Criminal records checks "Arbitrary" and unlawful

February 24, 2016

R (on the application of P) v. Secretary of State for Justice [2016] All ER (D) 166 (Jan)

The High Court has upheld a challenge by way of judicial review to the criminal records disclosure scheme used in England and Wales. It has found the scheme to be "arbitrary" and disproportionate, and it was ruled unlawful, as incompatible with Article 8 of the European Convention on Human Rights.

Under the Rehabilitation of Offenders Act 1974, convictions, cautions, reprimands and warnings become "spent" after a certain period of time. However, in certain "excepted positions" (principally those working with children or vulnerable adults) the general rule does not apply and all prior convictions must be disclosed, however old or trivial, where there has been more than one previous conviction. The focus of the challenge was on this exception.

Both claimants in the case had multiple minor historic criminal offences recorded against them – one during a period where the applicant was suffering from an undiagnosed mental health condition and the other for offences which were over 30 years old. Both claimants had no subsequent convictions but were still required to disclose their historic convictions under the current scheme. The claimants argued that this was affecting their ability to find employment and impacted on their Article 8 rights.

Article 8 provides that:

- everyone has the right to respect for his private and family life, his home and his correspondence; and
- there shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interest of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

The High Court found that setting the bar at any more than one single conviction is arbitrary and neither in accordance with the law nor proportionate within the second limb of the test set out in Article 8.2 (as argued by the defendants).

The court has asked the government to make submissions to address the faults in the statutory scheme, before it makes its final order. The criminal records disclosure scheme will continue to run in its current form until this final order is made. The Home Office is considering whether there may be grounds to seek leave to appeal the decision.

Affected employers will not need to make any changes to their criminal records checks processes until the final order

is made. However, they may wish to take preparatory steps in anticipation of the changes to the law, which are inevitable in light of the High Court's judgment. This may involve employers having extra regard to information on DBS certificates (particularly where convictions may be considered minor or occurred a long time ago) and making a reasonable assessment of whether a prospective employee should be discounted simply on the basis of minor past convictions.

Employers may also wish to take stock of how robust their current background checks and pre-employment processes are, and consider whether any modifications would be beneficial.

Your Key Contacts

Gilla Harris
Partner, London
D +44 20 7320 6960
gilla.harris@dentons.com

Sarah Beeby
Partner, Milton Keynes
D +44 20 7320 4096
M +44 7584 204819
sarah.beeby@dentons.com