Tribunals Service
Information Tribunal

Information Tribunal Appeal Numbers: EA/2007/0096,98,99,108,127

Heard at Procession House, London, EC4 **Decision Promulgated**

Between 8th and 18th April 2008 21 July 2008

BEFORE **Chairman**

JOHN ANGEL

And

Lay Members

RICHARD FOX AND NIGEL WATSON

Between **THE CHIEF CONSTABLE OF HUMBERSIDE**

First Appellant

and

THE CHIEF CONSTABLE OF STAFFORDSHIRE POLICE

Second Appellant

and

THE CHIEF CONSTABLE OF NORTHUMBRIA POLICE

Third Appellant

and

THE CHIEF CONSTABLE OF WEST MIDLANDS POLICE

Fourth Appellant

and

THE CHIEF CONSTABLE OF GREATER MANCHESTER POLICE

Fifth Appellant

and

THE INFORMATION COMMISSIONER **Respondent**

Representation:

For the Appellants: Mr. David N Jones

For the Respondent: Mr. Timothy Pitt-Payne

:

Decision

The Tribunal upholds the five enforcement notices dated 8th, 16th, 15th and 16th August and 15th November 2007 and dismisses the appeals.

Reasons for Decision

Introduction

1. The Chief Constables of the 43 England and Wales police forces through their Association of Chief Police Officers (ACPO) now pool much of their collective intelligence on the Police National Computer (PNC) in order to undertake their functions. The PNC holds conviction data gathered from the Courts (which are often referred to as 'hard data') and other data such as arrests and charges (which are often referred to as 'soft data') provided by Chief Constables.

2. The Bichard Inquiry found that there was a lack of proper sharing of criminal intelligence between forces and recommended a major review of the position. The Inquiry particularly recognised that policing could no longer rely on local information, but needed national and even international intelligence for police forces to be able to operate effectively.

3. Since the introduction of the Data Protection Act 1984 ACPO has sought to deal with Chief Constables' data protection obligations by introducing a series of codes of practice on the retention of personal data, including conviction data. The Bichard Inquiry Report has resulted in a major review by ACPO of its intelligence requirements. It would appear that up until 2006 the codes had been discussed with and, in effect, received endorsement by the Information Commissioner (the Commissioner) and his predecessor the Data Protection Registrar. However neither the Registrar nor the Commissioner accepted that compliance with these codes solely met the Chief Constables' data protection obligations. These obligations were considered in the Bichard Inquiry Report and in the decision and judgment of the Tribunal in *The Chief Constables of West Yorkshire, South Yorkshire and North Wales v The Information Commissioner* in 2005 (the 2005 Tribunal decision). It emerged during that case, that although Sir Michael Bichard had recommended that ACPO in consultation with the Commissioner suitably revise the 2002 Code in the light of the Inquiry's recommendations, ACPO and the Commissioner could not find an agreed way forward. This was followed by the Commissioner issuing three enforcement notices in 2004 requiring conviction data to be erased which were appealed by the Chief Constables involved to the Information Tribunal.

4. Following the 2005 Tribunal decision a 4th code was introduced by ACPO in March 2006, without the endorsement of the Commissioner. This was followed by five new enforcement notices being issued in 2007 (the Enforcement Notices), requiring the erasure of conviction data, which are the subject of these appeals.

5. The Tribunal has no power to formulate general rules for the future retention of conviction information. Our jurisdiction limits us to considering these five appeals on their individual merits. However we recognise that this decision will inevitably inform the approach taken in future by both the Commissioner and the police in respect of conviction information held.

6. At the heart of these appeals are five individuals. The question is whether information held on the Police National Computer (PNC) about those individuals ought to be deleted from the PNC. The PNC contains criminal conviction information about each of the five individuals. In one case, what is recorded is a reprimand (administered when the individual was 13 years old); in the other four cases, the individuals were convicted in court. In each case, the Commissioner has served an enforcement notice requiring the deletion of the conviction information from the PNC.

7. The Commissioner took enforcement action because he considered that the continuing retention of the information breached the Data Protection Principles (the DPPs) set out in Schedule 1 to the Data Protection Act 1998 (DPA). In effect the Commissioner considered in each case that the information was irrelevant and excessive in relation to the purposes for which it was held, and that it had been held for longer than necessary. In the case involving a reprimand, the Commissioner also considered that the retention of the information was unfair, in the light of the representations that were made to the individual before she agreed to accept the reprimand. In each case, the Commissioner considered that retention of the information had caused and was likely to cause distress to the individual.

8. The five Appellants are the data controllers on whom the Enforcement Notices were served. They deny any breach of the DPPs, and they also contend that the Commissioner reached a wrong conclusion in relation to distress. They ask us to quash the Enforcement Notices.

9. None of the five individuals are parties to these appeals, although one of them was called by the Commissioner as a witness. They are referred to by the initials of the police forces to which the Enforcement Notices are addressed in order to maintain their anonymity, although one of them gave evidence in open hearing before us. The Secretary of State for the Home Department (Home Office) is not a party to these appeals, but was permitted to make written submissions to the Tribunal.

10. Underlying these appeals is a fundamental difference of approach between the Commissioner and the police in relation to criminal conviction information held on the PNC. The police approach is that criminal conviction information should not be deleted from the PNC except in very rare circumstances, but that such information should in certain circumstances "step down", i.e. that it should remain on the PNC but should only be accessible to police users of the PNC. The step down approach derives from the 2005 Tribunal decision. The Commissioner endorses the step down approach, but also considers that there should be provision for conviction information to "step out" from the PNC, i.e. to be removed altogether.

The Home Office consider that even the step down approach is wrong in law in certain circumstances because of the need for other agencies to have access to such data.

The evidence before the Tribunal

11. We heard evidence either orally or on the basis of an unchallenged witness statement from the following Appellants' witnesses: Richard Heatley, Head of the Information Compliance Unit Humberside Police; Janet Turner, Information Compliance Officer Staffordshire Police; Hayley Morrison, Disclosure Manager Northumbria Police; Kate Firkins, Data Protection Manager West Midlands Police; Adrienne Walker, Corporate Information Manager, Greater Manchester Police; John Dineen, Force Vetting Officer GMP; Deputy Chief Constable Ian Readhead, Hampshire Police; Detective Superintendent Gary Malcolm Linton, Head of ACRO Hampshire Police; Mike McMullen, Deputy Head ACRO; Superintendent Philip Michael Lay, Head of Public Protection Section Greater Manchester Police; Detective Sergeant Stewart Watson, Humberside Police; Christopher William Paul Newall, Principal Legal Advisor to DPP Crown Prosecution Service; Ian Gray, Deputy Director HR Policy & Reward Access HM Prison Service; Roz Hamilton, Director of Offender Management Greater Manchester Probation Board; Antony Decrop, Head of Safeguarding Children's Services Department Manchester City Council; Richard Eric Blows, Deputy Director of Safeguarding Operations Division Department for Children, Schools and Families; Adrian McAllisterChief Executive of the Independent Safeguarding Authority and Vince Gaskell, Chief Executive of CRB. On behalf of the Commissioner we heard oral evidence from Mick Gorrill, Head of the Investigations Unit of the Regulatory Action Division Information Commissioner's Office (ICO), Jonathan Bamford Assistant Commissioner and Director of Data Protection Development ICO and SP (the data subject in relation to one of the Enforcement Notices). We also heard evidence from three expert witnesses, namely Professors Brian Francis and Keith Soothill on behalf of the Commissioner and Professor Lawrence William Sherman on behalf of the Appellants. This is nineteen witnesses on behalf of the Appellants and five witnesses on behalf of the Commissioner. Some of these witnesses also gave evidence before the 2005 Tribunal.

Legal and policy framework governing information held on the PNC

12. It is important to understand the legal and policy framework governing the PNC. The Tribunal has heard a considerable amount of evidence on the matter. The PNC is not in itself a legal entity. It is a computer system which was set up some time ago. The Chief Constables or Officers of the 43 England and Wales police forces through ACPO pool much of their collective intelligence on the PNC. It processes hard and soft data. It also identifies whether DNA and finger prints are held on an individual. The technology used is old and is planned to be updated. In addition each force has a variety of systems where intelligence is held locally.

13. Each of the 43 police forces in England and Wales can add information to the PNC, and can also delete information. In evidence Jonathan Bamford explained that the Commissioner regards the Chief Officer of each police force as being a data controller in respect of the information they added to the PNC. In each of the present appeals, the Commissioner has

taken enforcement action against the Chief Officer of the police force that originally added the relevant information to the PNC. The Appellants have not suggested in these appeals that the Commissioner ought instead to have taken enforcement action against some other police force or police body.

14. The Tribunal heard evidence about the role played by ACPO, and the ACPO Criminal Records Office (ACRO), in relation to the PNC. Mike McMullen explained that ACRO was established in May 2006 "to provide operational support to the police service in relation to record management and the associated DNA and fingerprint records". The Commissioner has postulated that it may be that ACPO and/or ACRO ought also to be regarded as data controllers in respect of the PNC, but this is not an issue that the Tribunal needs to determine in this case.

15. The PNC infrastructure is maintained by the National Police Improvement Agency (NPIA). The Commissioner did not suggest that the NPIA was a data controller in respect of the PNC, though it may be a data processor. Again it is not a matter we need determine in this case.

16. We heard evidence that information held on the PNC is available to a number of different organisations other than the police. For instance, Vince Gaskell explained how the Criminal Records Bureau (CRB) was able to access criminal conviction information on the PNC for the purpose of preparing standard and enhanced disclosure certificates. It was also explained in evidence that it is envisaged that the Independent Safeguarding Agency (ISA), when it comes into operation, will make use of conviction information held on the PNC for the purpose of monitoring individuals who engage or seek employment or training in certain kinds of work. We examine these agencies and the certificates they produce in more detail later in this decision.

17. Statutory authority for the existence of the PNC is provided by section 27(4) of the Police and Criminal Evidence Act 1984. This provides:

> *The Secretary of State may by regulations make provision for recording in national police records convictions for such offences as are specified in the regulations.*

18. The type of information that may be recorded on the PNC is governed by regulations made under that section. Regulation 3 of the National Police Records (Recordable Offences) Regulations 2000 (SI 2000/1139) provides:

> *There may be recorded in national police records—*
>
> *convictions for; and*
>
> *cautions, reprimands and warnings given in respect of,*
>
> *any offence punishable with imprisonment and any offence specified in the Schedule to these Regulations.*
>
> *In paragraph (1) above—*

the reference to an offence punishable with imprisonment shall be construed without regard to any prohibition or restriction imposed by or under any enactment on the punishment of young offenders;

"caution" has the same meaning as in Part V of the Police Act 1997; and

"reprimand" and "warning" mean a reprimand or, as the case may be, a warning given under section 65 of the Crime and Disorder Act 1998.

Where the conviction of any person is recordable in accordance with this regulation, there may also be recorded in national police records his conviction for any other offence of which he is convicted in the same proceedings.

19. We note that the legal framework is permissive, not mandatory. Certain conviction information *may* be recorded in national police records; there is no statutory obligation to record conviction information, and nor is there an obligation to retain conviction information (either for any particular period, or indefinitely) once it has been recorded. Nor is the legislative framework comprehensive. Certain legal offences are not liable to imprisonment and are not specified in the Schedule to the Regulations, and hence they are not recordable. For instance, it is understood that the offences created by the DPA itself are at present not recordable. Therefore even if all recordable offences were recorded and retained indefinitely, the PNC would not be a comprehensive record of all criminal convictions.

Data Protection Principles

20. As data controllers, the Appellants must comply with the requirements of the DPA, and in particular must comply under section 4(4) with the Data Protection Principles (DPPs) set out at Schedule 1 to the DPA. The DPPs are, in effect, a set of good data management principles.

21. The DPA was introduced to comply with the requirements of Directive 95/46/EC (the DP Directive). Hence the DP Directive is relevant to the interpretation of the DPA, and the legislation ought if possible to be construed consistently with the Directive. In addition the right to private life under Article 8 of the European Convention on Human Rights (ECHR) is relevant in construing the DPA, for two reasons. One is that the DP Directive was in itself intended to give effect to the Article 8 right. The other is that the Tribunal is obliged under section 3 of the Human Rights Act 1998 (HRA) to interpret the DPA consistently with Convention rights if possible.

22. For the purpose of these appeals the main focus is on the third and fifth DPPs (DPP3 and DPP5). DPP3 reads:

Personal data shall be adequate, relevant and not excessive in relation to the purpose or purposes for which they are processed.

DPP5 reads:

Personal data processed for any purpose or purposes shall not be kept for longer than is necessary for that purpose or those purposes.

One of the appeals (in relation to SP) also requires the Tribunal to consider the requirement in the first DPP (DPP1), that personal data should be processed fairly. The Tribunal is not required in this case to consider the other aspects of DPP1 such as the requirement to satisfy one of the conditions in Schedule 2 or Schedule 3 of DPA 1998 in order to justify the processing of personal data.

Police codes/guidelines

23. Historically, there has been a range of guidance in relation to the holding of information for police purposes. The first ACPO Code of Practice for Police Computer Systems was published in 1987 and was not provided in evidence. A comprehensive revision was published in 1995 (the 1995 Code). The 1995 Code reflected the terms of the Data Protection Act 1984, the predecessor of the DPA. The 1995 Code incorporated general rules for criminal record weeding or deletion on police computer systems at paragraph 2.6.3 of the Code. The general principle under point 4 of that paragraph was that where a data subject had not been convicted for a recordable offence for a period of twenty years then the record would be deleted unless certain conditions applied.

24. A further set of general weeding rules for criminal records (the 1999 Rules) was endorsed by the ACPO Crime Committee in September 1999. The general rule was that where a data subject had not been convicted for a recordable offence for a period of 10 years from the date of their last conviction then the record would be deleted unless certain conditions applied at paragraph 5 of these Rules. The range of criminal conviction information that would be deleted under the 1999 Rules was more extensive than under the 1995 Code. A revised ACPO Code of Practice for Data Protection (the 2002 Code) was adopted in October 2002 and at paragraph 8.4 incorporated the 1999 Rules in their entirety. We note there is also a November 2000 version of the 1999 Rules. However any variations between the original 1999 Rules, the November 2000 version of those Rules, and the version incorporated in the 2002 Code, is not material to our considerations.

25. The operation of the 2002 Code (including the weeding rules), and its relationship with the DPA, was considered by the Information Tribunal in its 2005 decision. The relevant policy and guidance framework in relation to police information, including information held on the PNC, has subsequently changed. These changes are important to any consideration of the relevance for present purposes of the 2005 Tribunal decision. The new framework is set out in three main documents, which should be considered together.

26. At this stage we should recall that the Bichard Inquiry Report published in June 2004 identified a need for improved record creation, retention, review, deletion and disclosure of criminal intelligence. The 2005 Tribunal decision at paragraphs 56 to 72 referred to and commented on those parts of the Report which we consider are also relevant to these appeals.

27. The Report recommended that a new code of practice was needed and that "it should supersede all existing guidance and cover the capture, review, retention or deletion of all information (whether or not it is conviction related). The Code should also cover the sharing of information by the police with partner agencies."

28. The first part of the new framework is a Code of Practice on the *Management of Police Information* which was published in July 2005 and came into effect on 14th November 2005

(the 2005 Code). The 2005 Code was part of the government's response to the recommendations of the Bichard Inquiry. It was made by the Secretary of State under sections 39 and 39A of the Police Act 1996 and sections 28, 28A, 73 and 73A of the Police Act 1997. The 2005 Code expressly recognises at paragraph 1.2.4 that there is an existing legal framework for the management of information in legislation relating to data protection, human rights and freedom of information. It provides under paragraph 3.1.1 and elsewhere that guidance will be issued on various issues about the management of police information generally.

29. The 2005 Code defines "police information" under paragraph 2.2.1 as information recorded for police purposes. Paragraph 2.2.2 provides that for the purposes of the 2005 Code, police purposes are:

> *protecting life and property;*
>
> *preventing the commission of offences;*
>
> *bringing offenders to justice;*
>
> *any duty or responsibility of the police arising from common or statute law.*

Both the third and the fifth data protection principles require that data processing should be assessed by reference to the purpose(s) for which the data are processed; so the question of what are "police purposes" is important for the purposes of these appeals.

30. The 2005 Code does not contain detailed provisions about the retention and deletion of police information. Paragraph 4.6 provides that on each occasion when it is reviewed, information originally recorded for police purposes should be considered for retention or deletion in accordance with criteria set out in guidance under the 2005 Code. It also provides that guidance will acknowledge that there are certain public protection matters which are of such importance that information should only be deleted if: (a) the information has been shown to be inaccurate, in ways which cannot be dealt with by amending the record; or (b) it is no longer considered that the information is necessary for police purposes. Thus the 2005 Code anticipates that detailed guidance will be issued subsequently.

31. The second part of the new framework is a document entitled *Guidance on the Management of Police Information* (MOPI) which has been produced by the National Centre for Policing Excellence (NCPE) on behalf of ACPO. NCPE was established by the Police Reform Act 2002. This guidance document is made under the 2005 Code. Section 7 of this document gives guidance for the review, retention and disposal of police information held on all systems other than the PNC. MOPI specifically recognises that police information must be managed lawfully and in accordance with the DPA and HRA and states that "compliance is central to the management of police information". Section 7.4 sets out National Retention Assessment Criteria for this information. Two points are significant: (i) the recognition that the infringement of an individuals' privacy created by the retention of their personal information must satisfy a *proportionality* test; and (ii) the focus on assessing the *risk of harm* presented

by individuals. Section 7.4 is structured around six basic questions: it states that these questions:

> *are focused on known risk factors, in an effort to draw reasonable and informed conclusions about the risk of harm presented by individuals or offences*.

32. Following MOPI, ACPO produced a data protection manual of guidance on 10th October 2006 (DP guidelines) to assist police forces in their statutory responsibilities to comply with the DPA. In relation to the review, retention and disposal of personal data in respect of the 5th Data Protection Principle the manual states (at paragraph 4.3) "within police forces a systematic approach will be followed including a definition of review periods for particular categories of documents or information containing personal information. At the end of such periods they will be reviewed and disposed of if no longer required. Police forces may need to consider certain statutory requirements which may specify required retention periods or the potential value of some personal data and other information which may suggest further retention for historic purposes." There is an acknowledgement that some such information may be retained as statistical data and which is no longer personal data.

33. The third part of the new framework is the document entitled *Retention Guidelines for Nominal Records on the Police National Computer* (the 2006 Guidelines) which provides guidance as to the retention of records held on the PNC. This is the document Jonathan Bamford referred to in evidence "as the current retention guidelines". It is the detailed guidance foreshadowed by paragraph 4.6 of the 2005 Code. The 2006 Guidelines came into effect on 31st March 2006, replacing the weeding provisions in the 2002 Code. The 2006 Guidelines have been considered in some detail in the course of the evidence given at this hearing.

34. The 2006 Guidelines explain at paragraph 2.8 that PNC "nominal records" (that is to say, records linked to a specific named individual) will contain event histories to reflect the fact that the subject may have been convicted (including cautions, reprimands and warnings), dealt with by the issue of a Penalty Notice for Disorder, or dealt with as a "CJ Arrestee": A "CJ Arrestee" for this purpose is a person who is detained at a police station having been arrested for a recordable offence, but where the arrest results in no further action being taken (paragraph 2.5 of the 2006 Guidelines). Nominal records will be retained on the PNC until the data subject is deemed to have reached 100 years of age (paragraph 3.1 of the Guidelines).

35. The 2006 Guidelines are based on a format of restricting access to PNC data rather than the deletion of that data (paragraph 1.3 of the 2006 Guidelines). Periods of time are set after which the relevant event histories will step down, in which case the records in question will only be open to inspection by the police, not by other users of the PNC. The step down periods will depend on the age of the subject, the final outcome, the sentence imposed (if any), and the offence category. Appendix 3 to the 2006 Guidelines sets out detailed offence categories. There are three categories of offence – A, B and C – with A being the most serious and C the least serious.

36. At present, step down is a manual process. Where a record is stepped down from the PNC then conviction information is removed from the PNC, although a record of an individual's name and other identifying information remains on the PNC. The individual's record on the PNC would also include an indication that information has been stepped down. Detective

Superintendent Linton explained in evidence that at present information is held in paper records, not on computer, under the control of ACPO.

37. The issue of whether the CRB is able to access stepped down information has caused some difficulty. The 2006 Guidelines indicate that the CRB will not automatically receive stepped down information as part of the standard or the enhanced disclosure process (explained below), but that the CRB may obtain that information as part of an enhanced disclosure, if a chief officer of police in the exercise of his discretion considers that it should be disclosed. However, it is clear from Detective Superintendent Linton's evidence before the Tribunal that police forces wish to modify the operation of the 2006 Guidelines so that conviction information is automatically provided to the CRB as part of the standard and enhanced disclosure process. It is also intended that at some point in the future the step down process should operate automatically, not manually. What is envisaged is that stepped down information will be held on the PNC, but that special measures will be taken to ensure that it is only accessible to police users of the PNC.

38. A point made by the Appellants and by the Home Office is that once conviction information is the subject of automated step down, so that it remains on the PNC after step down, then the police will have no option but to pass it on to the CRB for the purpose of standard disclosures. This is said to follow from the way in which the Police Act 1997 obliges the Secretary of State to include conviction information held in "central records" in any standard or enhanced disclosure certificate, and also obliges the police to provide the CRB with information for this purpose. An amendment to the Police Act 1997 allowed the definition of central records to be modified by order (under section 113A(7)), but this amendment has not been brought into force and it appears there is no current intention to do so. Also it would appear from the evidence that there has been a change of heart at the Home Office in respect of the treatment of stepped down information. We deal with this point in more detail below.

39. The 2006 Guidelines make provision at Appendix 2 for an exceptional case procedure for the removal of DNA, fingerprints and PNC records (prior to the expiry of the 100 year period referred to at paragraph 3.1 of the guidelines). Appendix 2 states that Chief Officers have the discretion to authorise the deletion of any specific data entry on the PNC "owned" by them, but goes on to suggest that this discretion should only be exercised in exceptional cases. Some examples are given of cases that might be regarded as exceptional.

40. The question of how the Appellants and ACPO understand the meaning of "exceptional cases" was addressed at some length in evidence. Deputy Chief Constable Readhead gave four examples of situations which might be exceptional:

    a) individuals are arrested in a situation in which it turns out that in fact no crime has been committed (e.g. a number of people are arrested on suspicion of murder, and it subsequently turns out that the deceased died of natural causes);

    b) a reprimand or caution is on the PNC but has been (or appears to have been) improperly administered;

    c) an individual's record is on the PNC in respect of conduct that was criminal at the time the record was created, but that is no longer criminal; and

d) an individual's record shows that he was convicted for unlawful sexual intercourse with a girl under 16: the intercourse was consensual, many years have passed, the couple are now married, and the individual has no other convictions on the PNC.

Deputy Chief Constable Readhead did not accept that deletion would necessarily take place even in these cases. His position appeared to be that it was seriously arguable that records should be deleted in these cases, on the grounds that they were exceptional.

41. Some police forces have taken a wider view of what constitutes "exceptional cases". The Tribunal heard evidence of deletions by both Thames Valley Police and Greater Manchester Police. Greater Manchester Police were originally minded to delete information about the individual known as "GMP" and we refer to this evidence later in our decision. The Tribunal has also heard evidence about the deletion by Greater Manchester Police of the conviction information about another individual, which again is referred to later in this decision.

The remaining data protection legislative framework

42. It is agreed that the five Appellants are the data controllers of the conviction data in issue, under section 1(1) of DPA and that subject to section 27(1) DPA, they are obliged to comply with the DPPs in relation to personal data with respect to which they are the data controllers (section 4(4)). The parties in these appeals agree that the conviction data in question are personal data and more particularly are 'sensitive' personal data as defined under section 2 DPA. We have already set out the relevant DPPs above.

43. Under section 16 DPA, the five Appellants as data controllers registered their purpose as 'policing' and the purpose description as

"The prevention and detection of crimes; apprehension and

prosecution of offenders, protection of life and properties;

maintenance of law and order; also rendering assistance to

the public in accordance with force policies and procedures

And the further description of purpose as

protection and detection of crime

apprehension and prosecution of offenders

maintenance of law and order,

protection of life and property

vetting and licensing

public safety

rendering assistance to members of the public in accordance

with Force policy"

44. Section 27 DPA provides for exemptions to, inter alia, the provisions of the first data protection principle and one of those exemptions, section 29, relates to the prevention and detection of crime and the apprehension or prosecution of offenders.

45. Under section 42 a request may be made to the Commissioner by or on behalf of any person who is, or believes himself to be, directly affected by the processing of any personal data for an assessment as to whether it is likely or unlikely the processing has been or has been carried out in compliance with the provisions of the Act.

46. Under section 40 the Commissioner may serve an enforcement notice on a data controller if satisfied that the data controller has contravened or is contravening any of the data protection principles.

47. Under section 48(1) a person on whom an enforcement notice has been served may appeal to the Information Tribunal. By section 49, if the Tribunal considers that the notice against which the appeal is brought is not in accordance with the law, or to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently, the Tribunal shall allow the appeal or substitute such other notice or decision as could have been served or made by the Commissioner; and in any other case the Tribunal shall dismiss the appeal. Under section 49(2) on such an appeal, the Tribunal may review any determination of fact on which the notice in question was based.

48. Under rule 26 of the Information Tribunal (Enforcement Appeals) Rules 2005 it is for the Commissioner to satisfy the Tribunal that the disputed decision(s) should be upheld.

Disclosure of criminal intelligence to non police agencies

49. The Enforcement Notices in these appeals arise due to the Chief Constables, through the National Identification Service (NIS), disclosing to the CRB the conviction data of the data subjects in these appeals held on the PNC so that the CRB, as an executive agency of the Home Office, could respond to requests for what are called "standard" and "enhanced" certificates. The legislative background to this process is explained in this section of the decision.

50. Under the Rehabilitation of Offenders Act 1974 (ROA) an individual is entitled not to answer any question about his spent convictions (s. 4(2)). The Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 (ROA Exceptions Order) however, provides that a person may ask about an individual's spent convictions in order to assess the suitability of an individual to hold certain positions of trust/responsibility (Article 3). Such a question is referred to as an "exempted question". Most commonly, exempted questions are asked to assess suitability to work with children and vulnerable adults.

51. Part V of the Police Act 1997 provides for the disclosure of criminal convictions, cautions, reprimands and other information by the Secretary of State of the Home Office to prescribed persons. Section 113A of the Act provides for the provision of a standard disclosure certificate. Such a certificate may be provided to any person who is permitted to ask an exempted question under the Rehabilitation of Offenders Act (Exceptions Order) 1975. Disclosures under a standard certificate would be a person's previous criminal convictions, cautions or reprimands including any spent convictions.

52. Section 113B of the Act provides for enhanced criminal records certificates. Enquiries would be from persons included in the Rehabilitation of Offenders Act (Exceptions Order) 1975. The disclosures would be as for a standard disclosure certificate but in cases which involve, principally, working or coming into contact with young and vulnerable people would also include further soft data or intelligence at the discretion of the Chief Officer of the relevant police force which "might be relevant for the purpose described" (section 113B(3) and (4)).

53. Both types of certificates must set out details of every "relevant matter" held on "central records". This means such records of convictions, cautions, and other information held for the use of police forces generally (s. 113A(6) and Police Act (Criminal Records) Regulations 2002 (SI 2002/233) (Criminal Record Regulations) reg. 9). As mentioned earlier in this decision it should be noted that not all offences are "recordable": only records of offences which are punishable by imprisonment or specified in Schedule 1 to the National Police Records (Recordable Offences) Regulations 2000 (SI 2000/1139) are entered on the PNC. Any person who holds records of convictions including cautions and other information for the use of police forces generally must make such information available to the Secretary of State to enable him to exercise his functions (section 119).

54. Statutory provision is also made for barring people from working in certain positions involving work with children and vulnerable adults. At present, three lists are maintained of persons who are barred on suitability grounds from working respectively in schools, with children and with vulnerable adults: List 99 (under section 142 of the Education Act 2000); the PoCA list (under section 1 of the Protection of Children Act 1999); and the PoVA list (under section 81 of the Care Standards Act 2000). Decisions on barring in the case of List 99 and PoCA are taken by the Secretary of State for Children, Schools and Families; decisions on barring in the case of PoVA are taken on behalf of the Secretary of State for Health. Appeals against barring lie to the Care Standards Tribunal. If someone is included on a barred list, that information will also be included on a standard or enhanced certificate.

55. In or around October 2009, these lists will be replaced by two lists (children's barred list and adults' barred list) maintained under the SVGA 2006. Decisions on barring will be taken by the ISA. The SVGA 2006 also requires persons who work with children or vulnerable adults to register with the Secretary of State (through the CRB) so that they can be monitored (section 24). In essence, monitoring will require checks similar to those currently made by the CRB for the purposes of an enhanced disclosure to be made not simply when the individual begins the relevant employment/work, but periodically thereafter for so long as they continue in that employment/work. For the purpose of registration and barring decisions, the ISA will be entitled to require anyone who "holds records or cautions for the use of police forces generally" to provide it with the details of any "relevant matter" within the meaning of section 113A(6) of the PA 1997, (SVGA 2006, Schedule 3, para 19). Further, the CRB will be obliged to collate "relevant information" which is again defined (section. 24(8)) to include the

prescribed details of any "relevant matter", and to provide that information to the ISA (schedule 3, para 20(1))

56. It is important to highlight some of the features of the disclosure regime set out above.

57. Part V of the PA 1997 does not in itself confer a freestanding right to obtain the details of an individual's conviction record. Rather, the gateway to obtaining a certificate is the right to ask an exempted question under the ROA and the ROA Exceptions Order. The ROA itself defines in some detail what types of offences are to be treated as spent, and also when they are to be treated as spent. The ROA Exceptions Order, made under section 4(4) of the ROA and since frequently amended, in turn defines the circumstances in which a person is entitled in principle to know whether an individual has any convictions, notwithstanding that the convictions may be spent. The ROA and the ROA Exceptions Order thus provide for just two categories of conviction: unspent and spent and treat all spent convictions as disclosable in response to an exempted question.

58. The effect of the interaction between the ROA and the ROA Exceptions Order and Part V of the PA 1997 is that the standard or enhanced certificate acts as a check of the answer to an exempted question which the employer is entitled to ask the applicant or employee directly in any event as was accepted by the Court of Appeal in *X v Chief Constable of West Midlands Police* [2005] 1 WLR 65 at [44]. In evidence before the Tribunal Antony Decrop and Ian Gray explained that it is common practice for employers who are entitled to ask exempted questions to ask for details of previous convictions including spent convictions in employment application forms, and in addition to obtain a standard or enhanced certificate to check the answer given. The Commissioner made the point that it is a matter for employers to decide whether or not to ask about spent convictions and they are not obliged to do so.

59. No standard or enhanced certificate may be obtained without the knowledge and consent of the individual whose criminal record is in issue. An individual who does not wish his criminal record to become known to a prospective employer may choose not to seek employment of the type to which the ROA Exceptions Order applies.

60. A standard or enhanced certificate does not result in the individual's criminal record becoming publicly available. The issue of the certificate is very closely controlled. It is provided only to the applicant and the "registered person", i.e. the prospective employer/organisation which has obtained the certificate on the employer's behalf. There are safeguards to ensure that (a) the certificate is only provided to an applicant where there is sufficient evidence of his identity (the CRB may refuse to issue a certificate if there is insufficient evidence of identity - section 118); (b) the registered person is suitable to receive such information (this is ensured through the registration process, which is itself governed by regulations - sections 120, 120ZA and 120A and Police Act 1997 (Criminal Records) (Registration) Regulations 2006, SI 2006/750); (c) the registered person is entitled to receive the information on the certificate in question (this is ensured by requiring the registered person to countersign the application and state that it is required for an exempted question and (in the case of an enhanced certificate) a prescribed purpose); and (d) the certificate is not further disclosed (unauthorised further disclosure of a certificate is a criminal offence under section 124).

61. The existence of spent convictions does not mean in itself that an individual is automatically barred from working in a position to which the ROA Exceptions Order applies. It is for the

prospective employer to judge the relevance of the spent conviction to the suitability of the applicant for the job in question, taking into account all relevant circumstances including other information available to him such as information provided by the police under section 113B(4), references/disciplinary records from previous employers etc. It is open to the applicant to provide additional information to the employer, such as an explanation of the circumstances of any spent conviction. If the applicant considers that the information contained in the certificate is inaccurate, he has the right to challenge it: section 117 of the 1997 Act.

62. Vince Gaskell explained in his evidence, safeguards have been put in place, in the form of a statutory code of practice (issued under section 122 of the 1997 Act) and guidance, to seek to ensure that employers act fairly and reasonably, and that individuals whose convictions are not properly to be treated as rendering them unsuitable for a particular job are not prejudiced by their disclosure. The code provides that it is a condition of registration that registered persons comply with the code, and all registered persons must have a written policy on recruitment of ex-offenders and conviction information must be discussed with the applicant before withdrawing an offer of employment. Jonathan Bamford for the Commissioner suggested in evidence that employers do not in practice comply with the code. Vince Gaskell explained the careful work that the CRB has done to ensure that the code is complied with, which includes risk assessments, surveys, and personal visits to those whom the CRB is concerned are not compliant. He explained that approximately 200,000 disclosures (in the most recent year for which figures are available) included information on applicants, and those resulted in someone being refused employment as a result in approximately 20,000 cases.

63. The same point may be made concerning barring under the SVGA 2006. Adrian McAllister of the ISA explained that the existence of a conviction will not (save for certain serious offences which are not in issue in the present appeals) automatically result in a decision to bar. On the contrary, the ISA will collate and consider all the information available on a person before taking a decision on whether to bar. In so doing, it will be assisted by a panel of experts. Any actual decision to bar will only be taken after careful consideration and a balancing of the rights of the individual against the public interest in the protection of children and vulnerable adults.

64. We find that although these vetting regimes require access to the PNC, the statutory direction is to the information held on the PNC, presumably at the time of the enquiry. There is no statutory requirement on the owners of the data, namely the 43 Chief Constables in England and Wales, to process (including holding) all conviction data on behalf of the CRB or ISA. We do not find, for example, that sections 113A and 113B of the Police Act 1997 impose a statutory obligation upon the police in respect of employment vetting which automatically designates it as a police purpose in data protection terms.

<u>The background to the five Enforcement Notices</u>

65. The Enforcement Notices arose from the CRB responding to requests for standard and enhanced certificates. As already explained in order to maintain the anonymity of the data subjects it was agreed by the parties that the data subjects in these appeals should be

referred to by the initials of the appropriate Appellant. The relevant personal data in respect of the five data subjects and the background to their complaints is set out below.

Data Subject HP

66. HP was born on 18th October 1967. On 2nd April 1984 HP was convicted of an offence of theft at the Hull Juvenile Court. He was fined £15. The retained details of the offence are that he had removed items from a display in Marks & Spencer in Whitefriargate, Hull at 9.25 hours on 2nd March 1984. The offence was committed along with one other. At the time of the offence and date of conviction HP was 16 years old. The offence was disclosed on an enhanced disclosure certificate dated 7th July 2006. HP had applied for a position as a care officer with the Hull City Council.

67. On 16th September 2006 HP made a complaint to the Commissioner's office (ICO). In his complaint he said he had been informed by his employer that an enhanced disclosure certificate had revealed his conviction, which he had not previously disclosed and he was informed by his manager that he may be disciplined. The ICO corresponded with the First Appellant in respect of the conviction between the 19th December 2006 and 8th August 2007. He asked for it to be stepped down or deleted from the PNC. The First Appellant agreed to step down the conviction but not to delete it. The ICO issued a preliminary enforcement notice on the 9th July 2007 and an enforcement notice on 8th August 2007. The notice required the First Appellant to erase the conviction data relating to HP held on the PNC database. The Commissioner said that the retention of the information contravened the third and fifth data protection principles. He said that he had taken into account whether the contravention of the principles had caused or were likely to cause HP damage or distress and had taken into account the provisions of Article 8 of ECHR.

68. There was no other data revealed on the enhanced disclosure certificate and there was no evidence before us that there was any other data, either hard or soft intelligence held on the PNC by the time of the hearing which was 24 years after the date of the 1984 conviction.

Data Subject SP

69. SP was born on 4th April 1988. On 30th June 2001 SP was reprimanded for an offence of common assault by the Second Appellant. The offence was committed on 30th June 2001. The details of the offence are that SP had punched a 15 year old girl to the ground, kicked her and caused her injury in Wolgaston Way, Penkridge, Staffordshire. SP was 13 years old at the time of the reprimand and offence. The reprimand was disclosed on an enhanced disclosure certificate dated 1st September 2006 to Four Seasons Health Care to whom SP had applied for a post as a care assistant. It had been revealed to her employer after she had commenced employment in September 2006. The only other hard or soft intelligence revealed on the PNC was that SP's DNA and fingerprints were held.

70. SP complained to the ICO on 14th November 2006 that she had been informed by the police officer who reprimanded her that the matter would be removed by the time she was 18 years of age provided she kept out of trouble. This information was consistent with the police weeding or retention rules laid down at the time and the Appellants presented no evidence to us which contradicted SP's assertion. In evidence before the Tribunal SP said that she was devastated to learn that the reprimand was still recorded and had not been deleted because,

in effect, it meant that she would be unable to undertake training for caring roles, which was her chosen career path, because of the retaining of her criminal record.

71. The ICO corresponded with the Second Appellant between 6th January 2007 and 6th August 2007 and requested the Second Appellant to step down the reprimand or delete it from the PNC database. The Second Appellant agreed to step down the reprimand but not to delete it from the PNC database. In a letter to the Commissioner dated 10th January 2007 Detective Superintendent Gary Linton explained that "this decision is in keeping with ACPO policy dated 7th December 2006 that forces should not weed any records that would have fallen to weed under the old weeding rules." The Respondent issued a preliminary enforcement notice on 9th July 2007 and an enforcement notice on 16th August 2007. In the enforcement notice the Respondent required the Second Appellant to erase the data of the reprimand from the PNC database on the grounds that it breached the first, third and fifth data protection principles. The Commissioner believed that the first data protection principle was breached because of the representation which had been made to SP that it would be removed after 5 years. The Commissioner said he had taken into account that distress had been caused or was likely and the provisions of Article 8 of ECHR.

Data Subject NP

72. NP was born on 21st April 1960. On 28th September 1981 NP was convicted of an offence of obtaining by deception and an offence of attempting to obtain by deception at the Newcastle Upon Tyne Magistrates Court for which he was fined £150 and £100 respectively and ordered to pay costs of £10. The offences were committed on 26th August 1981. The circumstances were that at 11.30 am on that day at Gledsons Electrical Co, Redburn Industrial Estate, Westerhope, Newcastle upon Tyne, NP posed as a representative of a company in order to obtain goods. NP was 20 years of age at the time. The offences were disclosed in a standard disclosure certificate dated 13th September 2006 to Home Group Ltd upon an application of NP for the post of Housing Maintenance Officer. NP complained to the ICO on 17th October 2006 that his conviction was still retained notwithstanding under previous weeding rules it would have been removed. No other hard or soft intelligence was revealed on the PNC.

73. In correspondence between the ICO and the Third Appellant between 19th December 2006 and 15th August 2007 the Commissioner requested the Third Appellant to delete the conviction data from the PNC or step it down. The Third Appellant agreed to step down the conviction data but not to delete it. The ICO served a preliminary enforcement notice on the Third Appellant, dated 9th July 2007 and an enforcement notice on 15th August 2007. The ICO required the Third Appellant to erase the conviction data in respect of NP on the grounds that it breached the third and fifth data protection principles. The ICO said that he had taken into account whether distress had been or would be likely to be caused to NP and Article 8 of the ECHR. The Third Appellant agreed to step down the conviction data but not to erase it. The convictions are now 26 years old.

Data Subject WMP

74. WMP was born on 12th February 1962. On 8th February 1978, at the West Bromwich Juvenile Court, WMP was convicted of two offences of attempted theft, in respect of which he was conditionally discharged for two years, and an offence of criminal damage, for which he was fined £25 and ordered to pay compensation of £6.60, a legal aid contribution of £30 and costs

of £29.20. The circumstances of the offences were that on 2nd July 1977 at 3.50 pm WMP and another individual inserted metal blanks into an amusement arcade roulette machine at Dearmouth Park, West Bromwich. WMP was 15 years of age at the time of the offence and conviction. There is no evidence of any other hard or soft intelligence held on the PNC. The convictions were disclosed in an enhanced disclosure certificate dated 23rd August 2006 to Humber Parascending when WMP applied for a position on a Summer Scorcher Activity. WMP complained to the ICO on 5th October 2006 and requested that his convictions be removed as he regarded them, in today's terms, as nothing more than a juvenile prank. He said that as a professional trainer and businessman he felt the terminology used could compromise his integrity.

75. The ICO corresponded with the Fourth Appellant between 11th December 2006 and 15th August 2007 and requested that the Fourth Appellant should remove the conviction data or step it down. The Fourth Appellant agreed to step down the conviction but not to delete it. The ICO issued a preliminary enforcement notice on the 9th July 2007 and an enforcement notice on 16th August 2007. The ICO required the Fourth Appellant to delete the conviction data on the grounds that in his opinion it contravened the third and fifth data protection principles. He said that he had taken into account whether the contravention caused or was likely to cause WMP distress and Article 8 of the ECHR. The conviction is now 30 years old.

Data Subject GMP

76. GMP was born on 16th May 1964. On 25th May 1983 GMP was convicted of an offence of theft (and two matters that were taken into consideration) at the Manchester Magistrates' Court. GMP was sentenced to a conditional discharge of 12 months and ordered to pay compensation of £185 and costs of £35. The circumstances of the offence are that GMP used a Williams & Glynn cashline card belonging to another to obtain £100 from a bank cashpoint dispenser machine on 20th April 1983 at Williams & Glynns Bank, Mosley Street, Manchester. GMP was 18 years of age at the date of the offence and 19 years of age at the date of the conviction. There is no evidence of any other hard or soft intelligence held on the PNC. The conviction was disclosed in a response to a subject access request (pursuant to Section 7 of the Data Protection Act 1998) made by GMP on 1st June 2006 and provided by the NIS on 6th July 2006. GMP had made the request to support an application for a passport, residency and citizenship to the state of St Lucia.

77. GMP made a complaint to the ICO on 5th October 2006 GMP said that because her conviction had been disclosed this would affect her plans to emigrate to St Lucia. The ICO corresponded with the Fifth Appellant between 3rd January 2007 and 29th October 2007 and requested the Fifth Appellant to delete the conviction data in relation to GMP from the PNC or step down the data. By letter dated 13th February 2007 Martin Bailey the Assistant Information Manager of the Fifth Appellant wrote to the Commissioner that "I can confirm that a report has now been submitted to Force Command requesting the deletion of the conviction on the grounds that continued retention amounts to a prima facie breach of the 1st and 5th Principles." On 3rd August Adrienne Walker the Corporate Information Manager of the Fifth Appellant wrote to the Commissioner saying that she had been in touch with ACPO and that "The Assistant Chief Constable is of a mind to support the ACPO position and proposes to resist the request to remove or 'step out' the information." The Fifth Appellant then agreed to step down the data but not to delete it. The ICO issued a preliminary enforcement notice on the Fifth Appellant on 9th July 2007 and an enforcement notice on 15th November 2007. The

ICO required the Fifth Appellant to delete the conviction data in relation to GMP on the grounds that its retention breached the third and fifth data protection principles. The Commissioner said that he had taken into account whether retention of the data had caused or was likely to cause GMP distress, and Article 8 of the ECHR. The conviction is now 24 years old.

78. We would observe that under the 2002 Code all the conviction data in question, except for that of SP, should have been weeded, deleted or stepped out before the 2006 Guidelines came into practice. In evidence we heard that weeding did not take place proactively in accordance with the various codes only retrospectively usually following a request for removal. We note that in an internal Greater Manchester Police memo of 9th March 2007 there was an acceptance that in the case of GMP that if the weeding guidelines had been applied proactively then GMP's conviction data would have been deleted either as early as 23rd September 1999 and no later than 25th May 2003. In these appeals all the conviction data stepped down under the 2006 Guidelines. This did not happen until after the Commissioner's intervention, again retrospectively.

79. We also note that Greater Manchester Police in January 2007 stepped out or weeded the conviction data of another data subject who we shall call "GMP 2" on the basis that his case was exceptional. We note that the Assistant Chief Constable took this decision having taken into account the need for consistent application of the weeding rules by police forces. We have reviewed GMP2's record and there does not appear to be any exceptional circumstances such as described in the 2006 Guidelines. This appears to be a different approach to the weeding of conviction data to that taken in respect of the data subjects in these appeals in relation to similar if not more serious offences committed over 20 years ago.

The general ground of appeal

80. All the Appellants have appealed the requirement to erase conviction data in the Enforcement Notices. They dispute that there has been a breach of the data protection principles and argue that the Commissioner has wrongly exercised his discretion in requiring the Appellants to erase the data.

2005 Tribunal decision

81. Some of the evidence before the 2005 Tribunal is still accepted by the parties particularly the findings and observations in relation to the Bichard Inquiry.

82. The Commissioner issued enforcement notices requiring the erasure of the conviction data in question on the basis that it was being processed in breach of 3rd and 5th DPPs. The 2005 Tribunal substituted new enforcement notices requiring the conviction data to be "stepped down" so that it could only be processed by Chief Constables for their own use. The Tribunal did not require the data in question to be stepped out.

83. However in these appeals the Appellants are challenging the following findings of 2005 Tribunal:

(i) That the retention of a criminal conviction, caution or reprimand is a breach of Article 8(1) of ECHR (para 173 of the judgment);

(ii) That section 29(3) DPA was not material or determinative on the question of disclosure of conviction data in determining contraventions of data protection principles (paras 193 and 194 of the judgment);

(iii) That part V of the Police Act 1997 should be interpreted so as to exclude stepped down data from disclosure to the CRB under the provisions of Section 113A or 113B of the Police Act 1997. Whilst the Appellants accept the rule that stepped down material should in general be for police eyes only they contend the exception to this rule is disclosure to and through the CRB, pursuant to obligations set out in primary legislation in Part V of the Police Act 1997. The Appellants contend that the legislation is not incompatible with European Convention or community law and the Tribunal was wrong to find as such;

(iv) That employment vetting was not a police purpose (para 75, p. 35 of the judgment and para 80 of the judgment), or that such a purpose is limited to the protection of young people and vulnerable adults (para 148 of the judgment). The Appellants contend that sections 113A and 113B of the Police Act 1997 impose a statutory obligation upon the police in respect of employment vetting which thereby designates it as a police purpose.

84. We are not required to consider the findings of another Tribunal in relation to different enforcement notices and make no direct findings on these matters. However the questions for the Tribunal to determine in this case as set out in the next section do cover most of the matters raised so to that extent are dealt with in this decision.

<u>The questions for the Tribunal</u>

85. The parties consider the Tribunal has to determine the following questions in these appeals:

85.1. What are the *purposes* of the Appellants in the context of the third and fifth data protection principles? Do they extend beyond operational detection of crime to:

[i] assistance to the Crown Prosecution Service (or any other prosecuting agency) in the prosecution of an offence, and the courts in the administration of justice;

[ii] assisting organisations such as social services departments and probation services in multi- agency work to protect the public, in particular young and vulnerable persons;

[iii] disclosure of information in the context of employment vetting to the CRB; and

[iv] public safety and protection of life and property, for example assisting members of the public in discovering the whereabouts of missing persons.

85.2. In respect of each such purpose, has the *retention* of any of the conviction data of the data subjects ceased to be adequate or relevant, or is it excessive? (Data Protection Principle 3).

85.3. In respect of each such purpose, is the keeping of the conviction data longer than is necessary? (Data Protection Principle 5)

85.4. Do the convictions and reprimand, or any of them, fall within the exceptional category recognised in Appendix 2 to the 2006 Guidelines warranting stepping out?

85.5. Has the conviction data in respect of SP been processed unfairly and, if so, how? (Data Protection Principle 1)

85.6. To what extent, if at all, does Section 29 DPA exempt the principle(s) in respect of any alleged contravention?

85.7. Has there been a breach of Article 8(1) of the ECHR, in the processing of any of the data?

85.8. If there has been a breach of Article 8(1) of the ECHR, is it qualified by Article 8(2)?

85.9. If the answer to 85.2 and 85.3. is in the negative in respect of any of the conviction data, and there has been no contravention of the DPPs, has the Commissioner erred in law in the issuance of the enforcement notices?

85.10. If the answer to questions 85.2 and 85.3. is, in any part, in the affirmative, has the Commissioner wrongly exercised his discretion in the issuance of the enforcement notices?

85.11. To what extent has the retention of the data caused, or will it be likely to cause, damage or distress, and if it has not, or there are several causes, does that vitiate the Commissioner's exercise of his discretion?

85.12. If any appeal is to be dismissed, should the Tribunal vary the notices and order the Appellants to delete the DNA and fingerprints, if retained, of any of the data subjects?

86. The Home Office has raised the following further matters for the Tribunal to determine, in addition to making representations in relation to 85.7. and 85.8. above, namely:

> 86.1 Whether disclosure of the conviction data at issue in these appeals under Part V of the Police Act 1997 and in the future under SVGA 2006 is lawful and does not infringe the Data Protection Principles and Article 8 ECHR; and
>
> 86.2 Whether Part V of the Police Act 1997 and the SVAG 2006 (when it comes into force) impose mandatory duties on the police in certain circumstances to disclose all conviction data held on the PNC to the CRB and the ISA.

87. We have already considered the matter at paragraph 86.2 in the section "Disclosure of criminal intelligence to non police agencies" where we found that the statutory provisions

referred to do not impose a mandatory duty to disclose all conviction data, only the information held on the PNC in certain circumstances.

88. We have considered the questions set out in paragraphs 85 and 86 (where still to be considered) taking into account all the evidence and arguments before us and the fact that the onus of proof lies on the Commissioner and deal with each one as follows.

1: The Appellants' purposes to which compliance with DPP3 and DPP5 is to be assessed

89. The 2005 Code contains a description of police purposes - see paragraph 29 above. The notification provided by the Appellants to the Commissioner for the purposes of the DPA includes a summary of the purposes for which the Appellants process personal data – see paragraph 43 above. Both of these are expressed in similar wide and general terms.

90. The Commissioner contends that the most obvious purposes for which the police process personal data would be for the prevention and detection of crime, the investigation and apprehension of offenders, and the maintenance of law and order. These, he submits, are "core" police purposes, and they must be taken into account in applying DPP3 and DPP5.

91. The Appellants and Home Office take a different view and contend that all the notified purposes must be taken into account in applying DPP3 and DPP5. These purposes should be interpreted widely and require providing criminal intelligence to other bodies. We note that there is no purpose expressed as such in these terms. Does for example "vetting" relate only to the other purpose alongside its registration, namely "licensing" or to say employment vetting by other bodies? We were provided with very little evidence to help us understand these purposes. We can understand vetting in relation to someone who might be applying for a license for premises. However we are not sure this can be extended to vetting by other bodies by way of a request to the CRB. It has been argued that providing conviction data by way of a standard or enhanced disclosure certificate is for the prevention of crime. This is rather remote from the police's main activities in relation to this purpose, but even if encompassed in the purpose it is difficult to accept that the police would then be required to provide more data to such a body than is required for their core needs, particularly where the relevant legislation described above does not require otherwise, only information held by the police at the time of say a CRB enquiry. It is not clear to us the extent to which the purpose(s) for which the police are registered under the DPA would be pursued if they provided all conviction data to other bodies such as the CRB. Therefore we find that we agree with the Commissioner that we must concentrate on the obvious or core police purposes which are easily understood. We would comment that one of the principal reasons behind the registration process is so that it is transparent and clear as to what purposes are being pursued by a data controller in order for it to be seen that there is compliance with the DPPs.

92. It is clear from the evidence before the Tribunal, particularly that given by Mike McMullen, that a considerable number of other bodies use information held on the PNC for various purposes, although they do not necessarily have direct access. The 2006 Guidelines recognise this: hence the provision for certain convictions to be stepped down, and thereby protected from access by non-police users.

93. The Commissioner contends that the fact that such organisations are permitted to access the PNC and that the Chief Constables may work in partnership with other organisations does not mean that the purposes for which it does so are to be treated as policing purposes. This does not mean that all of the purposes pursued by the partner organisation should be treated as being police purposes.

94. The Appellants identified four possible purposes that are said to be of relevance:

    (1) providing assistance to the Crown Prosecution Service (CPS) (or any other prosecuting agency) in the prosecution of an offence, and the courts in the administration of justice;

    (2) assisting organisations such as social services departments and probation services in multi-agency work to protect the public, in particular young and vulnerable persons;

    (3) disclosure of information in the context of employment vetting to the CRB; and

    (4) public safety and protection of life and property, for example assisting members of the public in discovering the whereabouts of missing persons.

95. The Appellants maintain that they process information about the criminal records of individuals for each of these four purposes, and that each of these purposes should be taken into account in the present case in relation to both DPP3 and DPP5.

96. We consider the correct approach is that the police process data for what the Commissioner describes as their core purposes. In data protection terms this processing requires holding criminal intelligence on the PNC for so long as it is necessary for the police's core purposes. During the course of holding such data the police are under statutory obligations to allow access to or disclosure of such data to other bodies for their purposes. However we do not consider that Chief Constables are required under their statutory obligations to hold data they no longer require for core purposes. They are only required to provide data that they do hold at the time of the request for access. We heard evidence that Chief Constables have been weeding/deleting conviction data under the various codes of practice until the 2006 Guidelines, and even since then in exceptional cases. Therefore Chief Constables, in any case, are unable to provide all conviction data to these other bodies, only the data which is held on the PNC at the time of access or the request for access. If Chief Constables in accordance with good management practice and/or other statutory requirements, like their data protection obligations, as envisaged by the 2005 Code and the criteria used in MOPI, delete conviction data or other intelligence from time to time, then in the Tribunal's view there is no counter or overriding obligation on them not to delete that data.

97. This reflects the position, in our view, that Chief Constables cannot be expected to incorporate other bodies' purposes as part of their own even though there may be some common objectives, like the prevention of crime.

98. This point can be understood by reference to the disclosure of information in the context of employment vetting by the CRB. Section 119 of the Police Act 1997 provides

> *Any person who holds records of convictions, cautions or other information for the use of police forces generally shall make those records available to the Secretary of State for the purpose of enabling him to carry out his functions under this Part in relation to*
>
> *a) any application for a certificate or for registration; or*
> *b) the determination of whether a person should continue to be a registered person.*

The obligation relates to information *held* for the *use* of police forces. In our view if the information is no longer held then there is no obligation under this section.

99. We appreciate that this finding may have unfortunate consequences for other bodies now and in the future who require such information for their purposes. We make some general observations. It seems to us that the PNC has evolved over the years and it is now regarded as the main source of criminal intelligence for a variety of organisations. However it has no proper statutory framework. It is not regarded as an entity in its own right with its own purposes serving a number of bodies and this is apparent from the fact that neither the PNC nor its various administrators, ACPO, NIS, NPIA, are registered as data controllers with the Commissioner. If the government wishes the PNC to have that role then it needs to legislate accordingly. This would provide the opportunity for Parliamentary debate as to how best to provide an appropriate and proper legislative framework so that there is a clear understanding of data ownership and obligations with proper safeguards.

100. Even if we are wrong we would still come to the same conclusion and examine the four purposes at paragraph 94 to show why.

Assisting the CPS and the Courts

101. As far as the first purpose is concerned, we heard evidence that information held on the PNC is currently provided to both the CPS and to the Courts. Christopher Newall in his written statement explained that there are limited circumstances in which information about the past criminal convictions of a defendant (or a witness) may be placed before the Court. The Court may also take account of previous convictions when passing sentence. The PNC is not the only record of past convictions. Both Detective Superintendent Linton and Deputy Chief Constable Readhead explained that individual courts maintain their own records of convictions, and that those records are kept indefinitely. However, there is at present a practical difficulty in making use of these Court records, which is that there is no effective way of carrying out a nationwide search of these records. There is no suggestion that there is anything improper in PNC records being used by the CPS or the Courts in this way.

102. The Commissioner maintains that there is an important difference between: (i) policing purposes; (ii) the prosecution of offenders; and (iii) the administration of justice. Detective

Chief Constable Readhead in evidence explained that securing the conviction of offenders was not part of the function of the police. Their function was to obtain the best evidence that they could in relation to criminal offences, and it was then for others to use that evidence in seeking to secure convictions. He further explained that in many ways there needs to be co-operation between those involved in policing, the prosecution of offenders, and the administration of justice: but nevertheless these are in principle distinct functions and tasks. The Commissioner accepts that where the police hold conviction information for their own purposes then it is proper for them to provide that information for use by the CPS or the Courts; but it does not follow, the Commissioner argues, that information that no longer has a policing purpose can properly be retained by the police, solely to ensure that a fuller record of conviction information is available for use by the CPS or by the Courts.

103. The Appellants object that this approach creates practical difficulties for the administration of justice. However the Commissioner points out that both the 1995 Code and the 2002 Code (incorporating the 1999 weeding rules) provide for an extensive range of old conviction information to be removed from the PNC. Likewise, we heard evidence that in Scotland a significant amount of conviction information is deleted applying the so-called 40/20 and the 70/30 rules. We heard no evidence that this has impeded the prosecution of offenders or the administration of justice in Scotland. Again the Commissioner points out that nowhere in the extensive legislative framework governing the retention and use of conviction information by the police is there an obligation for the police to record all conviction information, still less for them to retain it indefinitely. Nor are the police empowered to record details of all offences on the PNC, but only certain offences ("recordable offences"). The Commissioner maintained that if the police forces are to be required to retain information that is no longer needed for their own purposes - because the CPS or the Court Service need it, or may need it, then there needs to be specific legal provision for this with proper safeguards as to who may use that information and for what purposes.

104. We agree with the Commissioner's contentions.

Multi-agency working

105. The Tribunal heard evidence about how the police work with other agencies, particularly from Superintendent Lay, Anthony Decrop, Richard Blows, Adrian McAllister and Detective Chief Constable Readhead who placed some emphasis on this work. The Appellants maintain that the functions of the police in preventing crime, maintaining law and order and protecting life and property necessitate close involvement with agencies whose objective is to protect the young and vulnerable, or members of society generally, from criminals. This involves working with social services departments, education departments and schools, the Probation Service, CAFCASS (looks after the interests of children in family proceedings), health authorities, fire authorities, Guardians ad Litem and many other similar agencies.

106. The Commissioner suggests that the multi-agency working described in evidence, focuses on the prevention of crime and in particular the need to protect children and vulnerable adults from physical, sexual and financial abuse. He accepts that the police do, quite properly, work with other agencies to achieve these objects. However the Commissioner maintains that multi-agency working does not in itself mean that the purposes for which the police hold information have been extended. What it means, the Commissioner says on the evidence

before the Tribunal, is that the police are co-operating with other agencies in order to achieve the object of preventing crime. We agree with the Commissioner.

Employment vetting

107. The Tribunal heard a considerable amount of evidence about the work of the CRB. At present the CRB provide two kinds of certificate for the purposes of employment vetting - standard and enhanced disclosure certificates. In both cases, the certificate must relate to employment for which ROA is disapplied, entitling the employer to ask questions about spent convictions. A standard disclosure certificate will include an individual's complete conviction record (as set out in the PNC). An enhanced disclosure certificate will contain the same information as a standard disclosure certificate, and in addition any information that a Chief Officer of police considers ought to be included on the certificate. Whether a prospective employer is entitled to a standard disclosure certificate, or to an enhanced disclosure certificate, will depend on the nature of the employment in question. The provision of these certificates by the CRB is governed by Part V of the Police Act 1997. Conviction information from the PNC is provided to the CRB for inclusion in both standard and enhanced certificates.

108. The disclosure system operated by the CRB is to a great extent intended for the protection of children or vulnerable adults from criminal conduct against them. The Appellants contend that one of the purposes for which the police hold information is for the prevention of crime, and this includes helping to prevent crime by ensuring that those who present an unacceptable risk of committing offences against children or vulnerable adults are not employed to work with them. This is underlined by section 119 of the Police Act 1997 set out above.

109. This contention is accepted by the Commissioner. However, the Commissioner argues that if the police hold information that is no longer relevant for the prevention and detection of crime, then its continued retention by the police cannot properly be justified by relying on its potential value to prospective employers. It is not the function of the police to run an information service for prospective employers helping them to assess, in general terms, whether they wish to employ particular individuals. Again the Tribunal agrees with this contention and would refer to our findings in the section above headed "Disclosure of criminal intelligence to non police agencies." _

Public safety and missing persons

110. The fourth potentially relevant purpose identified in the list of issues was the "public safety and protection of life and property, for example assisting members of the public in discovering the whereabouts of missing persons". The Appellants' witnesses explained in evidence that in a wide range of situations, the British public expect the police to assist in situations of risk or danger. The assistance provided in respect of missing persons is an obvious example. Another example would be attendance at a place where someone was reported to be about to commit suicide, for example a person standing at the top of a multi-storey building and threatening to jump. Attempting to commit suicide is no longer a criminal offence in this country. Nevertheless, in such a situation, the police have a duty to render assistance, even though in doing so they will neither prevent nor detect crime.

111. These police purpose are largely agreed upon by the parties. The Commissioner however makes one qualification in respect of missing persons. He argues there are no doubt many situations in which the police would seek to discover the whereabouts of missing persons. However, the Commissioner does not accept that discovering the whereabouts of a missing person is a police purpose, in cases where there is no reason to suppose that the individual has committed a criminal offence, has come to any harm, or is a danger to him or herself or others. Detective Superintendent Linton in evidence was reluctant to accept this, though he did accept that the police would respect the decision of an adult who wanted to relocate himself and to break all contact with friends and family.

112. The Tribunal considers the position is unclear but in any case Chief Constables will only be able to use the information they hold to assist them with say locating missing persons. This purpose does not justify, in our view, retaining of all criminal intelligence or just conviction data which otherwise would be processed in contravention of DPP3 and 5.

2 and 3: The Third and Fifth Data Protection Principles

113. The Commissioner contends that the relevant conviction data in each of these appeals is irrelevant and/or excessive, and that it is has been retained for longer than necessary.

114. The 3rd DPP also refers to the adequacy of the personal data. The Appellants contend that the term *adequate* suggests a focus upon the sufficiency or reliability of the information and in this respect conviction data scores particularly well. It is an independent record that a criminal act has taken place which has either been admitted by the data subject or has been found proven to a high standard of proof, beyond reasonable doubt, by an independent court. The data will constitute, as a minimum, information in relation to the nature of the offence and the sentence which was imposed upon the data subject. Increasingly, in more recent times, the information includes additional details in respect of the circumstances of the offence. The data records the address of the offender at the time of the conviction. It may include identifying characteristics about the offender, e.g. bodily scars. The Commissioner does not appear to challenge this contention.

115. However the parties do not agree on the other aspects of the application of the two DPPs, namely whether retention is *relevant* and *excessive* and whether it has been kept *for longer than is necessary*.

116. At the heart of the Appellants' argument is that the Bichard Inquiry at paragraph 4.45 of the Report expressed the view that "the police are the first to be judge of their operational needs and the primary decision makers; the Information Commissioner's role is a really more supervisory one". And at 4.45.2 "police judgments about operational needs will not be lightly interfered with by the Information Commissioner". His office "cannot and should not substitute their judgment for that of experienced practitioners". In respect of the conviction data subject to the appeal there is a conflict of opinion between the parties as to whether the information has any real value. The Appellants' say that the police must be the judge of whether there is any value. The 2006 Guidelines reflect that view. Much evidence was presented before the Tribunal to demonstrate why this view has been taken particularly by Detective Sergeant

Watson and Detective Superintendent Linton. We were on numerous occasions referred to the case of Dr Harold Shipman and the subsequent enquiry by Lady Justice Smith.

117. The Home Office supports the Appellants' view but also considers the statutory scheme governing disclosures under the PA 1997 (and in future under the SVGA 2006) in itself establishes that retention and disclosure of all conviction data is relevant and not excessive. They argue that disclosure of conviction data by the police to the CRB from the PNC is a statutory duty under section 119 of the Police Act 1997 and accordingly is a "police purpose". This is because the disclosure of details of spent convictions by the police to the CRB, and the onward disclosure of those details in a standard or enhanced certificate, is a mandatory statutory duty imposed on the police and the CRB respectively and is not a matter of administrative discretion. The absence of discretion is a necessary feature of the 1997 Act, because, the Home Office argues, Parliament has already determined through the ROA and the ROA Exceptions Order (which is subject to affirmative resolution of both Houses of Parliament) that spent convictions should, in the public interest, be disclosed to a person to enable him to assess the suitability of an individual for a position to which the Order applies.

118. This the Home Office contends demonstrates that Parliament has already balanced the interest of the individual in rehabilitation against the public interest in disclosure of spent convictions in certain circumstances, and decided that it is relevant and not excessive for an individual to be required to provide a prospective employer with information on all his spent convictions (no matter how old) in certain closely defined circumstances. The provision of a standard or enhanced certificate provides the check of the answer given by the individual concerning his past convictions.

119. Although understanding this argument the Tribunal finds it difficult to accept that these statutory provisions establish that the retention and disclosure of all conviction data is thereby relevant and not excessive. We accept that it is a relevant consideration to be taken into account, but compliance with the rehabilitation of offenders provisions cannot, in our view, be regarded as, in effect, the sole consideration when determining compliance with DPP3 and DPP5, particularly in relation to the data subjects in this case.

120. In any case we do not understand the Commissioner to suggest that the ROA or the ROA Exceptions Order are in any way unlawful or that the police are not under a duty to disclose conviction data held by them on the request of the CRB under the above statutes. The issue is one of retention and disclosure of data which infringes DPP3 and DPP5, not the data's disclosure while processed in accordance with the DPPs.

121. The Commissioner, although accepting the Bichard Inquiry's view, contends that it is not enough for the Appellants simply to show that there is a theoretical possibility that the information might be of some future use for policing purposes. In his opinion both the third and the fifth principles should be approached by reference to whether the continued retention of the data is *necessary* (in the sense of being reasonably necessary for police purposes), and whether it is *proportionate* (that is, whether the purposes pursued justify the interference with the rights of the data subjects). This approach follows, given that the DPA is intended to give effect to the privacy right contained in Article 8 of ECHR, and which appears to be accepted by the High Court in *Stone v South East Coast SHA and others* [2006] EWHC 1668 (Admin), especially at paragraphs 59 and 60. As to the way in which considerations of necessity and

proportionality are addressed in the context of Article 8 we note the findings in the 2005 Tribunal decision at paragraphs 168 to 177 and the Tribunals references to *R (Ellis) v Chief Constable of Essex Police* [2003] EWHC 1321 and *R (Marper) v Chief Constable of South Yorkshire Police* [2004] 1 WLR 2196. There appears to be little dispute between the parties that DPP3 and DPP5 need to be approached in this way.

122. The Appellants did not identify any considerations that were specific to the individual data subjects that justified the retention of their conviction information. The Appellants approach in each case based on the evidence of Richard Heatley for Humberside Police, Janet Turner for Staffordshire Police, Hayley Morrison for Northumbria Police, Kate Firkins for West Midlands Police and Adrienne Walker for Greater Manchester Police was that they applied the 2006 Guidelines, and/or that they had followed advice from ACPO based on the Guidelines. None of these witnesses identified any features specific to the individual data subjects that justified the retention of their conviction information. After she had given her evidence, Adrienne Walker helpfully provided some documentary evidence to the Tribunal which indicated that the view had at one stage been taken within Greater Manchester Police that the information in relation to GMP was of no policing value. We have already referred to this.

123. Rather than relying on considerations that are specific to any of the individual data subjects, the Appellants appear to have relied on a general principle: conviction information, once recorded by the police, ought to be retained for life - except possibly in the very narrow circumstances described by Deputy Chief Constable Readhead in evidence about exceptional cases. In order to justify this principle the Appellants called a number of experienced police officers who gave evidence as to how past convictions had led to the apprehension of offenders. Although in no way wishing to substitute our judgment for that of experienced practitioners we would observe that it seemed to us that few if any of these examples seemed to relate to the sorts of offences committed by the data subjects in this case.

124. The Commissioner relied on the undisputed features of the conviction information which has already been set out above, in particular the age of the individuals at the time of offence and conviction; the nature of the convictions; the level of sentences imposed; and the time that has passed without any further convictions being recorded on the PNC. Generally, the Commissioner relied on the evidence of Mick Gorrill in relation to the value of this information for policing purposes who, although currently an Assistant Information Commissioner, had over 30 years policing experience most recently with the Greater Manchester Police before his retirement from the service. His view was that the material had no continuing value for police purposes.

125. Mr Pitt-Payne on behalf of the Commissioner also relied on the evidence of Professors Francis and Soothill as contained in their written report entitled *When do ex-offenders become like non-offenders* dated 3rd March 2008 (Francis/Soothill report) and their evidence before the Tribunal. Their evidence addressed the relevance of a previous conviction in assessing the likelihood of future offending behaviour, by means of a detailed statistical analysis. The report compared the curves (as mapped on a graph) showing the risk of future offending in respect of non-offenders (i.e. individuals with no criminal convictions), as against various groups of ex-offenders with significant crime-free periods. The differences in risk as between the non-offending and ex-offending groups converge over time, to a point where after significant crime free periods they become very close.

126. The Appellants expert witness Professor Sherman who produced the report "*Destroying evidence or forecasting crime risk? Assessing two theories of crime prevention"* dated 1st April 2008 (the Sherman report) does not reject the statistical analysis in the Francis/Soothill report. He builds on that analysis and seeks to draw further statistical inferences from it, particularly that although the absolute significance is low the relative significance is much greater.

127. We find that because there is to a large extent agreement between the experts that the research is of value to the considerations in this case, although there are some limitations, that its use to demonstrate the degree of risk of reoffending is helpful. This is particularly because the 2005 Code and its implementing guidelines emphasise that management of data is very much a risk assessment exercise. The Francis/Soothill and Sherman reports provide an objective basis upon which the Tribunal can consider the Enforcement Notices in this case.

128. Mr Pitt-Payne considers that the question that this material gives rise to is this: does there come a point where the differences between the ex-offender and the non-offender groups are of no practical significance? That is to say, does there come a point where those differences are so small that for practical purposes the ex-offender and non-offender groups should be treated as equivalent in terms of their risk of future offending behaviour? The Commissioner's submission is that the answer is yes, in the case of the groups of ex-offenders shown in table 12 of the Francis/Soothill report (and tables 1 and 2 of the Sherman report).

129. Mr Pitt-Payne further contends that this is of considerable relevance in assessing whether the continued retention of conviction information complies with DPP3 or DPP5. Much of the evidence for the Appellants is about risk-assessment: whether performed by the police, by prospective employers who obtain information from the CRB, or by other agencies working with the police. The argument is that the conviction information is needed to be retained in order to enable informed judgments to be made about the level of risk presented by various individuals. The relevant risks are, on analysis, almost entirely concerned with future offending behaviour. If there comes a point where the difference in the risk of future offending behaviour as between ex-offenders and non-offenders is of no practical significance, then the Commissioner argues any justification for retaining the information in order to assess the risk of future offending behaviour is destroyed.

130. There was some discussion when the experts gave their evidence as to whether questions of practical significance – as opposed to statistical significance - were properly matters of expert opinion. We are reluctant to get into the realms of a criminology and statistical debate. However we did find the expert evidence helpful in making our own judgment about the practical significance of the conviction information that is at issue in this case and that it could be informed by the statistical work in the Francis/Soothill report and the Sherman report. It is also informed by the evidence that the Tribunal has heard about the different ways in which conviction information is used. The Commissioner invites us to find that in certain circumstances the information is of no practical significance. The Appellants sought to draw a parallel with health information in deciding what medical treatments should be offered across a population as a whole. However we agree with the Commissioner that the use that is made of criminal conviction information is very different as it will be used to inform decisions about individuals, for example should this individual be allowed to look after elderly residents in a care home and so on. In the context of this kind of decision making, we consider that a difference in conviction risk rate of (say) 1.6% as against 0.7%, or 0.8% as against 0.7%, is of

no practical significance. We do not find the relative figures propounded by Professor Sherman to be helpful in this case.

131. There was also some discussion in the expert evidence of the fact that there is a considerable amount of undetected crime. However, there was no evidence before the Tribunal as to relative rates of undetected crime as between non-offenders, and individuals with juvenile or young adult convictions followed by a long period without any further convictions. For this reason, the Cambridge study discussed by Professor Sherman in section 2.2 of his report is of very little assistance to the Tribunal.

132. Mr Pitt-Payne provided the Tribunal with a detailed application of DPP3 and DPP5 to the individual data subjects based on the background to the Enforcement Notices set out at paragraphs 66 to 80 above and how the Francis/Soothill and Sherman statistics might be applied to each case. We found this analysis very helpful and have therefore set it out in some detail.

Data subject HP

133. The following features are relevant.

133.1. Time elapsed since the conviction: the offence took place on 2nd March 1984. HP was convicted on 2nd April 1984. No further convictions are recorded on the PNC. HP therefore had a crime-free period of 23 years at the time of the Commissioner's Enforcement Notice, and now has a crime-free period of 24 years.

133.2. Nature of the conviction: HP was convicted of shoplifting from a display in Marks and Spencer. This was not a sexual offence or an offence of violence; it did not involve a child or vulnerable adult; and it did not involve any of the specific circumstances that might make a shoplifting offence of increased interest to the police. It was suggested in evidence that a conviction for theft of pornographic material from a sex shop, even if it was a historic conviction and there had been a long period without reoffending, might assist in assessing whether an individual's current risk of sex offending and/or offences against children.

133.3. Age at time of conviction: HP was born on 18th October 1967. He was 16 years old at the time of the offence and of the conviction.

133.4. Disposal of the offence by the court: HP was fined £15. So this was not a case where a custodial sentence was imposed (even a suspended sentence); there was a small fine.

134. Applying the statistical analysis in the Francis/Soothill report, once 20 years had elapsed since the conviction then HP had no more than a 1.6% chance of reoffending within the next 5 years. This compares with a probability of 0.7% for those without any previous convictions at all (these figures appear in the Francis/Soothill Tables 6 and 12 (b)). The respective percentages in Sherman Table 1 are 1.5758% and 0.6713%. Given the low levels of absolute probability, we consider that the relative risk ratio (2.35 to 1 – Sherman Table 1) is of no practical significance. Indeed, the 1.6% chance is likely to overstate the reoffending risk in this case. The Francis/Soothill report is based on information about a population of 1523 individuals with a juvenile finding of guilt, of which 24 individuals reoffended during a 5 year period after a crime-free horizon of 20 years. That population of 1523 would include individuals with more serious convictions than those of HP (including convictions for violent

and sexual offences, and convictions that led to a custodial sentence); it would also include individuals with multiple convictions.

135. The Commissioner contends that the retention of this information is excessive in relation to policing purposes, and the material has been kept for longer than necessary. Although it is possible to construct hypothetical circumstances in which the information might be of value for policing purposes, it cannot realistically be said to be necessary for those purposes. The Commissioner submits that the information is highly unlikely to assist an employer in any future employment decision in deciding whether HP is suitable to work with children or vulnerable adults; and that it is also highly unlikely to have any bearing on any of the risk assessment exercises discussed in the evidence in this case (e.g. under the MAPPA or SOPO processes, or in relation to child welfare assessments). Given the nature of the information the Commissioner concludes that it is extremely unlikely either: (i) that there would be proper grounds for disclosing it to the Court if HP were to be tried in future; or (ii) that it would be of any assistance to the Court in sentencing HP following any future trial. His overall assessment is that retention of this information is a breach of DPP3 and DPP5.

136. The general considerations in paragraphs 134 and 135 are also applicable to the analysis of the other data subjects.

Data subject SP

137. The following features are relevant.

137.1. Time elapsed: SP received a reprimand on 30th June 2001. No further convictions are recorded on the PNC. SP therefore had a crime-free period of 6 years by the time that the Commissioner's Enforcement Notice was served.

137.2. Nature of the offence: this was an assault on a girl of similar age. The offence did not involve a child (in the sense of a person significantly younger than SP) or a vulnerable adult.

137.3. Age at time of reprimand: SP was 13 years old.

137.4. Disposal of the offence: there is some significance in the fact that the offence was dealt with by reprimand and not by a court process.

138. The Francis/Soothill report does not directly cover the circumstances of SP's case, in that: (i) it does not deal with individuals who received reprimands (as opposed to convictions); and (ii) their own statistical work does not deal with individuals who have a crime-free horizon of only 6 years. We heard evidence from Professors Soothill and Sherman that in purely statistical terms the early age of the offence is a factor that creates an increased risk of reoffending. However, against this should be set the fact that SP is female, and it is generally accepted that the risk of offending behaviour of all kinds is significantly lower for females. Also the study by Kurlychek et al referred to in Francis/Soothill suggested that after a crime-free period of about seven years there is little difference between non-offenders and former (juvenile) offenders in terms of their propensity to reoffend. The Commissioner's overall assessment is that retention of this information is a breach of DPP3 and DPP5. There are also issues in this case as to the application of DPP1 which are considered below.

Data subject NP

139. The following features are relevant.

139.1. Time elapsed since the conviction: the offence took place on 26th August 1981. NP was convicted on 28th September 1981. No further convictions are recorded on the PNC. NP therefore had a crime-free period of just under 26 years at the time of the Commissioner's Enforcement Notice, and now has a crime-free period of 26 years.

139.2. Nature of the conviction: NP was convicted of posing as a representative of a company in order to obtain goods. This was not a sexual offence or an offence of violence; it did not involve a child or vulnerable adult; and nor were there any special circumstances that suggested NP might be a risk to children or vulnerable adults, or the public in general.

139.3. Age at time of conviction: NP was born on 21st April 1960. He was 21 years old at the time of the offence and conviction.

139.4. Disposal of the offence by the court: NP was convicted of two offences and was fined £150 and £100 (and was also ordered to pay £10 costs). This was not a case where a custodial sentence was imposed (even a suspended sentence); there was a relatively small fine.

140. Applying the statistical analysis in the Francis/Soothill report, once 20 years had elapsed since the conviction then NP had no more than a 0.8% chance of reoffending within the next 5 years. This compares with a probability of 0.7% for those without any previous convictions at all (these figures appear in Francis/Soothill Table 12(b) and in Sherman Table 2 which gives the respective percentages as 0.8258% and 0.6713%).

141. Given the low levels of absolute probability, the Commissioner maintains that the relative risk ratio (1.23 to 1 – Sherman Table 2) is of no practical significance. There are slight differences between NP's case and the group of people considered for Francis/Soothill Table 12(b): (i) NP was 21 at the date of conviction (not 17-20); and (ii) he was convicted of two offences (albeit on the same occasion) not a single offence. On the other hand, he has a 26 year conviction-free horizon (not a 20 year horizon) which is likely to reduce the conviction risk in his case still further. The Commissioner's overall assessment it is that retention of this information is a breach of DPP3 and DPP5.

Data subject WMP

142. The following features are relevant.

142.1. Time elapsed since the conviction: the offence took place on 2nd July 1977. WMP was convicted on 8th February 1978. No further convictions are recorded on the PNC. WMP therefore had a crime-free period of 29 years at the time of the Commissioner's Enforcement Notice, and now has a crime-free period of 30 years.

142.2. Nature of the conviction: WMP was convicted of two offences of attempted theft and an offence of criminal damage: he and another individual had inserted metal blanks into an amusement arcade roulette machine. This was not a sexual offence or an offence of violence; it did not involve a child or vulnerable adult; and it did not involve any special circumstances that might make a historic dishonesty offence of increased interest to the police.

142.3. Age at time of conviction: WMP was born on 12th February 1962. He was 16 years old at the time of the offence and of the conviction.

142.4. Disposal of the offence by the court: WMP was conditionally discharged for two years (in respect of the theft offences) and he was fined £25 and ordered to pay compensation

of £6.60, a legal aid contribution of £30 and costs of £29.20 (in respect of the offence of criminal damage).

143. Applying the statistical analysis in the Francis/Soothill report, once 20 years had elapsed since the conviction then WMP had no more than a 1.6% chance of reoffending within the next 5 years. This compares with a probability of 0.7% for those without any previous convictions at all (these figures appear in Francis/Soothill Tables 6, 12(a) and (b) and in the Sherman Table 1 as respective percentages 1.5758% and 0.6713%). However, it is highly likely that the figure of 1.6% overstates the risk in HP's case. First, as explained above the Francis/Soothill analysis is based on all of those with juvenile convictions (regardless of the seriousness of the offence and irrespective of whether a custodial sentence was imposed). Secondly, the longest conviction-free period analysed in Francis/Soothill is 20 years; but WMP has now been conviction free for 30 years. The Commissioner's overall assessment is that retention of this information is a breach of DPP3 and DPP5.

Data subject GMP

144. The following features are relevant.

144.1. Time elapsed since the conviction: the offence took place on 20th April 1983. GMP was convicted on 25th May 1983. No further convictions are recorded on the PNC. GMP therefore had a conviction-free period of 24 years at the time of the Commissioner's Enforcement Notice.

144.2. Nature of the conviction: GMP was convicted of an offence of theft (and two matters that were taken into consideration). The circumstances were that GMP used a cashline card belonging to another to obtain £100 from a cashpoint. This was not a sexual offence or an offence of violence; it did not involve a child or vulnerable adult; and it did not involve any of the specific circumstances that might make a dishonesty offence of increased interest to the police.

144.3. Age at time of conviction: GMP was born on 16th May 1964. GMP was 18 years old at the time of the offence and 19 years old at the date of the conviction.

144.4. Disposal of the offence by the court: GMP was given a conditional discharge of 12 months and ordered to pay compensation of £185 and costs of £35. This was not a case where a custodial sentence was imposed (even a suspended sentence).

145. Applying the statistical analysis in the Francis/Soothill report, once 20 years had elapsed since the conviction then GMP had no more than a 0.8% chance of reoffending within the next 5 years. This compares with a probability of 0.7% for those without any previous convictions at all (these figures appear in Francis/Soothill Table 12(b) and Sherman Table 2). This is the same statistical analysis as relates to NP. If anything these figures overstate the risk posed, since GMP now has a conviction-free period of 24 years (not 20 years).

146. The material disclosed by Adrienne Walker following her evidence in relation to GMP is of considerable interest. It indicates that the report of 9th March 2007 by Mr. Bailey made out a strong case that the record was of no further policing value; and that it was retained largely out of a desire not to undermine the ACPO position in negotiations with the Commissioner.

147. We consider the analysis in this section very helpful. It clearly tends to the view, applying the necessity and proportionality tests referred to in paragraph 121 above, that retention of this information is an infringement of DPP3 and DPP5.

Effects on the data subjects if the information is retained

148. The Commissioner argues that there is a significant adverse effect on the individuals if the information is retained.
    148.1. The fact that the conviction information is still held by the police on the PNC is in itself likely to be a source of concern to individuals in the position of these data subjects, because it may suggest to them (rightly or wrongly) that they are still of interest to the police.
    148.2. Where that information comes to the attention of third parties (including employers who lawfully obtain it as part of a standard or enhanced disclosure) then there is a serious risk that the fact that the information remains on the PNC will itself lead to adverse inferences. It may lead third parties to consider that the data subjects are still of interest to the police in some way. Even where employers are legitimately aware of the conviction (e.g. as a result of asking a lawful question about spent convictions) the fact that the conviction is still on the PNC may give it considerably more weight in their eyes. This is not a speculative point: SP's oral evidence indicated that those who had become aware of her reprimand had taken it a great deal more seriously once they found out that it was still on the PNC.
    148.3. As long as the information is retained then there is risk that it will be disclosed by way of an enforced subject access request, either to an unscrupulous employer or to a foreign government. Even if the prohibition on enforced subject access in the DPA is brought into force, this cannot in practical terms be enforced against foreign governments.
    148.4. The potential for retention to cause distress to the data subjects which is discussed below.

149. We accept these adverse affects and would add another potential one. The retention of personal data always runs the risk of inadvertent disclosure as has happened in a number of well publicised situations recently.

The approach to retention of conviction information in the 2006 Guidelines

150. Underlying the dispute between the Commissioner and the Appellants in these cases is the approach taken in the 2006 Guidelines to the retention of conviction information, as interpreted by ACPO and ACRO. On that approach, as explained by Deputy Chief Constable Readhead in his evidence, the circumstances in which conviction information would be removed from the PNC are very rare indeed.

151. In the Commissioner's view this approach is likely to lead to the retention of excessive information, and to the retention of information for longer than necessary. The present cases are an example of the potential consequences. It is clear on the approach currently taken that ACPO/ACRO would not regard these as exceptional cases, and suitable for removal of the information from the database, even if the conviction-free period was (say) 40, 50 or 60 years. The Commissioner considers that alongside the step down approach in the 2006 Guidelines there needs to be a provision for weeding or step out.

152. In relation to the Appellants' general position that all criminal convictions should, in effect, be indefinitely retained by the police, the Commissioner makes the following points:
    152.1. Both the 1995 Code and the 2002 Code (incorporating the 1999 Rules) provided for extensive weeding of criminal records. Under the 2002 Code, all of the conviction information with which these appeals are concerned would have been removed from the PNC.
    152.2. Although there have been assertions that the 2002 Code is no longer appropriate, there has been little evidence that the operation of the Code caused difficulties in practice for policing; and there has been no evidence of representations by the courts, the CPS, the CRB or other users of PNC information that the data retention rules ought to be changed.
    152.3. There is no statutory duty on the police to record all conviction information, still less to retain all conviction information indefinitely. Nor is there any evidence of any pressure being brought to bear for such a duty to be introduced. Indeed, the police do not even have the power to record all convictions (only "recordable convictions").
    152.4. The retention rules operated in Scotland still provide for extensive removal of conviction information: the 40/20 rule would have resulted in the removal by now of all of the data subjects' conviction information (apart from that of SP) if this case were taking place in Scotland.
    152.5. There is a striking contrast between the approach taken in relation to soft intelligence information or data, which is considered for deletion on the basis of a careful risk assessment, and the much more inflexible approach taken in relation to conviction information.

153. Both Thames Valley Police and Greater Manchester Police have taken a wider view of the circumstances in which information can properly be deleted, than the ACPO position would require.

154. We consider that taken together, the above points are a further indication that the general approach to the retention of conviction information exemplified by the present cases goes beyond what is necessary for policing purposes and is likely to lead to breaches of DPP3 and DPP5.

4: What falls within the exceptional category in the 2006 Guidelines?

155. The Tribunal considers this is the wrong question. The question for the Tribunal is whether there has been a breach of any of the DPPs, rather than what is the proper interpretation of the exceptional category in the 2006 Guidelines. In order to determine this question the Tribunal needs to consider whether the 2006 Guidelines as a whole are a necessary and proportionate response to meeting the polices' purposes taking into account the legislative and practice framework in which they are required to operate.

156. The 2005 Code provides the framework as described above. MOPI covers all information other than conviction data. The 2006 Guidelines cover conviction information. The approach of MOPI and the 2006 Guidelines is entirely different. MOPI expressly recognises data protection and human rights obligations and provides objective criteria for assessing the risk of whether or not data needs to be retained. The 2006 Guidelines, in contrast, do not refer to data protection or human right obligations and there are no risk assessment criteria. In effect all conviction data is retained for life. No risk assessment is made. The exceptional category

can hardly be regarded as such. The ACPO/ACRO interpretation as explained by Deputy Chief Constable Readhead is that the circumstances in which conviction information should be deleted from the PNC are very narrow indeed, and that "exceptional circumstances" should be narrowly interpreted. There are no criteria as such in appendix 2 only examples of where conviction data may be deleted. These examples and the ones given in evidence appear to the Tribunal to be cases where under most circumstances the data should never have been recorded in the first place. These really are properly described as exceptional cases but in our view do not represent a proper application of the relevant DPPs.

157. The 1999 and 2002 Codes at least made an attempt at a data retention policy for conviction data which was necessary and proportionate. In our view there is no such attempt in the 2006 Guidelines. We appreciate times have changed and that the criteria for weeding data must adapt to these changes so that they are necessary and proportionate to current police purposes. However it appears to us that the police have not even attempted to undertake a reasonable approach to this task in contrast to that taken in MOPI. They have in effect stopped weeding conviction data.

158. At this point we should say that any retention guidelines cannot be determinative of compliance with the DPA. Under the Data Protection Act 1984 the Data Protection Registrar had statutory responsibilities to encourage representative organisations like ACPO to produce such guidelines to encourage consistency of approach where large amounts of similar data were being processed by many different organisations. However these guidelines or codes were never designed to completely replace the organisations' data protection obligations for all personal data only to provide a framework which would be likely to work for the vast majority of the personal data being processed. It was still necessary ultimately to consider individual cases on their merits. This was recognised by the Data Protection Registrar's introduction to the 1999 Code. In the 2005 Tribunal decision it was recognised that one of the Commissioner's reasons for being unhappy with the 2002 Code was because the Code's guidelines were regarded by ACPO as a definitive interpretation of the polices' data protection obligations which did not recognise that there was still a need to have regard to individual cases. Similarly the 2006 Guidelines cannot be a definitive interpretation, even if reasonably established, of the polices' compliance with the DPPs. In fact it is aptly described as "guidelines".

159. Moreover from the evidence before the Tribunal it is clear that the 2006 Guidelines have been interpreted in different ways by different police forces. Some police forces would take a wider interpretation as was clear from Deputy Chief Constable Readhead's evidence in relation to the deletion by Thames Valley Police and Greater Manchester Police's originally minded position which they took in relation to GMP, and did in fact take in relation to GMP2. This to us is a recognition that the exceptions allowed for in the 2006 Guidelines do not provide a proper basis for a weeding policy which complies with the DPPs. We are mindful that the responsibility under the DPA is for the Chief Officer or data controller to determine what is necessary and proportionate in individual cases and not ACPO.

160. The Commissioner considers that if the 2006 Guidelines are to be applied in a way that would be consistent with DPP3 and DPP5, then the category of exceptional cases would need to be wider than ACPO's approach at present allows for. The Commissioner's preference, as explained by Jonathan Bamford in evidence, is for a "step out" model to be developed, to

complement the step down approach. We agree with the Commissioner. We would also observe that ACPO seems to have interpreted the 2005 Tribunal decision as providing a basis for, in effect, a step down model only. This is clearly not the case from reading the decision. The 2002 Code was based on a step out model which the Tribunal seems to have assumed would continue but with the addition of a step down model. Moreover the 2005 Tribunal provided guidance on what other weeding criteria might be adopted to ensure that any new code would comply with the DPA. These do not seem to have been taken into account in the 2006 Guidelines.

5: Has SP's conviction data been processed unfairly?

161. The Commissioner relies on the fairness aspect of the first DPP as a separate point in support of the Enforcement Notice in SP's case. The basis for this is that SP was told in 2001 at the time of the reprimand that the reprimand would be removed from her record when she was 18 if she did not get into any more trouble.

162. On the basis of SP's evidence she made an admission, and received a reprimand, after being given the information about the future removal of the reprimand from her record. If she had not received that information then she might not have made the admission and received the reprimand (instead, she might have chosen to go to court). In the circumstances, the Commissioner argues, it is unfair to retain the information in a manner that is inconsistent with the assurance that she was given in 2001 about the future treatment of that information. The assurance that SP says that she was given would be consistent with the 1999 Rules that applied at the time of her reprimand; and this corroborates her evidence as to what she says she was told. It appears that the reason that the reprimand has not been removed from the PNC is that the 1999 Rules were eventually replaced by the 2006 Code, before the record was removed. However, the Commissioner says there is no evidence that the assurance SP was given in 2001 was qualified by a statement that, if the police retention rules changed, then there might be a different outcome.

163. The Appellants remind us that the representation made was not a circumstance which created the criminal record. If SP had not agreed to the reprimand, the matter would have been subject to a criminal charge and subject to a hearing in the criminal courts. SP may have admitted the offence based on her statement to the police at the time and been convicted. Therefore, the Appellants contend, the representation did not fall into the category envisaged by paragraph 1(1) of Part 2 of Schedule 1, namely obtaining information by deceiving or misleading a data subject. We agree with this contention.

164. The parties agree that none of the other paragraphs in part 2 of Schedule 1 to the Act, in which fairness is illustrated, are applicable to the case of SP. It is therefore necessary, the Appellants and Home Office argue, to consider the notion of fairness in general terms. It is recognised that fairness includes the interests of the data controller as well as the data subject (*Johnson -v- MDU [2007]* EWCA Civ 262, para 62). The Appellants also argue that we should take into account the public interest (*Attorney General's Reference (Number 3 of 1999)* [2001] 2 AC 91 at 118*),* that a breach of promise must be considered against all the other circumstances (*R v Townsend [1997] 22 CR App r at 540)* and that in public law a promise by a public authority although creating a legitimate expectation may justify a change of approach by a counter veiling public interest (*R v Secretary of State for Education and Employment, ex*

p Begbie [2000] 1 W.L.R. 1115 and *R v North East Devon Health Authority ex p Coughlan* [2001] QB 213, CA at [57]). Therefore the Appellants argue their need to retain data of this type is important for its stated purposes.

165. The basis of the Appellants' argument is that 2006 Guidelines should be followed despite the representation made to SP because of the benefits the conviction data will provide to the wider public. As will be appreciated from our findings so far we are not convinced that will be so in SP's case and certainly the 2006 Guidelines do not in our view provide that proportionate approach which leads us to accept the Appellants' argument.

166. Janet Turner for Staffordshire Police in evidence was very unclear as to whether the question of fairness to SP had been considered when reaching the decision to retain the information. This leads us to the view that the personal data was processed unfairly.

6: Does section 29 DPA exempt data controllers from compliance with the DPPs in respect of any alleged contravention?

167. Under section 29(3) of DPA 1998, personal data are exempt from the "non-disclosure provisions" in any case in which the disclosure is for a purpose mentioned in section 29(1) and the applications of those provisions in relation to the disclosure "would be likely to prejudice" any of the matters mentioned in that sub section.

168. Section 29(1) reads as follows:

> *"Personal data processed for any of the following purposes*
>
> *(a) the prevention or detection of crime,*
>
> *(b) the apprehension or prosecution of offenders, or*
>
> *(c) the assessment or collection of any tax or duty or any imposition of*
>
> *a similar nature,*
>
> *are exempt, from the first data protection principle (except to the extent to which it requires compliance with the conditions in schedules 2 and 3) and*
>
> *section 7 in any case to the extent to which the application of those matters the data would be likely to prejudice any of the matters mentioned in the sub section."*

169. The Enforcement Notices focus on the retention of information, and on breaches of DPP3 and DPP5 (except in the case of SP). The intention, we believe behind the provision, is that personal data can be disclosed for the limited purposes set out in section 29(1) even if otherwise in breach of DPP1. It does not apply to DPP3 and DPP5. Therefore in our view section 29 can only be considered, if at all, in the context of the fifth issue which relates to SP alone.

170. The section only applies where there is a likelihood of prejudice to any of the matters set out in section 29(1). The Commissioner contends that upholding his Enforcement Notice would not be likely to prejudice any of those matters. The test of whether disclosure would be *likely*

to prejudice requires consideration of whether there is a significant and weighty chance of prejudice as found by the court in *R (Lord) v Secretary of State* [2003] EWHC 2073 (Admin) at paragraphs 99-100.

171. In relation to the application of this test we have considered the evidence and submissions, particularly of the Home Office, in this case. In our view the fact that a previous conviction might be *relevant* to any risk assessment does not necessarily amount to a *significant or weighty likelihood of prejudice* to say the prevention of crime, particularly where the witnesses appeared to be applying a different test i.e. that of relevance. We find that in all the circumstances of this case it would not be likely to prejudice any of the purposes stated in section 29(1).

172. The Appellants also argue that under section 29(3) DPA there is wider application to all the DPPs. This exempts personal data from the non-disclosure provisions, which is not the basis of these appeals, and is subject to a similar likely prejudice test. Even if we are required to consider this sub-section we find that on the facts of this case that it would not be likely to prejudice any of the matters mentioned in sub-section (1).

7 and 8 : The application of ECHR article 8

Application of article 8: general considerations

173. The 2005 Tribunal decision found that Article 8(1) of ECHR was engaged by the retention of information about the criminal convictions of individuals.

174. We note that the Commissioner's Enforcement Notices although put on the basis of there being a breach of the DPA also refer to Article 8 ECHR as being relevant in construing the DPA. The Commissioner explained that this is because the Act is intended to give effect to the DP Directive, which is in turn intended to give effect to Article 8. This is already explained at paragraph 21 above. He maintains that the relevant data protection principles need to be approached by reference to the standards of necessity and proportionality that are inherent in Article 8 which again is explained above at paragraph 121.

175. Paragraph 21 of this decision does not consider the whole position. The 2005 Tribunal decision placed weight upon the fact that under section 2 DPA the commission or alleged commission by a data subject of an offence or a conviction is defined as sensitive personal data. Such data has additional safeguards attached to it. Article 8 of the DP Directive provides for special categories of data albeit commission of offences is not contained within paragraph 1 of article 8 to which the additional safeguards provided for in section 2 DPA attach. Paragraph 5 of article 8 provides different and separate obligations in respect of convictions. It states that the processing of data relating to offences, criminal convictions or security measures may be carried out only under the control of official authority or if suitable special safeguards are provided under national law, subject to delegations which may be granted by the Member State under national provisions providing suitable specific safeguards. It goes on to provide that "*a complete register of criminal convictions may be kept only under the control of official authority".*

176. The Appellants argue that the 2005 Tribunal decision is wrong and that Article 8 is not engaged for two main reasons. Firstly in relation to the provision under paragraph 5 of article 8 of the DP Directive the Appellants maintain that this provision means that a Member State who chooses to retain all criminal records could not be acting excessively, be retaining them longer than necessary or be in breach of the principles which the legislation creates and therefore mere retention does not engage Article 8 of the ECHR. Secondly, the Appellants argue that a criminal conviction is not a private matter but a subject of public record. The Home Office make similar arguments but in addition contend that Article 8(1) is not engaged by the disclosure of conviction data under Part V 1997 Act because the data subject has not only consented, but has in fact applied for disclosure of his/her conviction record to himself/herself and the registered person and that application has been made in order to pursue his/her application for a particular employment. The Home Office and Appellants call in support of their argument a number of decisions including the House of Lords decision in *Marper v Chief Constable of South Yorkshire* [2004] 1 WLR 2196 where their Lordships concluded that the mere retention of DNA and fingerprints did not engage Article 8(1) ECHR. We consider all these cases are distinguishable or not relevant to these appeals.

177. In *R v Worcester CC ex p SW* [2002] HRLR 702 the personal data was held on a Health Service index specifically in relation to employment in that sector before the HRA came into force. In *R (A) v Chief Constable of C* [2001] 1 WLR 461 the court found that the information in question, which was not conviction data, was not caught by the DPA because it was manually not automatically processed. Both cases also turned on whether the person involved had in effect waived their rights to privacy by putting themselves forward for employment in the public sector or public life. This is not relevant to our appeals because the issue at stake is the retention of information on the PNC, albeit that retention only came to light as a result of an application in relation to employment, training and emigration in most of the cases. In *Johnson v Medical Defence Union* [2007] 3 CMLR 9 the Court of Appeal found that Article 8 ECHR does not extend to loss of employment. This is not the main issue in these appeals. Again it is the retention and other processing of personal data and whether it infringes DPPs 3 and 5. In *R (Countryside Alliance v Attorney General)* [2007] 3 WLR 922 hunting with hounds was found to be an activity conducted in public and not related to a person's private life which engaged Article 8. Again we cannot see how this case is applicable to the retention of conviction data on the PNC. In *McFeeley v United Kingdom* [1981] 3 EHRR 161 the activities involved those arising from a prison protest were found to engage Article 8(1) but were justified under Article 8(2). In our view the issue that arose in *McFeeley* as to whether the interference with the Article 8(1) rights was justified under Article 8(2) is the same issue in question in the appeals before us, not whether Article 8(1) is engaged at all.

178. We have considered the arguments of the Appellants and Home Office but find that we still agree with the 2005 Tribunal decision findings at paragraphs 172 to 177, particularly in relation to the *Marper* decision. However we do not consider that these appeals just relate to the retention of personal data. They relate to the processing of data as defined by the DPA of which holding or retention of personal data is just one aspect of processing. It is unrealistic to consider DPPs 3 and 5 in complete isolation to the other DPPs when considering the data controller's purposes which will usually involve all aspects of processing. Retention is the

fundamental requirement because without data no processing can take place whatever the purpose.

179. This means that the processing including retention of that information is a breach of an individuals' Article 8(1) rights, unless it can be justified under Article 8(2). Article 8(2) in effect allows for such processing provided it is in accordance with the law and is necessary in a democratic society for a number reasons including the prevention of disorder and crime. The legislative framework and the DPPs already considered are, in our view, what article 8(2) is about. Therefore our findings in relation to these are the matters to be taken into account when considering whether there has been an interference by the Chief Constables with the data subjects privacy rights.

180. The Home Office argue that even if Article 8(1) is engaged , disclosure pursuant to Part V of the Police Act 1997 is justified and quote *X v Chief Constable of West Midlands Police* [2005] 1 WLR 65 at [20] and other decisions as authority for this proposition. We agree and in any case are bound by Court of Appeal's decision. We accept that if conviction data is lawfully held on the PNC then its disclosure by the CRB by way of a standard or enhanced disclosure certificate would be justified. However this is not what is at issue in this case. The issue is the retention of the personal data if that retention infringes DPPs 3 and 5. In any case we do not accept the Home Office's contention that *a fortiori* the retention of conviction data in itself involves minimal interference with the data subject's right to privacy and is also justified under Article 8(2). In our view it is clearly demonstrated from our other findings in this case that it is not a minimal interference with the data subjects Article 8(1) rights, even if such an interference test is the right approach to take.

The step down model and the role of the CRB

181. The 2005 Tribunal decision was that retention of the conviction information at issue in that case did not contravene DPP3 or DPP5; but that the information had to be held on a step down basis, and (as an aspect of this) ought not to be provided to the CRB as part of any standard disclosure. The decision envisaged that the information would be provided in the context of enhanced disclosure, but only if a Chief Police Officer exercised a discretion in favour of disclosure.

182. The point that is made in this case both by the Appellants and the Home Office is that, if the step down model operates as envisaged by the 2005 Tribunal decision, then: (i) the Secretary of State is unable to perform her duty under section 113A(3) and 113B(3) of the Police Act 1997 to provide certificates giving the prescribed details of every conviction of the application which is recorded in central records; and (ii) the police are unable to perform their duty under section 119(1) of the Police Act 1997, to provide information to the Secretary of State for the purpose of enabling him to carry out his functions under that part.

183. "Central records" are defined by section 113(6) as being such records of convictions cautions or other information held for the use of police forces generally as may be prescribed. The sections needs to be read with regulation 9 of the Police Act 1997 (Criminal Records) Regulations 2002 which prescribes the following for the purposes of section 113A(6):

Information in any form relating to convictions, cautions, reprimands and warnings on a names database held by the National Policing Improvement Agency for the use of constables …

184. However we do not need to consider this criticism of the 2005 Tribunal's decision if we are upholding the Commissioner's Enforcement Notices. The information in question will be "stepped out" (removed from the PNC), not stepped down. In our view, as already explained above, there is no duty on the CRB to provide conviction data not held on the PNC to employers under section 113A(3) and section 113B(3), and nor is there any duty on the police to provide such data under section 119(1). The issue raised in relation to the 2005 Tribunal decision only arises if we decide to vary the present Enforcement Notices along "step down" lines.

185. We would observe that if stepped down information is not held on the PNC – as is at present the case – then there may be no legal obstacle to the stepped down model operating in the way envisaged by the 2005 Tribunal decision. The information would not be held in central records for the purposes of section 113(6) of the 1997 Act (because of regulation 9 of the 2002 Regulations). Hence the Secretary of State would not be obliged to disclose it under section 113A(3) or section 113B(3) of the Police Act 1997; and hence the police would have no obligation to disclose it under section 119(1). There would be no need to adopt any "reading down" of the Police Act 1997 for this purpose.

186. However it is envisaged in the future that stepped down information will be held on the PNC but for restricted access only. This may result in a different view being taken but because of our conclusion in this case we do not need to decide the position and because it is only a change which may take place at sometime in the future.

187. We appreciate that the Home Office takes a different view but again we would state that this is not a matter that we need to decide in this case. However we would comment that the stepping down of conviction data was dealt with by the 2005 Tribunal and that if the government requires a different approach maybe this is a matter for Parliament to decide.

9: Has there been an error of law in issuing the Enforcement Notices?

188. The error of law relied upon by the Appellants is that the Commissioner wrongly concluded that there was a breach of the third and fifth DPPs (in relation to each of the data subjects), and of the first DPP (in relation to SP). We find that these DPPs have been correctly applied as already explained and that there is no error in law.

10: Has there been an error in the exercise of discretion in issuing the Enforcement Notices?

189. Under s.49(1) DPA the Tribunal has an unfettered right to substitute its own view for that of the Commissioner if it disagrees with the Commissioner's exercise of his discretion. The Appellants consider that the selection of language in the section is to vest the widest of

powers in the Tribunal. If the considerations of the Tribunal are that the Commissioner ought to have exercised his discretion differently it may substitute its own. We agree that the Tribunal has such wide powers and that it is not restricted to say *Wednesbury* reasonableness, particularly because we can review any determination of fact upon which the Enforcement Notices were based (section 49(2)) and consider any change of circumstances (section 49(3)).

190. The Commissioner was not obliged to issue Enforcement Notices. We have heard evidence as to the Commissioner's findings in relation to the data subjects and his considered view about whether the first, third, fifth DPPs had been breached. In the circumstances he had a discretion under section 40 DPA as to whether or not to do issue enforcement notices. Mick Gorrill in evidence explained at length the reasons why the Commissioner exercised that discretion as he did in these particular cases. These reasons included:

1. The Commissioner sought to resolve the cases informally in discussion with the Appellants, but was not able to do so. The Commissioner gave the opportunity for the Appellants to explain why they did not consider that these cases were exceptional within the terms of the current retention guidelines, and why they considered that the continued retention of the information was relevant for policing purposes.
2. The Commissioner currently is dealing with 14 unresolved complaints (including these 5 cases) about the way in which information is held on the PNC. The Commissioner has not taken enforcement action in all 14 cases: instead the current cases have been selected, as being (in the Commissioner's view) "strong" cases. The Commissioner considered that these cases ought to be resolved, without waiting for the outcome of further discussion with the police forces about general issues of policy.
3. The Commissioner decided to take enforcement action specifically because of the circumstances of these individual cases: the action is not intended simply as a mechanism to obtain guidance and set a framework for the future. There is a genuine dispute between the Commissioner and the Appellants about these individual cases: this is not simply a situation where action has been taken in order to generate a dispute for the sake of obtaining a Tribunal decision.

191. We consider that the Commissioner's decision to take enforcement action under section 40 DPA here was a legitimate and proper exercise of his discretion, and that there is no proper basis for the Tribunal to overturn that exercise.

11: Damage and distress

192. Section 40(2) DPA requires the Commissioner, in deciding whether to serve an enforcement notice, to consider whether damage or distress has been or is likely to be caused to any person. The existence of damage or distress is not a prerequisite for the service of an

enforcement notice: it is merely a consideration that the Commissioner is required to take into account.

193. In each of the cases relevant to this appeal, Mick Gorrill in evidence explained why the Commissioner considered that the data subjects had been caused distress or would be likely to be caused distress by the continued retention of their data. More generally the Commissioner contends that knowing that information is retained on the PNC is likely to cause distress to individuals, over and above any distress that may be caused by their being obliged to disclose the historical fact that they have a conviction. He continues the retention of information on the PNC is likely to give an impression, both to data subjects and to others, that the conviction is still regarded by the police as a serious and relevant matter and that the data subject is potentially of interest to the police.

194. It was clear from SP's evidence she was distressed by the fact that the conviction data was still held on the PNC despite the assurances given to her that her record would be removed by the time she was 18 provided there were no further offences. Although her evidence was a little confusing as what happened with particular jobs what was clear was that she considered that the existence of her record would, in effect, exclude her from the training required for her to work with disabled children which in turn caused her distress. We appreciate that the CRB guidelines as to how employers or other organisations should take into account disclosures provides the appropriate basis upon which to consider such matters. However we accept the Commissioner's witnesses' evidence that in reality a police record will reduce the chances of career progression and that this will cause distress to a data subject like SP who has set her heart on a care position.

195. The Appellants contend that even if the assertion of SP is correct, the disclosure by processing of the Second Appellant was not the cause of the distress. Firstly, it would have been disclosure by the Secretary of State (CRB), and not the Second Appellant which would have led to any difficulty with SP's employer. Secondly, if SP has been dismissed because of the revelation of the reprimand, the distress has been occasioned by the obligations arising from section 4(2)(a) of ROA and the ROA Exceptions Order which entitles such an employer to seek information in relation to all previous involvement with the police.

196. The Appellants take a similar position in respect of the data subject HP and argue that it does not appear that the revelation of the conviction had any impact upon his ability to engage in the summer scheme. Also, they say, there is no evidence that the Commissioner sought confirmation of this before he issued the enforcement notice.

197. In relation to WMP and NP the Appellants argue that the distress was really the embarrassment of revelations of their past. The disclosure of a conviction through a CRB certificate did not cause the distress, but rather the obligation upon the data subjects to disclose all information about their criminal offending, which was separately imposed by the provisions of ROA.

198. In the case of GMP the Appellants say that it remains unclear whether any distress has been occasioned as a consequence of the retention and subsequent disclosure through a subject access request of her conviction. The Commissioner failed to provide evidence from the St Lucia State as to whether or not this conviction would necessarily have precluded her from emigrating and purchasing property in St Lucia. Having read the email dated 30 January

2008 from the Embassy's advocate it is clear to the Tribunal this is not the case. The opinion states "any record of conviction makes it almost impossible for the grant of the licences or her citizenship even if the conviction is what may be regarded as spent." It is not realistic to suggest that any distress would be attributable to that State's policy and not the obligation on GMP to furnish it with honest answers as to her criminal background.

199. The Commissioner contends that the very existence of the conviction on the database is a cause of itself for concern. The Appellants point out that there is no evidence of this, and such assumptions should be treated with caution. In the judgment in the Court of Appeal in *Marper*, Waller LJ was unimpressed by the suggestion that mere retention of DNA gave rise to a stigma, and this view was adopted by Lord Steyn in the House of Lords (at para 39). This view was not being applied to conviction data.

200. Having considered all these arguments the Tribunal prefers the Commissioner's conclusions about distress. However even if we are wrong, it would not mean that we would come to different decision in this case. Our overall assessment – including any findings about distress – is that the Commissioner exercised his discretion correctly by issuing the Enforcement Notices.

12 : DNA and fingerprint data

201. If the Tribunal upholds the Enforcement Notices the Commissioner asks the Tribunal to substitute new enforcement notices so that the entire nominal record is erased from the PNC, in effect, so that any DNA and fingerprint data are also erased, if held. This was the case apparently with GMP2 where the entire nominal record and associated biometric information was deleted. The Commissioner argues that once the nominal record is deleted there is no value in retaining any DNA and/or fingerprint information as it will not be possible to link this with the individual in question. We cannot understand this point as the DNA and fingerprints would still be retained on a data subject's record, even if there was no other data.

202. The Appellants strongly maintain that the Tribunal should not extend the Enforcement Notices beyond their defined terms. They suggest it would be to venture upon an enquiry as to a wholly different form of data without service upon the Appellants of any details as to which data protection principles have been breached and in what manner. In addition it would circumvent the stages of enforcement and the processes provided for data controllers under the DPA. Moreover, the Appellants argue, the course invited is impermissible in the light of the House of Lords ruling in *Marper*. To remove the DNA and fingerprints of those data subjects if the appeals are dismissed would be to place them in a preferential position to individuals whose DNA and fingerprints are on the database but have never committed any offence whatsoever. Such a course would be, in the Appellants' view, perverse, inconsistent and unfair. Parliament has accepted that there are compelling reasons in the public interest to retain the DNA and fingerprints of those acquitted of criminal offences within Article 8(2) of the Convention. In *Marper* it was recognised that those reasons are the significant contribution made to the detection and prevention of crime. This public interest cannot apply, argues Mr Jones on behalf of the Appellants, with any less force to those who are actually convicted of crime. It follows, he says, that such retention within the third and fifth data protection

principles must be relevant and not excessive and it is not being kept for longer than is necessary.

203. The Commissioner contends that the situation is different from that in *Marper*. The argument that fingerprint and DNA data should be deleted would only come into play on the premise that the Tribunal had decided that the conviction information ought not to be retained. In *Marper*, the House of Lords were not considering a situation where there was a prior finding that other information linked with DNA records ought to be deleted.

204. We find there is some logic in both parties' arguments. However as the removal of DNA and fingerprint data was not dealt with in the Enforcement Notices we are of the view that we are not required to determine the matter. Therefore we do not intend to make any findings in relation to the issue except to observe that if the European Court of Human Rights should disagree with their Lordships findings in *Marper* then it could be a matter for another Tribunal to consider.

Conclusion and remedy

205. The Tribunal accepts that it is a police purpose to disclose conviction data held on the PNC to bodies such as the CRB and ISA who require such information in order to undertake their statutory duties. However the Tribunal finds that this does not mean that Chief Constables are required to retain conviction data on the PNC, in effect, indefinitely even if no longer required for their core purposes. Chief Constables are required to process personal data including conviction data in accordance with their statutory obligations under the DPA and HRA. If such compliance requires the erasure of conviction data, as seems to be accepted by the Appellants that it does for soft criminal intelligence or data, then that information will no longer be held on the PNC. This does not mean that the police are in breach of other statutory obligations because these other obligations, as explained above, in our view go no further than require the police to disclose information held on the PNC. This position has existed for many years with the weeding of conviction data in England and Wales up until 2006 and seems to exist quite happily in Scotland up to this very day. If the government requires a different regime to operate then it will need to legislate accordingly with all the necessary safeguards that would be considered appropriate.

206. We find that the responsibility for complying with the DPPs is that of the data controllers in these appeals namely the Chief Constables of the police forces involved, not ACPO. Any advice or guidance from ACPO cannot replace this responsibility under the DPA. The Chief Constables responsibility is to consider each case for the stepping out of conviction data on its own individual merits taking into account all the circumstances including any advice from ACPO in accordance with the DPA. This clearly happened in the case of GMP2.

207. Having considered all the evidence and arguments of the parties in these appeals and that the burden of proof lies on the Commissioner we uphold the Enforcement Notices in these particular cases and dismiss the appeals. We require the Appellants to erase the conviction data in question from the PNC within 35 days of the date of this decision.

208. In view of this finding we do not find it necessary to make a decision on the issue raised by Home Office in paragraph 86.1 above, namely whether disclosure of the conviction data at issue in these appeals under Part V of the Police Act 1997 and in the future under SVGA 2006 is lawful and does not infringe the Data Protection Principles and Article 8 ECHR. This is because as we are upholding the Enforcement Notices which require the erasure of the conviction data at issue in these appeals, the question of the disclosure of this personal data in the future under these provisions no longer arises.

209. The Tribunal would observe that the 2006 Guidelines do not appear to be a suitable approach to the retention of conviction data in order to comply with the DPA. ACPO seems to have ignored the guidance provided in the 2005 Tribunal decision at paragraph 225 of the judgment in relation to stepping out of conviction data. We appreciate that policing requirements have changed since that decision but the 2006 Guidelines do not appear to us to even attempt to provide a proper consideration of DPPs 3 and 5 in contrast to other police codes referred to in this decision.

210. Our decision is unanimous.

John Angel

Chairman Date 21 July 2008