered to her. On 19 May 2009 the Second Claimant voluntarily attended his local police station whereupon he, too, accepted a caution. Why he did so is obscure; there is no suggestion that he knew that his wife intended to leave the children alone or that he expected that she would do so.

22. In the aftermath of these events an investigation was undertaken by the social services department of the local authority. The relevant officers concluded that the children were well cared for, thriving at school and that there was no cause for concern for their welfare. The episode of leaving them alone in the house had been an isolated incident. On 28 May 2009 the Second Claimant's employers concluded that he posed no risk to any patients and that he should continue in his employment.

23. The Interested Party was informed of the caution accepted by the Second Claimant on 25 September 2009. As I have said, it was not until 2 March 2010 that the Interested Party placed the Second Claimant on the barred lists. There is no explanation before me as to this ostensibly unwarranted delay.

24. Not unnaturally, the Second Claimant sought the advice of the First Claimant. On 14 May 2010 the First Claimant sent representations to the Interested Party setting out the reasons why he should be removed from the lists. On 24 July 2010 the Interested Party removed the Second Claimant from the lists.

25. During the period when the Second Claimant was on the barred lists he was prevented from undertaking nursing duties; fortunately for him his employers transferred him to office duties. However, that meant that he suffered a loss of wages which has been calculated at £4,992.33. Following his removal from the barred lists the Second Claimant resumed his normal work.

26. The Third Claimant is a nurse. She was placed on the children's barred list and the adults' barred list on 7 June 2010. Prior to that date she had worked at placements arranged for her by an agency. She accepted a caution on 13 December 2009 for an offence contrary to section 1(1) of the 1933 Act. The allegation against her was that she had left her son, aged 11 years, at home alone whilst she went shopping. Her case was referred to the Nursing and Midwifery Council but she had been placed on the barred list before a hearing could take place.

27. The Interested Party was notified of her caution on 7 April 2010. As I have said she was placed on the barred lists on 7 June 2010. After receiving representations from the First Claimant the Interested Party removed her from the barred lists on 18 August 2010.

28. A period of 2 months elapsed between the Interested Party being informed of the caution and the Third Claimant being placed upon the barred lists. She was on the lists for approximately 2½ months. During the time that the Third Claimant was on the barred lists she was unable to work as a nurse or in any other capacity. She suffered a loss of earnings of £3,267.23 in the relevant period.

29. The Fourth Claimant is also a nurse. He was in full time employment prior to being placed on the children's barred list and the adults' barred list on 31 March 2010. The Fourth Claimant accepted a caution for an offence of sexual assault contrary to section 3 of the Sexual Offences Act 2003 on 18 July 2009. The brief circumstances relating to this offence were that he had kissed a young woman without her consent after he had offered her a lift in his car.

30. The Interested Party was notified of the caution on 3 November 2009. Again, there is no explanation before the court as to the delay of approximately 4 months before the Fourth Claimant was placed on the barred lists. The Fourth Claimant's case was considered by the Nursing & Midwifery Council on

17 May 2010. The precise nature of the charge brought against him is unclear; in any event the Council determined that the Fourth Claimant had no case to answer. The First Claimant made representations on behalf of the Fourth Claimant to the Interested Party on 25 June 2010 and he was removed from the barred lists on or about 20 August 2010.

31. The fact that the Fourth Claimant was upon the barred lists between 7 April 2010 and 20 August 2010 had very significant effects. First, he was unable to work in his normal capacity. His employer permitted him to take unpaid leave, so he did not lose his job. However, his gross loss of wages during the period when he was unable to work was in excess of £13,000. During this period the Fourth Claimant was unable to continue making loan payments in respect of his vehicle – the vehicle was repossessed in due course. The Fourth Claimant also failed to pay other debts and enforcement action in respect of these debts is still unresolved.

32. The Fifth Claimant is the subject of investigation in relation to allegations that she appeared at work on three occasions under the influence of drink. She has yet to be placed on a barred list – the decision making process described by Ms Hunter in relation to persons who are referred to the Interested Party on account of their conduct is still ongoing. The Fifth Claimant received a 'minded to bar' letter from the Interested Party on or about 19 July 2010. The First Claimant has made representations to the Interested Party about the Fifth Claimant's case. The Fifth Claimant is currently the subject of an interim suspension order imposed by the Nursing and Midwifery Council.

33. In her witness statement Ms Hunter says that priority is given to those persons automatically included upon a barred list as a consequence of receiving a caution; further priority is given to those persons who are not in prison. In those two groups further priority is given to anyone who is known to work in regulated activity. The impression which Ms Hunter gives is that the cases of those persons who are automatically included upon the barred lists but who fall into the identified groups are dealt with speedily.

The Grounds of Challenge

34. The Claimant alleges that the scheme described above is unlawful in that it is in breach of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR") in the following specific respects.

> a) The scheme requires ISA to place individuals who have been convicted or cautioned for a wide range of offences on the barred lists without the right to make representations prior to listing contrary to Articles 6 and 8 ECHR.
>
> b) The scheme as operated does not allow individuals who are given a right to make representations to do so orally rather than solely in writing, contrary to Article 6 ECHR.
>
> c) The scheme does not give individuals placed on a barred list the opportunity of a full merits review on appeal contrary to Article 6 ECHR.
>
> d) The minimum barring period of 10 years for a person aged 25 or over is disproportionate and in breach of Article 8 ECHR.

Although Articles 6 and 8 of the ECHR will be familiar to those interested in this judgment it as well to set out the relevant parts of each Article. The relevant part of Article 6 reads:

> "6-(1) In the determination of his civil rights and obligations…..everyone is entitled to a

fair and public hearing within a reasonable time by an independent and impartial tribunal established by law….."

Article 8 reads:-

"8-(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."

Ground (a)

35. The cornerstone of the Claimants' case is R (Wright) v Secretary of State for Health & Another [2009] 2 WLR 267. It is necessary to pay close attention to the reasoning of both the Court of Appeal and the House of Lords.

36. The relevant facts in Wright are as follows. Mrs. Wright was a nurse; over many years she was employed in care homes. On 25 November 2003 she was dismissed for gross misconduct; the misconduct alleged against her had occurred at the latest in May 2003. Sometime after November 2003 she was referred to the Secretary of State for Health under section 82(1) of the Care Standards Act 2000 ("the 2000 Act") which made provision for keeping a list of people considered unsuitable to work with vulnerable adults. On 11 October 2004 Mrs Wright was provisionally placed on the list. The decision to place her on the list was taken pursuant to section 82(4)(b) of the 2000 Act which subsection made no provision for affording to Mrs. Wright the right to make representations before her name was included on the list. On 22 November 2005 Mrs Wright's inclusion on the list was confirmed.

37. By reason of her provisional listing the Secretary of State for Education and Skills, pursuant to section 92 of the 2000 Act, also provisionally included Mrs. Wright's name on a list of persons unsuitable to work with children maintained under section 1 of the Protection of Children Act 1999. In due course Mrs Wright's name was also confirmed on that list.

38. With the support of the First Claimant in these proceedings, Mrs Wright (and other nurses whose names had been provisionally listed) sought judicial review of the decision to include their names on the lists and sought a declaration under section 4(2) of the Human Rights Act 1998 that section 82(4)(b) of the 2000 Act was incompatible with Article 6 and 8 of the ECHR. At first instance, Stanley Burnton J, as he then was, granted the declaration sought. On the Secretary of State's appeal to the Court of Appeal the majority held that the denial of a right to make representations before a care worker's name was provisionally included on the list under section 82(4)(b) was in every case a breach of the worker's rights under Article 6 of the Convention but that the judge had been wrong to grant the declaration of incompatibility, since any breach of the Claimants' Article 6 rights could be prevented and the incompatibility avoided by giving effect to section 82(4)(b) of the 2000 Act, pursuant to section 3(1) of the Human Rights Act 1998, so as to require the Secretary of State to give a care worker an opportunity to make representations before being included in the list, unless giving such an opportunity would expose vulnerable adults to the risk of harm. On the Claimant's appeal to the House of Lords, the House restored the order or Stanley Burnton J.

39. The main elements of the scheme under consideration in Wright are described in the following paragraphs of the speech of Baroness Hale.

> "6. Various persons and authorities are required to refer care workers to the Secretary of State for Health in certain circumstances. We are concerned with section 82(1). This requires the person who carries on a care home or domiciliary service ….to refer a care worker in the circumstances set out in section 82(2)(3). These cover workers who have been dismissed "on the grounds of misconduct (whether or not in the course of his employment) which harmed or placed at risk of harm a vulnerable adult" section (82(2)(a)); and also workers whom the employer would have considered dismissing if they had not resigned, retired or been made redundant (82(2)(b), workers who have been transferred to a non-care position (82(2)(c), workers who have been suspended or provisionally transferred (82(2)(d), and workers who have left in other circumstances but the employer would have considered dismissing had information which has since come to light been available at the time (section 82(3)), all of these for the same grounds as those set out in section 82(2)(a) above.
>
> 7. The key provision with which we are concerned is the process for provisional inclusion on the lists under section 82(4):
>
> "If it appears from the information submitted with a reference under sub-section (1) that it may be appropriate for the worker to be included in the lists kept under section 81, the Secretary of State shall – (a) determine the reference in accordance with sub-sections (5) to (7) and (b) pending that determination, provisionally include the worker in the list."
>
> 8. Under section 82(5), the Secretary of State must invite observations from the worker on any information submitted with the reference and from the employer on any observation submitted by the worker. Section 82(5) does not expressly require that this be done *after* the worker has been provisionally included in the list under section 82(4), but the sequence of sub-sections strongly suggest that this was the intention. Section 82(6) requires that, having considered the information and observations submitted, and any other information he considers relevant, the Secretary of State must then decide whether the test set out in section 82(7) is met;
>
> "This sub-section applies if the Secretary of State is of the opinion –(a) that the provider reasonably considered the worker to be guilty of misconduct (whether or not in the course of his employment) which harmed or placed at risk of harm a vulnerable adult, and b) that the worker is unsuitable to work with vulnerable adults."
>
> Thus the test is not whether misconduct actually took place, but whether the employer reasonably considered that it did. The Secretary of State must then make a judgment as to the suitability of the worker. If he is of the opinion that this test is met, section 82(6) provides that he must confirm the worker on the list (provided that a worker who was suspended or provisionally transferred has now been dismissed or her transfer confirmed). If he is not of that opinion, the worker must be removed from the list."

40. In the Court of Appeal, the majority view is contained within the judgment of Dyson LJ (as he then was). He first deals with the issue encapsulated by the sub-heading in his judgment "Is Article 6 engaged?" That, says Dyson LJ, turns upon whether the provisional inclusion of a worker in a barred list is a determination of a civil right within the meaning of Article 6(1). After reviewing the relevant

European authorities the Learned Judge concludes:-

> "86. In my view the judge was right to conclude that a decision to include a worker in the [barred] list engages Article 6 in all cases. The consequences of being provisionally included in the [barred] list can be seriously detrimental for the care worker. Whilst on the list he or she may not be offered employment in a relevant care position and, if employed in such a position, his or her employment is not even suspended, still less suspended on pay: it is terminated immediately. There is no requirement that, if at the stage of final determination, the care worker is removed from the list, he or she must be offered the previous employment. In my judgment the provisional inclusion of a care worker in the list can have a clear and decisive effect on the worker. To use the language of the *Markass* case, the decision to include in the list is potentially one of a drastic character which may cause irreversible prejudice to the worker.
>
> 87. In determining the effect of the provisional inclusion of a care worker in the list it is necessary to have in mind that the (Act] does not impose any time limit within which the Secretary of State must make the final determination under section 82(4)(a) and the worker may not appeal against his or her provisional inclusion in the list for 9 months (section 86(2), although I accept that the possibility of an application to remove under section 81(3) and judicial review should not be overlooked. The appeal process may take some time. It follows that there is inherent in the statutory scheme the real possibility that a care worker may be provisionally included in the list for more than nine months and unable to take on work in a care position during that period. It is true that they may be able to take on other work during the period although it is likely that the prospects of obtaining employment whilst they are included in the [barred] list will be reduced by the very fact of their inclusion in the list.
>
> 88. I accept that the degree of prejudice caused to the care worker will depend on the facts of the individual case. Relevant factors will include: whether the worker has been able to obtain suitable alternative employment in the meantime and the time taken to obtain a final decision from the Secretary of State or the Tribunal. But in my judgment the inclusion of a worker in the [barred] list has the potential to cause serious prejudice to a worker in all cases. The amount of prejudice caused in any individual case may not become clear for some time and until after (possibly time-consuming) investigations have been conducted. In my judgment, the question whether article 6 is engaged should not be decided by examining on a case by case basis the actual effect of provisional listing on an individual worker. The better approach is to recognise that provisional listing has the obvious potential to cause serious prejudice to workers in all cases and to hold that Article 6 is engaged in all cases."

41. Dyson LJ next considers whether or not there was a breach of Article 6 brought about by the failure of the Secretary of State to give the worker the right to make representations before he or she is included in the barred list. He concludes that a breach is established. He said:-

> "106. In my view there are two reasons why the failure to afford a worker the opportunity to make representations before being included in the [barred] list is a breach of Article 6….First, the denial of the right to make representations is not a mere formal or technical breach. It is a denial of one of the fundamental elements of the right to a fair determination of a person's civil rights, namely the right to be heard. And the denial is total. A worker is not given an opportunity even to make the briefest comments. Judicial

review does not afford a full jurisdiction since it cannot make good the consequences of the denial of the opportunity to make representations at the earlier stage.

107. Secondly, none of the three means suggested by Mr Sales can make good the serious detriment suffered by the care worker as a result of being included in the [barred] list. Section 81(3) does afford the worker a remedy of sorts. In some cases he or she will be able to make a successful application under section 81(3) [to be removed from the list] within a short time of being included in the list. But even in such cases there is the potential for serious and irreversible prejudice to the worker by being included in the list in the first place. The former employer may offer to restore the care worker to his or her employment but that is unlikely where the employer dismissed, suspended or provisionally transferred the worker on the grounds of misconduct. As for judicial review, proceedings are likely to take some time and, even if successful, are unlikely to result in the restoration of a worker to his or her former employment. The same applies in relation to an appeal to the Tribunal which cannot be determined until the worker has been in the list for nine months. 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 means suggested by Mr Sales."

42. In the next section of his judgment Dyson LJ resiles, to some extent, from the proposition that the failure to afford the opportunity to make representations in advance of inclusion on a barred list amounts to a breach of article 6. Under the heading *Right to make representations in all cases?* Dyson LJ says this:-

"108. The essential defect in the first stage of the process lies in the fact that, as interpreted by the Secretary of State, the [Act] does not allow the care worker in *any* circumstances to make representations before being provisionally included in the list. Although, for the reasons given earlier, I consider that article 6 is engaged in all cases it does not follow that a worker should be given the right to make representations in all cases. The Parliamentary intention of protecting vulnerable adults from the risk of harm from care workers must be respected. The right to a fair determination of a worker's civil rights does not require that the worker be accorded the right to make representations in all cases. Fairness requires a proportionate approach. A balance must be struck in the need to protect vulnerable adults from the risk of physical and psychological harm and the article 6 rights of care workers. There will be cases where the allegations of misconduct are so serious that, if they are true, the care worker is potentially a serious danger to vulnerable adults. In such circumstances the paramount need to protect vulnerable adults from real danger may require the care worker to be included in the list provisionally without being given an opportunity to meet the case against him or her before that step is taken. It will be a matter for the judgment of the Secretary of State to decide whether it is necessary to include a worker in the [barred] list without giving him or her an opportunity to make representations. In making this judgment the Secretary of State must take into account all the circumstances of the case but in particular the gravity of the allegations. We were told that in many cases the care worker is not included in the list until the lapse of a considerable time after the date of the reference under section 82(1). This provides some support for the view that, unsurprisingly, a significant number of references do not raise issues which call for urgent and immediate decisions. No reason has been advanced on behalf of the Secretary of State to justify the blanket denial to workers of an opportunity to make representations in all cases.

109. I agree with the judge who, at para 52, said that the provisions of the [Act] as to provisional listing are unfair and a disproportionate means of addressing the problem of provisional action. I should add that I do not accept that the fact that provisional listing is a "precautionary approach" which entails a low standard of proof (viz, "it may be appropriate for the worker to be included in the list") is a sufficient reason for denying the worker to make representations. It may be more difficult for the worker to persuade the Secretary of State not to include him or her in the list in the first place and to persuade him not to confirm the inclusion at a later stage. But the difficulty of the task cannot be a reason for denying a worker the opportunity of attempting to achieve it."

43. In the House of Lords the only substantive speech is that given by Baroness Hale. The following paragraphs of her speech are worthy of particular note:-

"19. Article 6(1) requires that

"In the determination of his civil rights and obligations… everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

This raises two questions. First, are we here concerned with a civil right at all? This is uncontroversial.…… The right to remain in the employment one currently holds must be a civil right, as too must the right to engage in a wide variety of jobs in the care sector even if one does not currently have one.

20. More controversial is the second question. Does provisional listing amount to a "determination" of a civil right, given that the listed person will eventually have the opportunity of taking the case before the Care Standards Tribunal? No one disputes the tribunal provides a full merits hearing which is article 6 compliant in every way. But it is a general principle, frequently reiterated by the European Court of Hyman Rights, that

"article 6 does not apply to proceedings relating to interim orders or other provisional measures adopted prior to the proceedings on the merits, as such measures cannot, as a general rule, be regarded as involving the determination of civil rights and obligations" (see, for example, Dogmoch v Germany (Application No 26315/03) (Unreported) given 18 September 2006).

21. There are exceptions to that general rule. Some interim measures have such a clear and decisive impact upon the exercise of a civil right that article 6(1) does apply…. If article 6 applies to the suspension of a doctor from medical practice (as in Le Compte), it must apply to the permanent separation of a person from her current employment.

22. This, too, the Secretary of State accepts. But there are cases in which provisional listing may not have quite such a dramatic effect. The scheme allows for a temporary suspension or transfer to a non-care position. However, it is unlikely that an employer will take this option. They will have to employ another person to do the work which the listed person was employed to do. The reality is that that particular job will be lost to the listed person for good. Of course, such listed people will no longer be employed in care positions and so will not lose their existing jobs. Much was made on behalf of the Secretary of State of the wide range of jobs, even within the care sector, which remained open to a listed person, including any job in an independent or NHS hospital. But, once

again, the reality is that a listed person is most unlikely to be able to obtain such a job or keep it if she does disclose that she has been listed. The main answer to this point, however, is that the scheme cannot assume that article 6(1) will never apply to provisional listing. There will undoubtedly be some cases, perhaps the majority, where it does apply. While the Strasbourg Court has the luxury of looking back at the particular circumstances of a concrete case, and deciding whether there has been a breach of Article 6 in that case, our national law has to devise a scheme which will be generally applicable before the particular impact of the decision is known. As Dyson LJ put it in the Court of Appeal, at para 88, "the question whether Article 6 is engaged should not be decided by examination on a case by case basis the actual effect of provisional listing on an individual worker". The Secretary of State has therefore accepted that the Court of Appeal's order was appropriate in the light of the challenge to the whole scheme, because it is designed to ensure that breaches do not occur.

23. The difficult question is how the requirements of Article 6 apply in cases such as this. It is a well-known principle that decisions which determine civil rights and obligations may be made by the administrative authorities, provided there is then access to an independent and impartial tribunal which exercises "full jurisdiction":….What amounts to "full jurisdiction" varies according to the nature of the decision being made…..

24…..

25. Nevertheless, Dyson LJ considered that there were two reasons why the failure to afford the care worker an opportunity to make representations before provisional listing would not be cured by the possibility of being taken off the list under section 81(3), or by judicial review, or by the later access to the tribunal…..

26. My Lords, the scheme appears premised on the assumption that permanently to ban a person from a wide variety of care positions does require a full merits hearing before an independent and impartial tribunal. That premise is, in my view, correct. The issue is what should be done on the way to that decision. How is a proper balance to be struck between the need to protect the vulnerable adults, who may be at risk from a care worker who has been referred to the Secretary of State, and the need to protect the care worker from suffering irreversible damage to her civil rights, as a result of allegations which later turn out to be unfounded, even frivolous or malicious, or at the very least blown up out of all proportion?....

27….

28. However, in my view, Dyson LJ was entirely correct in his conclusion that the scheme as enacted in the Care Standards Act 2000 does not comply with article 6(1), for the reasons he gave. The process does not begin fairly, by offering the care worker an opportunity to answer the allegations made against her, before imposing upon her possibly irreparable damage to her employment or prospects of employment.

29. Unfortunately, however, I cannot agree that the solution devised by the Court of Appeal is sufficient to solve the problem. This is principally because of what has become to be called the "Wright exception". The care worker suffers possibly irreparable damage without being heard whatever the nature of the allegations made against her. The care worker may have a good answer to the allegations no matter how serious they are. There

> may well be cases where the need to protect the vulnerable is so urgent that an "ex parte" procedure can be justified. But one would then expect there to be a swift method of hearing both sides of the story and doing so before irreparable damage was done. That is not provided for in the "Wright exception". Nor is there any method provided of assessing the true urgency of the case. As it happens, no great urgency was felt in the four cases before us where there was a gap of four to six months between the referral and the provisional listing. A greater sense of urgency may have been felt since the "Wright exception" criteria was devised….. The "Wright exception" criteria relates solely to the nature of the allegation made and to the possible harm which might be suffered; they do not relate to the circumstances of the particular care worker and whether in fact she presents any current risk of harm. There is the further difficulty that, if she is currently employed in a care position, the risk may be greater but so too will the effect upon her civil rights. The problem, it seems to me, stems from the draconian effect of provisional listing, coupled with the inevitable delay before a full merits hearing can be obtained. That cannot be cured by offering some of the care workers an opportunity to make representations in advance, while denying the opportunity to other workers who may have been just as unfairly treated by their former employers…."

44. In the Court of Appeal Dyson LJ did not deal with the finding of Stanley Burnton J that there had also been a breach of Article 8. In her speech, however, Baroness Hale considers the application of Article 8 and concludes:-

> "36. For my part, I am inclined to take the same view of whether article 8 is engaged as to whether article 6 is engaged. There will be some people for whom the impact upon personal relationships is so great as to constitute an interference with the right to respect for private life and others for whom it may not. The scope of the ban is very wide, bearing in mind that the worker is placed on both [barred] lists. The ban is also likely to have an effect in practice going beyond its effect in law. Even thought the lists are not made public, the fact is likely to get about and the stigma will be considerable. The scheme must therefore be devised in such a way as to prevent possible breaches of the article 8 rights.
>
> 37. Mr Spencer does not, of course, argue that such interference will never be justifiable under Article 8(2). The point is that the procedure must be fair in the light of the importance of the interests at stake. I would agree that the low threshold for provisional listing adds to the risk of arbitrary and unjustified interferences and thus contributes to the overall unfairness of the scheme."

45. I should not leave the speech of Baroness Hale without reference to paragraph 39 since Mr Grodzinski attaches considerable importance to the last sentence of the paragraph. The whole of paragraph 39 is in the following terms:-

> "However, I would not make any attempt to suggest ways in which the scheme could be made compatible. There are two reasons for this. First, the incompatibility arises from the inter-reaction between the three elements of the scheme – the procedure, the criterion and the consequences. It is not for us to attempt to re-write the legislation. There is, as I have already said, a delicate balance to be struck between protecting the rights of the care workers and protecting the welfare, as well as the rights, of the vulnerable people with whom they work. It is right that the balance be struck in the first instance by the legislature. Secondly, both the Care Standards Act 2000 and the Protection of Children

> Act 1999 will in due course be replaced by a completely different scheme laid down by and under the Safeguarding Vulnerable Groups 2006. While we have been informed of its existence, we have not heard argument on whether or not that scheme is compatible with the Convention rights as the question does not arise on these appeals. Nothing which I have said in this opinion is intended to cast any light upon that question."

46. Notwithstanding the last sentence of paragraph 39 of the speech of Baroness Hale Mr Wise QC submits that I am bound by important aspects of the decision. First, he submits that I am bound to hold that the inclusion of a person's name on a barred list is an act which is concerned with a civil right enjoyed by that person. He submits that is inescapable given the view expressed by Baroness Hale that the right to remain in an occupation is a civil right as is the right to engage in a wide variety of jobs in a particular sector even if one does not currently hold such a job. Second, Mr Wise submits that I am bound to hold that the inclusion of a person's name upon a barred list constitutes a "determination" of a civil right. That too, he submits emerges unequivocally from the speech of Baroness Hale. Third, submits Mr Wise, Article 6 must apply if he is right in his contention that a civil right has been determined.

47. It seems to me to be clear that the inclusion of a person's name upon one or more of the barred lists under the 2006 Act is an act which is concerned with that person's civil right to remain in the employment currently enjoyed or, if the person is unemployed, to engage in the whole of the wide variety of jobs available in the nursing sector. Further, it seems to me that the inclusion of a person's name on a barred list determines one of those civil rights. I reach those conclusions essentially for the reasons articulated by Dyson LJ and Baroness Hale in Wright. I can think of no reason why their reasoning in the context of the scheme under the 2000 Act is not equally applicable in the instant case.

48. Mr Grodzinski did not address these points in his skeleton argument nor did he submit, orally, that this analysis is incorrect. As will become apparent, he asks me to conclude that the decision in Wright is of no particular relevance when considering whether or not there has been a breach of Article 6 but, to repeat, he does not suggest that I am not bound to find that the inclusion of a person's name upon the barred list does not constitute a determination of a civil right.

49. However, Mr Grodzinski does take issue with the third submission made by Mr Wise QC, namely that Article 6 applies. He does so on a basis not taken in Wright and it is to this effect.

50. In Micallef v Malta, Application No 17056/06 15 October 2009 the Grand Chamber of the European Court of Human Rights reiterated

> "….that for Article 6(1) in its "civil" limb to be applicable, there must be a dispute ("*contestation*" in the French text) over a "civil right" which can be said, at least on arguable grounds, to be recognised under domestic law, irrespective of whether it is also protected under the Convention. The dispute must be genuine and serious; it may relate not only to the actual existence of a right but also to its scope and the manner of its exercise; and, finally, the result of the proceedings must be directly decisive for the right in question, mere tenuous connections or remote consequences not being sufficient to bring Article 6(1) into play."

51. Mr Grodzinski admits that at the point in time when a person's name is placed upon the barred list there is no "*contestation*" or dispute; the dispute arises later and only if the person chooses to exercise his right to make representations that his name should be removed from the list.

52. Mr Grodzinski fairly points out that this argument is not contained within his skeleton and, to repeat, it was a point not taken on behalf of the Defendant in Wright. The fact that the point is taken late in the day and is, apparently, novel is, however, no basis for rejecting it if I consider Mr Grodzinski's analysis to be correct.

53. In response, Mr Wise QC relies upon Moreira de Azevedo v Portugal (1991) 13 EHRR 721. In that case the Applicant was a Portuguese national who was the victim in a shooting incident. As a result of the injuries he sustained in the incident he was forced to take sick leave from his job. The criminal proceedings against the assailant eventually resulted in his being convicted of causing grievous bodily harm and the assailant was sentenced to imprisonment and ordered to pay the Applicant damages. The conviction was subsequently quashed on appeal and the prosecution declared out of time. The Applicant's appeal to the Supreme Court was dismissed. The Applicant complained that the criminal proceedings, the outcome of which was relevant to his claim for compensation, had taken an unreasonably long period of time and this had violated his rights in respect of the hearing of his claim. He relied on Article 6(1) of the Convention.

54. The Government of Portugal contended that the case did not involve a dispute about the Applicant's rights: the Applicant had never made a claim for compensation independently of the criminal proceedings; he had only availed himself of the status of being an assistente in the criminal proceedings and this was not enough to constitute a claim for compensation.

55. The court concluded that Article 6(1) was applicable in the case. Its reasoning is to be found in the following paragraphs:-

> "63. According to the Government, there is no sign in the contested proceedings of any *contestation* (dispute) concerning the applicant's 'civil rights and obligations.' Mr Moreira de Azevedo had never claimed compensation for the injuries sustained in as much as the status of *assistente* was not equivalent to the submission of such a claim. Only an express application lodged at the same time as the indictment, or within the time limit in which the indictment could be drawn up, would have constituted objective evidence of an intention to claim compensation.
>
> 64. Mr Moreira de Azevedo argued, on the other hand, and he referred to the case law of the Supreme Court, that a statement expressing a wish to intervene as *assistente* in itself incorporated an implied claim for financial reparation. In support of this view he cited his request that the decision as to the amount of damages be deferred until the subsequent enforcement proceedings.
>
> 65. The Commission took the view that the applicant had never asserted his civil rights by filing a formal claim for compensation in the criminal proceedings, as was required under Article 32 of the Code of Criminal Procedure. It considered that the guarantees secured under Article 6(1) of the Convention did not apply to situations in which, following a conviction, the court awarded a sum of money, of its own motion; it therefore concluded that Article 6(1) was not applicable.
>
> 66. In the court's opinion, the right to a fair trial holds so prominent a place in a democratic society that there can be no justification for interpreting Article 6(1) of the Convention restrictively.
>
> Conformity with the spirit of the Convention requires that word *contestation* should not

be construed too technically and that it should be given a substantive rather than a formal meaning. Besides it has no counterpart in the English text of Article 6(1).

In so far as the French word *contestation* would appear to require the existence of a dispute, if indeed it does so at all, the facts of the case show that there was one.

In any event, the case concerned the determination of a right; the result of the proceedings was decisive for that right.

67. The impact on civil proceedings of the status of *assistente*, which attached to the applicant during the criminal proceedings, is the subject of controversy amongst Portuguese legal writers. Clearly the applicant could have used the right made available to him under Article 32 of the Code of Criminal Procedure to submit a formal claim for damages, but the court cannot disregard the principles laid down by the Supreme Court in its 'ruling judgment' (*assento*) of 28 January 1976. In the light of these principles it appears that to intervene as an *assistente* is equivalent to filing a claim for compensation in civil proceedings.

By acquiring this status Mr Moreira de Azevedo demonstrated the importance which he attached not only to the criminal conviction of the accused but also to securing financial reparation for the injuries sustained. Moreover, his application at the decision as to quantum be deferred until the subsequent enforcement proceedings confirms that he genuinely expected to be paid damages."

56. The decision in Micallef post dates Azevedo v Portugal by some years. There is no mention of the Azevedo case in Micallef. Nonetheless, it seems to me, at the very least, that it is permissible to draw from Azevedo the proposition that the words *contestation* or dispute should not be given a restrictive or technical meaning. Rather the words should be interpreted widely so that the applicability of Article 6(1) is not restricted artificially.

57. The reality is that the dispute arises once the person concerned has been convicted or cautioned of a relevant offence or at the very latest when his name is referred to the Interested Party. He may strongly object to the inclusion of his name on a barred list at either of those points in time and he may resolve to object to the inclusion as soon as he is able. I do not see why the fact that the statute prevents the person raising his objection, formally, until after a point in time when his name has been included in the list precludes a finding that a dispute has arisen earlier. In the context of case such as this, an acceptance of Mr. Grodzinski's argument would permit the legislature to prevent Article 6 applying at a point in time when the procedural protection which it affords may be most necessary. That cannot be right. I am satisfied that Article 6 applies in this case.

58. I turn to the crucial and most difficult issue. Is there a breach of the Article? I deal first with the extent, if at all, that the decision in Wright is (i) binding upon me or (ii) a guide to my approach. I readily accept that the decision in Wright that the statutory scheme under consideration in that case was unlawful because it did not afford an opportunity to the person concerned to make representations prior to provisional listing cannot bind me in this case. To hold otherwise would be to fly in the face of the last sentence of paragraph 39 of the speech of Baroness Hale. Further, while the scheme under the 2000 Act is similar to the scheme in the instant case there are a number of differences. The most important difference for present purposes is that under the scheme considered in Wright a person could be placed upon a barred list without having an opportunity to make representations about it on the basis of allegations which had not been proved either to the criminal or civil standard. Under the

scheme in the instant case a person is placed upon the barred lists automatically only if he has been convicted of or has admitted a specified criminal offence.

59. Despite that important distinction aspects of the reasoning both of Baroness Hale and Dyson LJ which led them to conclude that the absence of a right to make representations prior to provisional listing under the 2000 Act was contrary to Article 6 ECHR are obviously relevant when considering whether the absence of a right to make representations prior to listing under the scheme introduced by the 2006 Act renders the scheme in breach of Article 6. I refer to paragraphs 106 and 107 of the judgment of Dyson LJ (paragraph 41 above) and paragraph 28 in the speech of Baroness Hale (paragraph 43 above). The potential consequences of being upon barred lists of the type in question are as there described. Those consequences are as real for the persons placed on the barred lists under the 2006 Act as they were for the persons provisionally listed under the earlier scheme.

60. Mr Grodzinski submits that notwithstanding these potential consequences the right to make representations after a person has been included on the list as to why he should be removed from the list provides sufficient procedural protection so as to be compliant with Article 6 given that the person in question has been convicted of or admitted one or more of the offences specified in the 2006 Act. He points out with some force that the offences there specified are all capable of being serious offences. Each of the offences specified is punishable by imprisonment and in many of the cases the maximum sentence available is measured in many years. Mr Grodzinski submits that the inclusion of a person upon a barred list who has been convicted or has admitted such an offence before it is determined, finally, whether that person should remain on the list is a legitimate and proportionate "holding" measure. He acknowledges that there can be unwarranted delays connected with the administration of the scheme but he submits that such delays are a reason for an improvement in procedures rather than an abandonment of that part of the current scheme which permits the automatic barring of individuals who have been convicted or cautioned in respect of specified offences.

61. At first blush Mr Grodzinski's submissions are attractive. In my judgment, however, the core submission, namely, that the automatic barring provision is a proportionate "holding measure" cannot be justified. As I set out in paragraph 33 above Ms Hunter asserts that the Interested Party gives priority to those cases where the person referred to the Interested Party is to be placed upon a barred list in consequence of having received a caution; she also says that priority is given to persons who are not in prison and who are known to work in a regulated activity. On that basis which, of course I accept, the Interested Party must have given priority to the cases of the Second, Third and Fourth Claimant. Yet in the case of the Second Claimant the Interested Party was informed of his caution on 25 September 2009 but did not place his name on the barred lists until 2 March 2010. The Interested Party was notified of the Third Claimant's caution on 7 April 2010 yet she was not listed until 7 June 2010. The Fourth Claimant was notified to the Interested Party on 3 November 2009 and his listing took place on 31 March 2010. What that means is that the shortest delay about which I have specific evidence between notification and listing was 2 months and in two cases the delay was just under 5 months and 5½ months.

62. It is also to be observed that the period which elapsed between the acceptance of the caution and the inclusion of the Second, Third and Fourth Claimants upon the barred lists was respectively 9 months and 7 days, 5 months 25 days and 8 months 13 days.

63. In the light of this evidence I simply cannot accept that the inclusion of the Claimants' names on the barred lists prior to receipt of representations was a legitimate and proportionate holding exercise. To repeat, each of these cases was treated as a priority, if I may say so for obvious reasons, yet there was a very significant delay before their names appeared on the barred lists.

64. Further, in judgment it would be wrong to proceed on the basis that the cases of the Second, Third and Fourth Claimants are in some way unrepresentative. I have no reason to doubt that they are typical examples of the type of cases referred to the Interested Party in respected of specified offences at the less serious end of the spectrum. Yet it seems to me that automatic barring is bound to have the greatest adverse effect upon those cautioned or convicted for offences at the less serious end of the scale, however efficiently their cases are considered. It is persons convicted or cautioned for comparatively minor specified offences that suffer most from automatic barring and have most to gain if they are permitted to make representations about whether they should be barred in advance of barring taking place.

65. The need for a holding measure in respect of a person convicted of a serious specified offence will be a rarity. Persons convicted of such serious offences will usually be sentenced to a term of imprisonment although I acknowledge the possibility that a minority of such persons might be made subject to some form of community punishment. This minority category, however, will be well known to the police and the probation services. The reality is that in most cases where an individual has been convicted of a serious specified offence the risk of harm to children or vulnerable adults thereafter will be non-existent (because the person is in prison) or small (because the person is subject to supervision within the community). It is difficult to see how the legitimate aim of safeguarding children and vulnerable adults from such persons would be compromised by permitting those persons to make representations about whether they should be included on barred lists before that step is taken.

66. That said, like Baroness Hale and Dyson LJ, I can envisage situations in which the need to make a decision about whether a person should be included on a barred list arises as a matter of urgency. I cannot conclude, however, that the automatic inclusion of all persons convicted or cautioned of specified offences can be justified simply to cater for what must be a very small number of truly urgent cases. In appropriate circumstances courts have to act with great speed. Regulatory bodies such as the Nursing and Midwifery Council or the General Medical Council are also capable of acting with commendable speed when the circumstances justify such action. I can see no reason why in a truly urgent case the Interested Party cannot act with speed so as to determine whether or not a person's name should be included on one or both of the barred lists.

67. As Dyson LJ explained so eloquently in Wright the denial of the right to make representations in advance of listing is not a mere formal or technical breach. It is a denial of one of the fundamental elements of the right to a fair determination of a person's civil rights, namely the right to be heard. In my judgment and notwithstanding the fact that the person concerned has been convicted or cautioned of a specified offence the denial of the right to make representations in advance of listing is a denial of a fundamental right. It is not justified on the basis put forward by the Defendant. I regard the denial of the right to a person to make representations as to why he should not be included upon one or more of the barred lists as being a breach of Article 6. Like Dyson LJ, 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.

68. I turn, shortly, to Article 8. Mr Grodzinski submits that if there is no breach of Article 6 there is no breach of Article 8. I did not press him to say whether the converse is also the case and in any event I do not consider that must be so.

69. The starting point for my consideration is paragraphs 36 and 37 of the speech of Baroness Hale (see paragraph 43 above). Like Baroness Hale I consider that there will be some people who are included

on the lists automatically for whom the impact upon personal relationships is so great as to constitute an interference with a right to respect for private life. The fact that there will be others who do not fall into that category is not the point. As Baroness Hale stresses a scheme such as the scheme under consideration in the instant case must be devised in such a way as to prevent possible breaches of the rights under Article 8.

70. I am conscious, of course, that the views of Baroness Hale are expressed in the context that a person was being placed upon a barred list on suspicion of certain kinds of behaviour not on the basis of the proved commission of a specified criminal offence. In many cases the stigma which arises by virtue of being included in a barred list would arise, in any event, by virtue of the fact of conviction or caution. As the facts as they relate to the Second, Third and Fourth Claimants show, however, there may be a significant number of cases where it is the fact of listing which gives rise to the stigma as opposed to the facts which supported the conviction or caution.

71. I appreciate, of course, that Baroness Hale attaches significance to the low threshold for provisional listing which was the feature of the scheme which she considered. No doubt that was an important factor in persuading her and the remainder of their Lordships that the scheme gave rise to possible breaches of rights under Article 8. It does not seem to me, however, that confining the scheme of automatic listing to those convicted or cautioned of specified offences necessarily prevents a breach of the rights under Article 8.

72. It goes without saying that Article 8(2) would have to be considered, very carefully, in any given case. Nonetheless, I am satisfied that the scheme with which I am concerned gives rise to potential breaches of Article 8.

73. What is the appropriate relief given that I accept that ground (a) is made out? Mr Wise QC submits that the relevant statutory provision can be interpreted in such a way so as to make it compatible with Articles 6 and 8. He asks me to invoke section 3 Human Rights Act 1998 which provides:-

> "(1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights."

74. Section 3 of the 1998 Act has been the subject of discussion at the highest level in Ghaidan v Godin-Mendoza [2004] 2AC 557 and Sheldrake v Director of Public Prosecutions [2005] 1AC 264. The approach which I must follow is encapsulated, succinctly, in paragraph 28 of the speech of Lord Bingham of Cornhill in Sheldrake.

> "28. The interpretive obligation of the courts under section 3 of the 1998 Act was the subject of an illuminating discussion in *Ghaidan v Godin-Mendoza* [2004] 2AC 557. The majority opinions of Lord Nichols, Lord Stein and Lord Roger of Earlsferry in that case (which Baroness Hale of Richmond agreed) do not lend themselves easily to a brief summary. But they leave no room for doubt on four important points. First, the interpretive obligation under section 3 is a very strong and far reaching one, and may require the court to depart from the legislative intention of Parliament. Secondly, a Convention-compliant interpretation under section 3 is the primary remedial measure and a declaration of incompatibility under section 4 an exceptional course. Thirdly, it is to be noted that during the passage of the Bill through Parliament the promoters of the Bill told both Houses that it was envisaged that the need for a declaration of incompatibility would rarely arise. Fourthly, there is a limit beyond which a Convention-compliant interpretation is not possible, such limit being illustrated by *R (Anderson v Secretary of State for the*

Home Department [2003] 1AC 837 and *Bellinger v Bellinger* (Lord Chancellor Intervening) [2003] 2AC 467. In explaining why a Convention-compliant interpretation may not be possible, members of the committee used differing expressions: such an interpretation would be incompatible with the underlying thrust of the legislation, or would not go with the grain of it, or would call for legislative deliberation, or would change the substance of a provision completely, or would remove its pith and substance, or would violate a cardinal principle of the legislation (paras 33, 49, 110 to 113, 116). All of these expressions, as I respectfully think, yield valuable insights, but none of them should be allowed to supplement the simple test enacted in the Act "so far as is possible to do so…" While the House declined to try to formulate precise rules (para 50), it was that cases in which section 3 could not be used would in practice be fairly easy to identify."

75. In the instant case the court is invited to read paragraph 8 of Schedule 3 to the 2006 Act as follows:-

> "(1) This paragraph applies to a person if any of the criteria prescribed for the purposes of this paragraph is satisfied in relation to the person.
>
> (2) If ISA is satisfied that this paragraph applies to the person it must, unless in such exceptional circumstances it is deemed necessary to bar a person in the interim (but such interim period being for a maximum of 14 days) –
>
> > a) hold an oral hearing, subsequent to which hearing ISA shall include the person in the Adults' Barred List if it appears to ISA that it is appropriate to include the person in that list."

76. It can be seen, immediately, that this formulation of paragraph 8 is, in reality, completely different from paragraph 8 as set out in paragraph 5 above. It is difficult to imagine a provision which is more dissimilar from that enacted by Parliament.

77. I simply do not accept that it is possible to interpret paragraph 8 in the manner for which Mr Wise QC contends. To be fair to him he acknowledged the difficulties during the course of his oral submissions.

78. Mr Grodzinski's position is clear. He submits that if I find ground (a) established I should make a declaration of incompatibility. That is what I propose to do.

Grounds (b) and (c)

79. Although grounds (b) and (c) were identified as distinct grounds it became clear to me during the course of the hearing that they were inextricably linked. Accordingly I propose to deal with the issues which arise compendiously.

80. The Claimants submit that the scheme as operated by the Interested Party does not permit an individual who is or maybe barred to have an oral hearing to explain why his name should be removed from the list or not included upon it as the case may be. Accordingly, submits Mr. Wise QC, the scheme does not comply with Article 6 ECHR.

81. At the forefront of Mr Wise's argument is the decision of the Grand Chamber of the European Court of Human Rights in Goc v Turkey (Application No. 36590/97). He relies upon the following short passage in the judgment of the Grand Chamber:-

> "According to the Courts established case-law, in proceedings before a court of first and

> only instance the right to a "public hearing" in the sense of Article 6(1) entails an entitlement to an "oral hearing" unless there are exceptional circumstances that justify dispensing with such a hearing ……"

The exceptional circumstances to which reference is there made are those which are set out in the dissenting judgment in Goc.

> "That case-law lays down three criteria for determining whether there are "exceptional circumstances" which justify dispensing with a public hearing: there must be no factual or legal issue which requires a hearing; the questions which the court is required to answer must be limited in scope and no public interest must be at stake."

82. In summary, Mr Wise QC submits that the Interested Party is equivalent to "a court of first and only instance"; he also submits that none of the exceptions apply.

83. Mr Wise QC also seeks to elicit assistance from the decision in R (G) v Governors of X School) [2010] PTSR 1435. In that case G was employed as a music assistant at a primary school. Disciplinary proceedings were brought against him for alleged sexual impropriety with a 15-year old pupil. G requested permission of the school governors for his solicitors to represent him at the hearing before the disciplinary committee. They refused and, following a hearing, G was summarily dismissed. He exercised his right to appeal against the dismissal and asked that he be legally represented before the appeal committee. That request, too, was refused.

84. In judicial review proceedings G alleged that the proceedings before the committee and the appeal committee involved a determination of his civil rights under Article 6 and that in view of the seriousness of the allegations and the consequences flowing from the allegations Article 6 required that he be permitted to engage a legal representative if he so desired.

85. The consequences for G were not just dismissal from his employment. Upon dismissal G was referred to the relevant Secretary of State to be included in a barred list.

86. The judge at first instance held that Article 6 applied to the disciplinary and appeal proceedings and that given the severity of the consequences of dismissal and inclusion upon a barred list G was entitled to an enhanced measure of procedural protection and was entitled to legal representation.

87. As is obvious there was no issue in G about whether he had the right to an oral hearing. To repeat the issue was whether he had the right to legal representation. Nonetheless, submits Mr Wise QC aspects of the reasoning of Laws LJ (who gave the only substantive judgment in the Court of Appeal) support his contention that a person who has been or may be included on the barred lists has a right to an oral hearing.

88. As I read his judgment Laws LJ was at pains to point out that Article 6 as it applies in its civil context does not necessarily entail a right of representation but may do so. Further that the level of procedural protection required by Article 6 depends upon what is at stake. Laws LJ was persuaded that a professional advocate might make a great deal of difference if present at the disciplinary or appeal proceedings; the outcome of those proceedings would determine whether G would appear in a barred list.

89. Mr Wise QC submits that there is a great deal at stake for a person included on a barred list and who is seeking removal from the list; self-evidently the same applies to a person who is seeking to avoid inclusion upon the list. An oral hearing might, in any given case, submits Mr Wise QC make a

significant difference to the outcome.

90. I deal first with the submission made by Mr Wise QC that this case falls squarely within the principles established in Goc. I do not accept that the Interested Party is to be equated with a court of first and only instance. I do not see how that can be when there is a statutory right of appeal from its decision to the Upper Tribunal.

91. In my judgment the issue of whether Article 6 requires an oral hearing before the Interested Party in every case must be judged not by the principles in Goc but by the more flexible principles which generally prevail when assessing the level of procedural protection which Article 6 affords in any given case.

92. This scheme affords to the affected person a right to make representations. The scheme does not preclude the Interested Party convening an oral hearing if it thinks it appropriate. Section 4 of the 2006 Act confers a right of appeal. Although permission to appeal is required, the scheme envisages that an appeal may be brought when, at least arguably, the Interested Party has made a mistake on any point of law or in any finding of fact upon which its decision is based. In the event that the appeal succeeds the Upper Tribunal may either direct the Interested Party to remove the person's name from the barred list or remit the matter to the Interested Party for a new decision. If it takes the latter course it may set out findings of fact upon which the Interested Party must base its new decision. In my judgment, these measures, taken together, afford a considerable degree of procedural protection.

93. Mr Grodzinski submits that there are many instances in which an administrative body takes a decision which determines civil rights yet Article 6 does not demand a right to an oral hearing at that stage. Classically, so he submits, that position prevails where there is a right of appeal on a question of fact and where that appeal is conducted by way of oral hearing. Mr Grodzinski relies upon the following decisions in particular. First, he relies upon the statement of principle contained within the decision of the House of Lords in R (Dudson) v Home Secretary [2006] 1AC 245. At paragraph 34, after a review of relevant cases in the European Court of Human Rights (including Goc) Lord Hope says this:-

> "None of these cases is directly comparable….but it is possible to extract from them the following principles. What is at issue is the general right to a "fair and public hearing" in Article 6(1). There is no absolute right to a public hearing at every stage of the proceedings at which the Applicant or his representatives are heard orally. The application of the Article to proceedings other than at first instance depends on the special features of the proceedings in question. Account must be taken of the entirety of the proceedings of which they form part, including those of first instance. Account must also be taken of the role of the person or persons conducting the proceedings that are in question, the nature of the system within they are being conducted and the scope of the powers that are being exercised. The overriding question, which is essentially a practical one as it depends on the facts of each case, is whether the issues that had to be dealt with at that stage could properly, as a matter of fair trial, be determined without the Applicant orally."

94. Second Mr Grodzinski draws attention to R (Thompson) v Law Society [2004] 1WLR 2522. Clarke LJ (as he then was) explained:-

> "The key point is a matter of principle is that the question whether the procedure satisfies Article 6(1), where there is a determination of civil rights and obligations, must be answered by reference to the whole process. The question in each case is whether the

process involved a court or courts having "full jurisdiction to deal with the case as the nature of the decision requires". There may be cases in which a public and oral hearing is required at first instance and other cases where it is not, just as there may be cases in which the potential of availability of judicial review will not be sufficient to avoid a breach of Article 6(1)."

The phrase "full jurisdiction to deal with the case as the nature of the decision requires" is a direct quotation from the speech of Lord Hoffmann in R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport & the Regions [2003] 2AC 295, 330 para 87.

95. It is clear that Clarke LJ was influenced not just by Alconbury but also by statements of principle made by Lord Bingham of Cornhill in Runa Begum v Tower Hamlets London Borough Council [2003] 2AC 430, 439 para 5. It is unnecessary to quote those passages in the speech of Lord Bingham; they are succinctly summarised in the paragraph from the judgment of Clarke LJ set out above. Finally, Mr Grodzinski relies upon the recent decision of the European Court of Human Rights in Tsfayo v United Kingdom [2007] H.L.R.19. I need not cite from this decision; it is entirely consistent with the line of domestic authority set out immediately above.

96. The approach which is encapsulated in these authorities supports the conclusion expressed in paragraph 92 above. However, in order to ascertain whether the process as a whole is fair it is necessary to consider, further, the nature of the right of appeal to the Upper Tribunal. As I have said the right arises upon the Interested Party making a mistake on any point of law or in any finding of fact upon which its decision is based. However, section 4(3) specifies that the decision whether or not it is appropriate for an individual to be included in a barred list is not a question of law or fact. In these circumstances it cannot be said that the individual has a full merits based right of appeal.

97. Mr Wise QC submits that sub-section 4(3) substantially limits the value of the appeal rights conferred under the 2006 Act. He points out, with some force, that the issue of whether it is appropriate for an individual to be included in a barred list is the ultimate question for the Interested Party. Under Schedule 3 Part 2 paragraph 8 of the 2006 Act the ultimate question for the Interested Party under the statutory scheme is whether "it is not appropriate for the person to be included in the list." If it is not appropriate the person must be removed from the list. Under paragraphs 9 and 11 the Interested Party must consider whether it is appropriate to include the person in the list. Accordingly, there is no right of appeal upon the ultimate question to be determined by the Interested Party.

98. Mr. Wise QC also submits that the decision in Wright provides support for the stance that the scheme does not comply with Article 6 because it does not provide for a full merits based appeal. He refers to the first sentence of paragraph 26 of the speech of Baroness Hale (quoted at paragraph 42 above) which appears to suggest that a full merits based appeal is a necessary requirement if the decision under attack is one which has the consequence that a person is being barred permanently from a wide variety of positions. Can it be different, postulates Mr. Wise, in the context of the present scheme?

99. In a written note provided to the court following the conclusion of the oral hearing Mr Grodzinski provides a detailed analysis of the nature of the right of appeal conferred by section 4 of the 2006 Act. He also draws my attention to aspects of the Tribunal Procedure (Upper Tribunal) Rules 2008.

100. Under the Rules an applicant must seek permission to appeal a decision of the Interested Party pursuant to section 4 within three months of the date on which written notice of the decision being challenged is sent to him. The application for permission to appeal is made on a particular form which provides the applicant with the opportunity to request an oral hearing at the permission stage. If

permission to appeal is refused on the papers, or permission is granted only on limited grounds, the applicant can ask for the matter to be reconsidered at an oral hearing provided he does so within 14 days of the refusal of permission on the papers. The Rules include an "overriding objective" to which the Tribunal is required to give effect when it exercises any power under the Rules. The overriding objective "is to enable the Tribunal to deal with cases fairly and justly". Hence when determining whether an oral hearing is required the Tribunal must act in accordance with that overriding objective.

101. Mr Grodzinski submits that the phrase "on any point of law" contained within section 4(2)(a) of the 2006 Act should not be interpreted narrowly and is not interpreted narrowly in the explanatory leaflet produced by the Upper Tribunal to explain what the phrase means. The leaflet provides examples of when the Interested Party may have erred in law. They are as follows:-

> "Examples of where the ISA may be wrong in law include:
>
> - The ISA did not apply the correct law or wrongly interpreted the law.
> - The ISA made a procedural error.
> - The ISA had no evidence, or not enough evidence, to support its decision.
>
> The ISA did not give adequate reasons for its decision in the written statement of its reasons. These are only examples and the Tribunal may consider the decision to be wrong in law for some other reason not mentioned here."

Mr Grodzinski fairly points out that the explanatory leaflet also contains the following sentence:-

> "You should note that section 4(3) of the Safeguarding Vulnerable Groups Act 2006 provides that the decision whether or not it is appropriate for an individual to be included in a barred list is not a question of law or fact."

Mr Grodzinski also points out, quite correctly, that in reaching decisions regarding the scope of its jurisdiction the Tribunal is required to act in accordance with the overriding objective and to comply with the Human Rights Act 1998.

102. During oral submissions there was some debate about the meaning to be attributed to the phrase "a mistake ….in any finding of fact within section 4(2)(b) of the Act". I can see no reason why the sub-section should be interpreted restrictively. In my judgment the Upper Tribunal has jurisdiction to investigate any arguable alleged wrong finding of fact provided the finding is material to the ultimate decision.

103. In light of the fact that the Upper Tribunal can put right any errors of law and any material errors of fact and, further, can do so at an oral hearing if that is necessary for the fair and just disposition of the appeal I have reached the conclusion that the absence of a right to an oral hearing before the Interested Party and the absence of a full merits based appeal to the Upper Tribunal does not infringe Article 6 EHCR. To repeat, an oral hearing before the Interested Party is permissible under the statutory scheme and there is no reason to suppose that in an appropriate case the Interested Party would not hold such a hearing as Ms Hunter asserts would be the case. I do not accept that this possibility is illusory as suggested on behalf of the Claimants. Indeed, a failure or refusal to conduct an oral hearing

in circumstances which would allow of an argument that the failure or refusal was unreasonable or irrational would itself raise the prospect of an appeal to the Upper Tribunal on a point of law. Further, any other error of law and relevant errors of fact made by the Interested Party can be put right on an appeal which, itself, may be conducted by way of oral hearing in an appropriate case.

104. I am more troubled by the absence of a full merits based appeal but I am persuaded that its absence does not render the scheme as a whole in breach of Article 6 for the following reasons. First, the Interested Party is a body which is independent of the executive agencies which will have referred individuals for inclusion/possible inclusion upon the barred lists. It is an expert body consisting of a board of individuals appointed under regulations governing public appointments and a team of highly-trained case workers. Paragraph 1(2)(b) of Schedule 1 to the 2006 Act specifies that the chairman and members "must appear to the Secretary of State to have knowledge or experience of any aspect of child protection or the protection of vulnerable adults." The Interested Party is in the best position to make a reasoned judgment as to when it is appropriate to include an individual's name on a barred list or remove an individual from the barred list. In the absence of an error of law or fact it is difficult to envisage a situation in which an appeal against the judgment of the Interested Party would have any realistic prospect of success. Second, if the Interested Party reached a decision that it was appropriate for an individual to be included in a barred list or appropriate to refuse to remove an individual from a barred list yet that conclusion was unreasonable or irrational that would constitute an error of law. I do not read section 4(3) of the Act as precluding a challenge to the ultimate decision on grounds that a decision to include an individual upon a barred list or to refuse to remove him from a list was unreasonable or irrational or, as Mr. Grodzinski submits, disproportionate. In my judgment all that section 4(3) precludes is an appeal against the ultimate decision when that decision is not flawed by any error of law or fact.

105. In the light of these conclusions the issue of relief does not arise. Had it been that I was persuaded that a right to an oral hearing before the Interested Party was necessary for compliance with Article 6 ECHR the relevant provisions of Schedule 3 to the Act could be so interpreted in reliance upon section 3 Human Rights Act 1998. Mr. Wise QC accepts that had I concluded that the absence of a full merits based appeal rendered the scheme in breach of Article 6 a declaration of incompatibility would be the appropriate relief.

Ground (d)

106. Mr Grodzinski accepts that Article 8 ECHR may apply in a particular case to the minimum barring period of 10 years for an adult aged 25 and over in that it may constitute an interference with that individual's right to private life. However, he submits that the minimum barring period is justified under Article 8(2). He submits that the barring period is within the margin of discretion available and it has been adopted in the interests of public safety, for the prevention of disorder or crime and for the protection of rights and freedoms of others.

107. Mr. Wise QC submits that a blanket minimum barring period of 10 years for a person aged 25 and over cannot be justified. Indeed, he submits that the Defendant has not suggested any proper justification. He points out that the minimum barring period applies to persons who have been included upon the barred lists by virtue of the commission of an offence (either within Regulation 5 or Regulation 6 of the 2009 Regulations) or by virtue of conduct or the risk posed to children or vulnerable adults (paragraphs 9 and 11 of Schedule 3 to the Act). That is potentially a very wide spread of persons. The reality, submits Mr. Wise QC, is that the minimum barring period of 10 years has been chosen for administrative convenience.

108. I should say at once that I do not accept that the period of 10 years has been chosen for reasons related to administrative convenience. It is part of a scheme which lays down three minimum barring periods depending upon the age of the person listed. The minimum barring period for a person aged under 18 is 1 year; the period for those aged between 18 and 24 is 5 years. There is nothing in the information put before me which suggests either that the three periods or the longest of the three are or is the product of administrative convenience.

109. In the absence of a finding that the minimum barring period of 10 years has been chosen for administrative convenience it is accepted on all sides that the issue raised in this ground of challenge is one of proportionality. That issue generally requires consideration of three questions:

> i) What is the extent of the interference with Article 8 rights?
>
> ii) How valuable are the barring provisions in achieving the legitimate aims which they seek to serve?
>
> iii) To what extent would that value be eroded if a review took place less than 10 years after an individual had been placed on a barred list?

110. Not surprisingly, Counsel were not able to point to specific authority which provides either an answer to those questions or, even, a clear guide as to what those answers should be.

111. Mr Grodzinski submits that the minimum barring period under scrutiny in this case is based on experience and upon the underlying rationale that where a person has been barred from working with a vulnerable group a significant time must be allowed to pass before it will be reasonable to expect that the person's circumstances will have changed in such a way that barring may no longer be appropriate.

112. He also places some reliance upon the responses to a consultation document which was issued by government departments following the coming into force of the 2006 Act but before minimum barring periods were enshrined in the 2008 Regulations. Part of the consultation process related to the minimum period before which a review should take place. Consultees were asked to consider three questions:-

> "Should the new scheme differentiate between young people and adults for the purposes of the minimum no-review period?
>
> Should the new scheme adopt the same minimum no-review periods as current schemes: 10 years for adults and 5 years for younger people?
>
> Under the schemes, the age boundary for the purposes for the minimum no-review period is 18. Should it remain at 18 or should it be raised to 25?"

Mr Wise QC properly points out that consultees were asked whether the same minimum no-review periods as were prescribed in existing schemes should continue. No formulated alternatives were presented for response. That said 80% of those who responded said that the minimum no-review period should remain at 10 years.

113. In the main, the responses came from bodies, organisations and individuals with relevant expertise over a wide spectrum. In those circumstances I do not accept the submission of Mr Wise QC that I should ignore the consultation exercise when making my judgment upon proportionality.

114. Let me return to the questions I posed at paragraph 109 above. The extent of the interference with Article 8 rights will, clearly, be fact specific in any given case. The minimum barring period will have little impact upon a person's private life if he has been sentenced to a substantial term of imprisonment for a serious specified offence. Conversely, if the person barred has been convicted of or cautioned for an offence at the less serious end of the spectrum – yet serious enough to lead to his being barred – the barring is capable of creating a considerable impact upon his private life. If a person has been included in a list by virtue of his conduct or because he is a risk to children or vulnerable adults the listing may, no doubt, have a significant impact upon his private life.

115. There can be little doubt that the barring provisions may be a valuable tool in achieving the legitimate ends which they seek to serve. I reject any submissions any made on behalf of the Claimants to contrary effect.

116. In his oral submissions Mr Wise QC focused, in particular, upon the third of the questions posed above namely to what extent would the value of the barring provisions be eroded if a review took place less than 10 years after an individual had been placed on a barred list. He points out that a review means just that; unless it is appropriate to remove an applicant from the barred lists removal will not take place.

117. There is a logical attraction about the submission of Mr Wise QC. However, taken to its logical conclusion the submission would or might result in a barring period which was obviously too short.

118. If a minimum barring period is justified, and no one has suggested that it is not, then, in my judgment its length must be proportionate to and commensurate with the mischief which it aims to defeat. Further, given that there is no formal challenge or even criticism of the barring periods applicable to persons under the age of 25 it seems to me to be clear that the issue is, in reality, whether a barring period as long as 10 years is justifiable.

119. I have a paucity of evidence to deal with this central issue. Mr Green's statements do not deal with it. Ms Hunter's statement does not deal with it and the explanatory memoranda which accompany the Regulations contain very little information which is relevant to the point now under consideration. I do, of course, have the responses to consultation.

120. I also face the difficulty that I have been provided with no information about the circumstances which have led the Interested Party to include persons on barred lists on account of their conduct or potential risk or to refuse to remove persons from the lists who have been convicted of or cautioned for specified offences.

121. As it seems to me the essential rationale for the 10 year period is that it "kicks in" when a person has become an adult, on any view, and, therefore, is less likely to be amenable to a rapid change in behaviour. Further, a longer period upon a barred list is justified for a person who is an adult than it is for a person who is emerging from adolescence into adulthood. On that basis a minimum barring period of more than 5 years is justified.

122. I am not prepared to hold that this analysis, albeit somewhat simplistic, is wrong. On that basis I am persuaded, just, that the period of 10 years, although on any view a long one, is not unjustified. I am conscious, however, that my judgment has been reached on very little factual material. Since the scheme as a whole is under review I express the hope that the issue of minimum barring periods will be looked at anxiously in the light of all the information available which bears upon this topic.

123. I appreciate, of course, that the Interested Party, of its own motion, is prepared to review a person's listing in what it regards as exceptional circumstances. It does not seem to me that this safeguard would be sufficient to remedy the situation if I had concluded that the minimum barring period of 10 years was disproportionate. Since I have not reached that conclusion, however, I do not intend to address this aspect of the case in any further detail.

124. Mr Wise QC submits that if this ground is made out it can be remedied by interpreting the 2008 Regulations so as to permit for a review before 10 years has elapsed. He submits that Regulation 9 of the 2009 Regulations can be interpreted to include a provision to the effect that following representations from the person whose name appears on the barred list the Interested Party may hold a review at a date earlier than the minimum period specified if it is proportionate so to do.

125. In my judgment the difficulties with this approach are identical to the difficulties which I identified in paragraphs 73 to 77 above. Had I been persuaded that the minimum barring period constituted an unjustified infringement of Article 8 ECHR I would have made a declaration of incompatibility.

Victims

126. As the case unfolded before me a controversy developed about whether any of the Claimants could bring themselves within section 7(1) of the Human Rights Act 1998. That sub-section reads:-

> "(1) A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may –
>
> a) bring proceedings against the authority under this Act in the appropriate court or Tribunal or
>
> b) rely on the Convention right or rights concerned in any legal proceedings, but only if he is (or would be) a victim of the unlawful act."

Clearly, the Second, Third and Fourth Claimants were victims in relation to ground (a). They cannot be victims in relation to grounds (b), (c) and (d) since their names have been removed from the barred lists.

127. Mr Grodzinski does not accept that the Fifth Claimant can be a victim in relation to grounds (b), (c) and (d). I do not agree. As Mr Wise QC and Mr Broach point out in their written note of 25 October 2010 the Fifth Claimant is a victim because she has been sent a 'minded to bar' letter and as such there is a realistic prospect that she may be confirmed on the barred list. If she is so confirmed then her appeal rights would be as set out in section 4 of the 2006 Act and she would be subject to the minimum barring period of 10 years without the right of a review in that time period.

128. In these circumstances, I can see no reason why the Fifth Claimant should not be categorised as a victim. To hold otherwise would mean that she has no right to challenge the legality of her appeal rights or the minimum barring period without review at this stage (although she can bring a challenge to the effect that she has no right to an oral hearing before the Interested Party). She would have to wait to see whether the Interested Party considered it appropriate to include her on the barred lists. I cannot think that such a consequence is desirable, or, more importantly, contemplated by the phraseology of section 7 of the 1998 Act.

Conclusion

129. I propose to grant a declaration in suitable form to take account of the fact that I am satisfied that ground (a) is made out. Given my findings on grounds (b), (c) and (d), however, all other claims are dismissed. The parties have agreed a timetable for the formulation of the order consequent upon this judgment. I will finalise the order (which will contain the declaration of incompatibility) following receipt of written submissions within the time frame agreed.
