



OUTER HOUSE, COURT OF SESSION

[2026] CSOH 106

P342/26

P343/26

OPINION OF LORD BRAID

in the Petitions of

THE GENERAL TEACHING COUNCIL FOR SCOTLAND

Petitioner

for

Judicial Review of refusals by the Scottish Ministers to disclose to the petitioner information relevant to the fitness to teach of (i) T and (ii) W

Petitioner: Johnston KC, Blair: Anderson Strathern

Respondents: Crawford KC, Jajdelski: Scottish Government

23 October 2026

Introduction

[1] In these petitions for Judicial Review, the General Teaching Council for Scotland (GTCS), the body charged with regulating the teaching profession in Scotland, challenges the refusal by Scottish Ministers, through its executive agency, Disclosure Scotland (DS) (the respondent), to disclose to it information relevant to the fitness to teach of two individuals, T and W. In each case, DS has notified the GTCS that it is considering the individual concerned for inclusion in the lists of persons maintained under section 1 of the Protection of Vulnerable Groups (Scotland) Act 2007 (the effect of which inclusion would, in

practical terms, be to bar the individual from teaching), but refuses to tell the GTCS what information has led to that consideration, asserting that it does not have the power to do so. Although the parties have lodged a significant amount of background material, including evidence about various case-studies involving teachers who are not the subject of either petition, the short point for determination by the court is whether section 30(5)(b) of the 2007 Act does, or does not, confer power on DS to share information with the GTCS beyond the name of the individual concerned, and the fact that the individual is being considered for inclusion in the lists maintained by DS.

[2] I set out the whole terms of section 30 later in this opinion but at this stage, the better to highlight the dispute, I draw attention to the terms of subsection (5)(b):

- “(5) A notice given under subsection (2), (3B), (3C) or (4) may include –
- (a) such details as Ministers think appropriate –
 - (i) where the individual has been barred (by being listed or otherwise), about the circumstances in which the individual was barred,
 - (ii) where they have decided not to list an individual, about the circumstances in which the individual was considered for listing,
 - and
 - (b) *any other information* about the individual which Ministers think appropriate [emphasis added].”

The dispute between the parties is as to the meaning of the words “any other information” in subsection (5)(b). Does “other” mean “other than the information specified in paragraph (a)”, as the respondent contends? Or, as the petitioner argues, does it have a broader meaning so as to include referral information where appropriate? The ground of challenge is simply that the respondent’s decisions not to share information with the petitioner proceed upon an erroneous interpretation of section 30(5)(b). The petitioner seeks reduction of the decisions, and declarator that the respondent has a power to share appropriate information including disclosure of information received when T and W, as the case may be, were referred for consideration for inclusion in the relevant lists.

Factual background

T

[3] T is a secondary school teacher who is entered on the petitioner's register of teachers. On 15 December 2025, DS wrote to the petitioner to notify it that a referral had been received in respect of T and that she was, accordingly, under consideration for listing in the children's and adults' lists. The letter noted that a referral had been received from T's former employer, which it named, but did not set out the reasons why DS was considering her for inclusion on the lists, nor describe the nature of the allegations against her, nor provide any of the evidence which had been provided in respect of T's alleged conduct. Further correspondence ensued between the parties, in which the petitioner requested the respondent to exercise its powers under section 30(5) of the 2007 Act and to provide the petitioner with the information given to it by T's former employer that had given rise to the consideration for listing. However, the respondent adopted the position maintained by it in this petition, that section 30(5) did not permit it to do that, and that it held no other power permitting or requiring it to do so. The consequence is that despite the listing letter having been sent on 15 December 2025, the petitioner has to this day been unable to obtain full information about the nature of the allegations, and so has been unable to investigate.

W

[4] W is also a teacher entered on the petitioner's register of teachers. On 17 December 2025, DS wrote to the petitioner to notify it that a referral had been received in respect of W and that he was, accordingly, under consideration for listing in the children's and adults' lists. The letter noted that a referral had been received from W's former employer, which it

named, but did not set out the reasons why the respondent was considering inclusion of W on the lists. It did not describe the nature of the allegations against W, nor provide any of the evidence which had been provided in respect of W's alleged conduct. Further correspondence ensued between the parties, along the same lines as that in the case of T, with the same end result. No further information has been made available to the court regarding W's case.

The petitioner

[5] In terms of Article 6 of the Public Services Reform (General Teaching Council for Scotland) Order 2011 the petitioner's functions include *inter alia* investigating the fitness to teach of individuals who are, or who are seeking to be, registered as teachers. In terms of Article 18(2)(b) of the Order, the petitioner must remove from the register any registered teacher whom it subsequently considers to be unfit to teach. In terms of Article 18(3), an individual is unfit to teach if the petitioner considers that the individual's conduct or professional competence falls significantly short of the standards to be expected of a registered teacher. The process of investigating and adjudicating a teacher's fitness to teach is set out in Fitness to Teach Rules promulgated by the petitioner. That process was explained in an affidavit by the petitioner's strategic director, Jennifer Macdonald. The petitioner investigates the conduct of a teacher when an allegation is of a level of seriousness which might present a risk to learners and/or colleagues, or a potential risk to public confidence in the teaching profession. The petitioner relies on various partner organisations, including DS, to share appropriate information to assist in the investigation of cases which ought to be investigated. Investigations must be proportionate and ECHR compliant. When a conduct referral is received, the first stage of the process is the Initial Consideration stage,

when the petitioner decides if the referral passes the threshold for investigation. If an investigation is opened, the petitioner then decides whether to apply for a Temporary Restriction Order (TRO) to be placed on the teacher's registration; such an order restricts an individual's registration pending the conclusion of the investigation (and restricts, although does not entirely preclude, the individual's employment as a teacher). The investigation may include the taking of witness statements, or contacting an employer, police or others for information. The individual concerned is given the opportunity to respond to the allegations. No details of the investigation are made available to the public. Often, a barrier to an investigation being progressed is information-sharing difficulties with individuals and organisations. Some cases relate to teachers facing criminal charges or having been convicted of a criminal offence. The process by which the petitioner finds out about a criminal charge or a conviction could best be described as *ad hoc*: the petitioner might be informed by the teacher, their employer, a listing letter from Disclosure Scotland signposting it to the police, or simply by reading an article in the press. The conduct could vary from serious offences raising child protection issues, to road traffic matters. If, following an investigation, impairment for fitness to teach is established, sanctions include anything from a reprimand to removal or refusal of registration. If an individual has been listed by DS, the petitioner must either remove or refuse registration, as the case may be.

[6] Ms Macdonald emphasised that in carrying out investigations, the petitioner is heavily reliant on information from others. Police Scotland formerly notified it of criminal cases involving teachers but has not done so since 2015. The lack of information sharing by DS had the consequence that the petitioner was often unable to carry out the Initial Consideration stage effectively. DS expected it to obtain relevant information from others, but that process was variable: sometimes the petitioner received information from another

source, sometimes not; and even where it did, that could take months. The petitioner also had no way of knowing whether DS held other relevant information, apart from that provided by the source of the referral to it. Worryingly, there had been cases where once the petitioner had obtained information, it was clear that the teacher was facing serious allegations of a safeguarding nature which had not been passed on to the petitioner by DS.

[7] Ms Macdonald went on to cite a number of examples, involving teachers other than T and W, to illustrate the difficulties caused by the refusal of DS to share information. These included cases where the teacher had been charged with sexual offences, some of them involving children, and where there had been a delay in the petitioner learning that and being able to seek a TRO.

[8] Further, it is the petitioner's understanding that in relation to the process of consideration for listing DS does not complete its own independent investigation but relies upon the information gathered from, and outcomes of, investigations carried out by third parties, including the petitioner. Thus, a notification of consideration for listing under the 2007 Act was usually accompanied by a notice under section 19 of that Act, requiring the petitioner to provide DS with information within a specified period, usually 14 days. A typical section 19 notice would request information as to whether the individual was subject to any fitness to teach proceedings; what conduct the proceedings related to; and the likely timescale for conclusion. DS would then often seek an early update, despite being aware that the petitioner had to obtain information from third parties which DS already held.

The statutory scheme for the protection of vulnerable groups

[9] Since the respondent's argument hinges in large part on there being a coherent scheme by virtue of both the 2007 Act and the Disclosure Scotland Act 2020 read together,

and is that disclosure of the information sought by the petitioner would infringe the provisions of the latter, it is necessary to say something about the operation of each Act, and the respondent's role under each. Much of what follows was contained within an affidavit by DS's Director of Safeguarding, Kathleen McNulty, which is helpful to an extent, although the provisions of the legislation are there to be read, and ultimately how they are intended to operate is a matter of law for the court.

[10] The 2007 Act is in two parts, designed to ensure that those who are unsuitable to work with children (or vulnerable adults) cannot do so. Part 1 of the Act is concerned with the maintenance of lists with a view to barring certain individuals from working with children or certain adults. Section 1 imposes a duty on the respondent to keep a children's list and an adult's list. For present purposes, it is sufficient to mention the provisions of the Act only insofar as they apply to the children's list, although similar provisions apply to the adult's list. Section 2 sets out various referral grounds, including that the individual has harmed a child, placed a child at risk of harm, engaged in inappropriate conduct including pornography or engaged in inappropriate sexual conduct involving a child. Sections 3 to 8 impose an obligation on various persons and organisations to make a referral to the respondent in certain specified circumstances, including where an individual has been dismissed on a referral ground. Where a referral is made the respondent must then, in terms of section 10, consider whether to list the individual concerned. The respondent must also give such consideration where they have come by vetting information (defined in section 49) about the individual which indicates that it may be appropriate to include the individual in the children's list, where the individual does, has done or is likely to carry out a regulated role (such as teaching) with children (section 12). In terms of section 15, the respondent must list an individual in the children's list if, after considering whether to do so, they are

satisfied by information relating to the individual's conduct – regardless of how it has come by that information, whether by referral or otherwise – that he or she is unsuitable to carry out regulated roles with children. The effect of inclusion in the list is to bar the individual in question from carrying out specified regulated work with children.

[11] The respondent also has a separate public safety role under the 2007 Act. Section 44 requires the respondent to administer a scheme under which information about individuals who carry out, or wish to carry out, regulated roles with children (or protected adults) is (a) collated and (b) disclosed. That scheme is known as the Protecting Vulnerable Groups Scheme. Individuals who wish to perform a regulated role with children (such as teaching) may apply to join the Scheme and must be admitted to it unless barred (section 45).

Section 45C of the 2007 Act makes it an offence to carry out a regulated role unless the individual is a Scheme member. Section 45D makes it an offence for an organisation to offer any type of regulated role to an individual unless it has received a Level 2 disclosure in pursuance of a request under section 18(1)(a) of the 2020 Act confirming that the individual participates in the Scheme in relation to that type of regulated role. It follows that an individual who wishes to teach must both be a member of the Scheme and hold a Level 2 disclosure under the 2020 Act.

[12] This leads to consideration of the 2020 Act, which partially repealed and amended the 2007 Act and which now regulates vetting and disclosure. Part 1 of the 2020 Act sets out provisions for, *inter alia*, Level 2 disclosure. Such disclosure requires to include the information specified in section 8, which is essentially the individual's criminal history, and, where the individual participates in the PVG Scheme (as teachers must), the further information specified in section 17, including a statement of whether or not the individual is being considered for inclusion in a relevant list, and certain prescribed information about

civil orders. An application for Level 2 disclosure must be countersigned by an accredited body (which the petitioner is). However, section 18 provides that the Level 2 disclosure may not be made to any accredited body that signed the application unless requested by the applicant. Instead of making such a request, the applicant may request a review under section 20. In particular, the applicant may request a review of the accuracy of any of the information within the disclosure, or a review of the inclusion of certain information (such as, for example, certain spent convictions). Where a review is requested, the Level 2 disclosure is not disclosed to the countersignatory or any other body, unless the applicant subsequently requests that it be disclosed. Sections 20 to 31 then deal with the review of Level 2 disclosures. It is sufficient for present purposes to note that, at least in relation to the inclusion of certain information (as opposed to the accuracy of information), the applicant must be given the opportunity to make representations, and there is an elaborate mechanism for review. Section 31 provides that at the conclusion of the review, a new Level 2 disclosure is provided to the Scheme member (whether or not the review has resulted in information being omitted). The effect of section 31(10) to (12) is that where information is excluded from the new Level 2 disclosure, and the applicant is a PVG scheme member, DS must also exclude the information from the scheme member's PVG scheme record where the purpose of the disclosure related to the type of regulated role for which the individual is a scheme member. The information is also to be treated as not being vetting information for the purposes of the PVG Act. Section 42 makes it an offence to unlawfully disclose a Level 2 disclosure, with reference to a lawful disclosure in section 43. Section 44(1) makes it an offence to request or seek a Level 2 disclosure other than for a permitted purpose, which is defined in section 44(2).

[13] As to the operation of these provisions in practice, Ms McNulty explained that DS carried out criminal record checks for vetting information, as defined in section 49 of the 2007 Act, which included information about convictions, cautions, notification requirements under Part 2 of the Sexual Offences Act 2003 and information which the police officer of a relevant police force reasonably believed to be relevant in relation to the type of regulated role for which the individual participated in the Scheme and which in their opinion ought to be included in the individual's Scheme Record. DS received referrals under part 1 of the 2007 Act from a range of sources, and the majority of cases where an individual was considered for listing came from ongoing monitoring and receipt of vetting information rather than from employer referrals.

[14] Further, the level of information received by DS at the referral stage varied widely and could be very limited in nature. Often, receipt of vetting information resulted in consideration for listing under the 2007 Act being undertaken in tandem with the review process under the 2020 Act. Those were different functions carried out by different teams. DS normally awaited the outcome of regulatory proceedings before reaching a decision on whether to list an individual.

[15] Ms McNulty then moved on to consider the implications of the petitioner's construction of section 30(5)(b) being held to be correct. She devoted some time to setting out the difficulties DS would face in deciding what information it was appropriate to disclose, having regard to the potentially sensitive nature of the information and the differing regimes as between the 2007 and 2020 Acts. Additionally, the notice had to be sent to persons other than the petitioner, including the individual's employer. On average, three notices were issued in each case. This is of limited assistance, since as senior counsel for the petitioner pointed out, a difficulty in compliance is not the reason advanced by the

respondent for not providing information to the petitioner, nor could it be, since it is irrelevant to the issue of statutory construction.

The legal framework

[16] Section 30 of the 2007 Act, insofar as material, provides:

“30 Notice of listing etc.

- (1) Subsection (2) applies where –
 - ...
 - (c) Ministers are considering whether to list an individual by virtue of sections 10 to 13...
- (2) Where this subsection applies, Ministers must notify the persons specified in subsection (3) of the fact –
 - ...
 - (b) that they are considering whether to list the individual.
- (3) Those persons are –
 - (a) the individual concerned,
 - (b) where ...
 - (ii) Ministers are considering whether to list the individual in the children's list

any organisation for which they know the individual is carrying out a regulated role with children, and any personnel supplier whom they know has offered or supplied the scheme member to carry out a regulated role with children,

 - (c) where ...
 - (ii) Ministers are considering whether to list the individual in the adults' list, any organisation for which they know the individual is carrying out a regulated role with adults, and any personnel supplier whom they know has offered or supplied the scheme member to carry out a regulated role with adults, and
 - (d) any relevant regulatory body whom Ministers think it would be appropriate to notify of that fact.

...

- (5) A notice given under subsection (2), (3B), (3C) or (4) may include –
 - (a) such details as Ministers think appropriate –
 - (i) where the individual has been barred (by being listed or otherwise), about the circumstances in which the individual was barred,

- (ii) where they have decided not to list an individual, about the circumstances in which the individual was considered for listing, and
 - (b) any other information about the individual which Ministers think appropriate. ...
- (7) The following persons are 'relevant regulatory bodies' – The General Teaching Council for Scotland..."

UNCRC

[17] The effect of section 24(1) of the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024, is that, so far as it is possible to do so, the 2007 Act must be read and given effect to in a way which is compatible with the UNCRC requirements.

[18] Article 19 of the UNCRC provides:

- "1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.
- 2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement."

[19] Article 34 provides:

"States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national measures to prevent: (a) The inducement or coercion of a child to engage in any unlawful sexual activity; (b) The exploitative use of children in prostitution or other unlawful sexual practices..."

Approach to statutory construction

[20] The core principles of statutory interpretation are well known and have been restated by the courts in a number of recent cases, most recently by the Supreme Court in *For Women Scotland v Scottish Ministers* 2025 SC (UKSC) 1 at paragraphs 8-14. I adopt the following summary, proposed by counsel for the petitioner, which is not controversial (all paragraph references being to *For Women Scotland* unless otherwise stated):

- a. The ultimate exercise of interpretation is an attempt to seek the meaning of the words which Parliament has used: paragraph 9.
- b. Words and passages in a statute derive their meaning from their context. On that basis the phrase or passage must be read in the context of the legislation as a whole: paragraph 9. Regard may also be had to the purpose of the statute: *Faculty of Advocates and Judicial Appointments Board for Scotland, Special Case* 2025 SLT 171, paragraph 25.
- c. External aids to interpretation must play a secondary role: paragraph 9. The context disclosed by such aids, including Parliamentary materials, is relevant to assist the court to ascertain the meaning of the statute, whether or not there is ambiguity and uncertainty; but external aids may not displace the meanings conveyed by the words of a statute that, after consideration of that context, are clear and unambiguous and which do not produce absurdity.
- d. Regard must be had to the specific words used in the statute but the courts ought not to take an artificially literal interpretation of the words without regard to the context of the provision in the statute and the purpose of the statute: paragraph 10.

- e. The courts should strive for an interpretation that is clear and predictable, which will be achieved if the legislation is construed according to the ordinary meaning of the words used: paragraph 12.

Submissions

Petitioner

[21] Senior counsel for the petitioner invited the court to reduce the decisions and to grant the declarators sought in each petition. On a proper construction, applying the principles set out above, section 30 provided the respondent with a discretion to disclose such information as it considered appropriate, in order to assist the petitioner in its function of public protection; that was the only construction consistent with the words of the statute and the underlying purpose of the legislation. In many circumstances, it would be appropriate for the sharing of such information to include a summary of the allegations against the teacher; any underlying documents which spoke to the allegations; and the identities of any relevant witnesses. That there was a discretion was clear from the words “think appropriate”; there was no other limit to the nature or scope of the information which could be disclosed. In deciding what it was appropriate to disclose, the respondent must have regard to the policy and objectives of the legislation, namely, the protection of the public. The petitioner’s approach was supported by the overall purpose served both by the 2007 Act, and by the 2011 order. Each had the overall purpose of protection of the public. The overall scheme of the former was to maintain lists of individuals who, by virtue of their character or conduct, ought not to be permitted to work with, among others, children, because they pose a risk to those children. The underlying purpose of the latter was to ensure that individuals who are unfit to teach are not able to do so, in order to protect

children from the harm posed by unfit teachers. Given that clear overlap, it would be wrong to impose an unnecessarily restrictive interpretation (inconsistent with the statutory language) on section 30(5)(b). The Act should be read permissively in service of that overall purpose and, to that end, as enabling the respondent to provide regulatory bodies such as the petitioner with information to assist them in the effective regulation of those registered with them. The petitioner's interpretation was consistent with the UNCRC requirements as set out in Articles 19 and 34, above.

[22] Disclosure was also consistent with the underlying common law approach to disclosure of information to professional regulators. The authorities vouched the following propositions:

- a. The maintenance of the reputation of professions by the proper investigation of fitness to practise concerns is a matter of very significant public interest:
Bolton v Law Society [1994] 1 WLR 512 at 518-519.
- b. The primary purpose of fitness to practise proceedings is to protect the public rather than to punish the practitioner: *Meadow v General Medical Council* [2007] QB 462 at paragraph 30.
- c. Statutory powers akin to allowing disclosure of information are to be interpreted as providing a broad power of recovery to regulators: *R (Nakash) v Metropolitan Police Service and the General Medical Council* [2014] EWHC 3810 (Admin) at paragraphs 37-47.
- d. The confidentiality of information provided in confidential circumstances ought generally to be protected. However, where a regulatory body seeks access to information which is of some relevance to the subject matter of a fitness to practise investigation, there is a countervailing public interest in

seeing that the information is provided to the regulator, to ensure proper protection of the profession. That countervailing public interest will ordinarily prevail in the balancing exercise: *Woolgar v Chief Constable of Sussex Police* [2000] 1 WLR 25 at 36.

- e. The power to use the material is limited by the nature of the public interest which the disclosure is to meet. Disclosure is not required for any “amorphous or vague public interest” but the proper regulation of the profession is likely to be a matter of very clear, specific public interest which would justify disclosure: *BC v Chief Constable of Police Scotland* 2021 SC 265 at paragraphs 107-108.
- f. A haver may be expected to disclose relevant information to a regulator, even where there is no request by the regulator: *Woolgar*, above, at 36.
- g. Disclosure for the purposes of protecting the public, and in circumstances where the *Woolgar* balancing exercise has been carried out, will amount to a lawful basis for disclosure in terms of the Data Protection Act 2018 and the GDPR: *General Teaching Council for Scotland v Chief Constable of Police Scotland* 2021 SLT 1512 at paragraph 32.
- h. Disclosure for the purposes of protecting the public, and in circumstances where the *Woolgar* balancing exercise has been carried out, will amount to a lawful basis for the purposes of Article 8 ECHR, provided such disclosure is a proportionate way of achieving the legitimate aim of properly regulating the profession: *MS v Sweden* [1999] 28 EHRR 313 at paragraph 41-44; *R (Nakash) v Metropolitan Police Service and GMC* [2014] EWHC 3810 (Admin) at paragraph 46.

To the extent that the above authorities are decisions of the English courts, they have been considered and applied by Lord Uist in *General Teaching Council for Scotland v Chief Constable of Police Scotland* 2021 SLT 1512.

[23] Finally, the petitioner's approach did not involve any incompatibility with an individual's ECHR rights. The cases relied on by the respondent in this regard (see below) were ones in which there had been no discretion to withhold information. Here, the respondent's discretion ensured that due consideration was given to those rights, and that any disclosure was proportionate and ECHR compliant.

Respondent

[24] Senior counsel for the respondent submitted that the petition should be refused. Properly construed, section 30(5)(b) did not provide the respondent with a power to share, either at the point of notifying the petitioner that an individual was under consideration for listing or at any time thereafter before a decision whether or not to list was made, information given to the respondent in the referral that had given rise to the listing. That was because referral information was not any *other* information in section 30(5)(b). That information was the *same* information as referred to in section 30(5)(a)(i) and (ii) (being information taken into account when deciding whether the individual was to be listed or not) and so could not be *other* information. The fact that section 30(5)(a) applied, as a matter of logic, to notices necessarily issued later than notices of consideration for listing did not mean that all of the information referred to in section 30(5)(a) only came into existence or became available to the respondent when the individual was barred, or when the respondent decided not to list the individual. Referral information would clearly form at least part of the same information which resulted in the eventual decision (to list, or not to

list), and so could not be “other” information. That interpretation was consistent with the policy intentions underlying the 2007 Act. The petitioner’s proposed construction would in effect render the word “other” superfluous, and also ran counter to the policy intention of the 2007 Act. That Act provided a carefully thought out and complete statutory regime to protect vulnerable groups. A notice of consideration for listing to which section 30(5)(b) applied enabled regulatory bodies, such as the petitioner, to undertake their own enquiries and take appropriate action in the interests of public safety. In the context of the overall regime, it provided an appropriate and proportionate balancing of the public interest in safeguarding the interests of the individual affected and the interests of others. Further, the 2007 Act and the 2020 Act must be read together. The information taken into account by the respondent in considering whether to list an individual would be the same as the information relevant in considering Level 2 disclosure. The disclosure and vetting regime in the 2020 Act sought to ensure that disclosure of information was compatible with an individual’s ECHR rights and contained various procedural safeguards to that end. Under that Act, information could be disclosed to the petitioner only if the individual consented. The petitioner’s construction of section 30(5)(b) would permit, at least in many cases, disclosure of information without any of those procedural safeguards, and without the individual’s consent. It would involve an infringement of the individual’s ECHR rights: *cf P v Scottish Ministers* [2017] CSOH 33; 2017 SLT 271; *R(T) v Chief Constable of Greater Manchester Police* [2015] AC 49. In summary, the petitioner’s construction of section 30(5)(b) would lead to an absurd result in the sense of the two statutory schemes being unworkable, impracticable, inconvenient, anomalous or illogical.

Decision

[25] The dispute between the parties boils down to whether “other” in section 30(5)(b) means “other than the information in subsection 30(5)(a)”, as the respondent contends; or whether, as the petitioner argues, it means additional to the information which must be included by virtue of section 30(2). The difficulty arises in large measure because section 30(5) applies both when an individual is being considered for listing, and when a decision has been taken either to list (or otherwise bar) an individual, or not to list, as the case may be, which necessarily happens later than the consideration stage.

[26] By way of introduction, there is little doubt that section 30(5)(b) is not drafted as clearly as it might have been, and that the listing provisions in the 2007 Act, as amended by the 2020 Act, do not mesh particularly well or seamlessly with the disclosure provisions in the 2020 Act. However, as the legislation makes clear, and as Ms McNulty’s affidavit acknowledged, the listing scheme under the 2007 Act and the disclosure scheme under the 2020 Act are separate and distinct, even though the same information may be relevant to both. It does not follow from the fact that, under one scheme, information may be disclosed to the petitioner in one capacity (as countersignatory to an application for Level 2 disclosure) that under another scheme that same information may not be passed to it in a different capacity (as regulator). Indeed, the legislation explicitly recognises that: the information which section 30(2) requires to be notified, namely that an individual is being considered for listing, is also information which must be included in a Level 2 disclosure; which is an example of information which may not be disclosed under one scheme being disclosed under the other. What the respondent’s submissions and the affidavit by Ms McNulty appeared at times to overlook is that the petitioner’s argument is not that the respondent *must* disclose referral information to the petitioner when it is giving consideration to listing

an individual, but simply that it has a discretion to do so where it considers that it is appropriate to do so. When all of the foregoing is borne in mind, many of the respondent's objections to the petitioner's construction fall away. As senior counsel for the petitioner observed, it is not the petitioner's case that the respondent should provide it with a Level 2 disclosure for any individual in contravention of the 2020 Act; simply that it has a discretion under the 2007 Act to provide more information than it currently does. The fact that the two schemes are separate is recognised by a number of statutory provisions, for example, section 31(12), which provides that information which is excluded from disclosure after review is to be removed from the individual's scheme record; and the somewhat convoluted definition of "vetting information" in section 49 of the 2007 Act, which recognises in subsection (1A) that different criteria apply to inclusion in a Level 2 disclosure than to inclusion in a scheme member's scheme record.

[27] Keeping these general observations in mind, a number of considerations suggest that the petitioner's construction is the correct one. First, the words must be read in the context of the 2007 Act as a whole, which has the purpose of the protection of the public, by, among other things, the maintenance of lists of those unsuitable for working with children. It is consistent with that purpose that more, rather than less, information be provided to a regulatory body (the more so when the decision whether or not to list turns, at least in part, on any investigation carried out by the regulatory body). Second, as senior counsel for the petitioner submitted, the natural meaning of "other" is that it signifies something additional to that already mentioned; not that it imposes a restriction. That natural meaning is consistent with the statutory purpose. Third, turning to construction of the words themselves, the first point to note is that, where a decision has been taken to list (or otherwise bar) or not to list, as the case may be, paragraphs (a) and (b), read together permit

the respondent to include not only information about the circumstances (which is likely to include referral or vetting information) but also any other information which it thinks appropriate. In that context, the “other” information will necessarily be additional information about something else, and paragraph (b) is on the face of it a permissive, rather than restrictive provision. It does not follow, as the respondent contends, that at the consideration stage, where, because no decision has yet been made, paragraph (a) is not engaged, “other” must be read in a restrictive way. If the respondent’s construction were correct, the only information which could be provided would be the same additional information as could be provided where paragraph (a) did apply, which makes little sense. For these reasons, in the context of a notice under section 30(2), where the conditions for paragraph (a) are absent, it is natural to read “other” as referring to information other than that which is already included under subsection (2), which is the information that a named individual is being considered for listing. Even if “other” is interpreted by reference to paragraph (a), paragraph (b) remains framed in very broad language, and is not such as to suggest that Parliament intended to restrict what could be provided to the petitioner. It is true that, as the respondent points out, “other” in that context might be seen as superfluous, but that is a function of the fact that the paragraph also covers notices where a decision has been taken, and where information has been included under paragraph (a). Fourth, the respondent’s approach involves construing paragraph (b) as if it read “information other than that specified in paragraph (a)” which is to turn the provision on its head. Fifth, Parliament must be intended to have had a purpose in requiring relevant regulatory bodies, including the petitioner, to be notified of the fact of consideration for listing, namely, to enable such bodies properly to exercise their statutory powers in a meaningful way. Finally, the respondent’s construction results in the legislative purpose being potentially thwarted in

many cases, as the examples cited by Ms Macdonald, and indeed the case of T itself, demonstrate.

[28] This construction of section 30(5)(b) is reinforced by the interpretative obligation imposed by section 24 of the UNCRC (Incorporation)(Scotland) Act 2024, which requires the court, insofar as it is possible to do so, to read and give effect to section 30(5) in a way which is compatible with the UNCRC requirements. Stated shortly, those requirements include, by Article 19, that States Parties must have appropriate measures to protect children from abuse at the hands of any person in whose care they are. A construction which permits the respondent, where appropriate, to share relevant safeguarding information with a regulatory body provides a more effective measure against potential child abuse than a construction which prevents the respondent from doing so. It is all very well for the respondent to argue that other routes exist whereby the petitioner is able to come by the information, but as the case of T, for one, demonstrates, these routes are not always effective. The practical effect of the respondent's approach is that an individual may, at least for a period, continue to teach whilst the petitioner attempts to obtain from other sources information already held by DS which suggests that the individual may present a risk to children. Further, there is an obvious circularity in the respondent's approach. It seeks information from the petitioner in order to assist its listing decision, whilst simultaneously maintaining that it lacks power to provide the petitioner with information which it accepts may be relevant to the petitioner's investigation of the individual concerned. The likely consequence is delay while the petitioner obtains that information from other sources. The respondent does not maintain that the petitioner should not have the information, simply that it should obtain the information from someone else; meanwhile, there is a risk that the

individual may continue teaching, when a TRO might otherwise have been sought by the petitioner.

[29] For all these reasons, I consider that the respondent has fallen into error by failing to acknowledge that section 30(5)(b) confers on it a discretion to share information with the petitioner.

[30] For completeness, I should deal with several other arguments presented by the parties insofar as I have not done so already. I find it unnecessary to analyse, in detail, the common law principles which the petitioner submitted could be derived from the authorities, since the petitioner accepted that if the respondent's construction of section 30(5)(b) were correct, that would effectively displace the common law. Suffice to say two things: first, the power to disclose information which is otherwise confidential is not inconsistent with the common law; but, second, it is going too far to take from *Woolgar*, above, that the countervailing public interest in disclosure will ordinarily prevail. Rather, a balancing exercise must be carried out, but that is precisely what the respondent must do under the 2007 Act anyway in deciding what information to share.

[31] Next, for the avoidance of doubt, I do not accept the respondent's submission that *P v Scottish Ministers* and *R(T) v Chief Constable of Greater Manchester Police*, both above, are authority for the proposition that an individual's ECHR rights will be infringed by the sharing of information under section 30(5). The significant difference between the statutory regime under consideration here, and the regimes in those cases, is that the respondent has a discretion as to what information to disclose. In this context, it is significant that the information will only be considered for disclosure in the first place if it is already information which has caused the respondent to give consideration for listing. Thereafter, it has a further discretion to exercise as to whether it is information which ought to be

disclosed. It does not avail the respondent to observe that information giving rise to consideration for listing may prove to be unfounded. The petitioner's procedures require that the information be investigated and be put to the individual concerned at an early stage in its consideration of the case.

[32] Finally, I should say a word about external aids, since both parties relied upon the same external aid in support of their proposed construction, namely, an extract from the Official Report of the Scottish Parliament Education Committee meeting of 13 February 2007, at which amendment 42 (which became section 30) was discussed. That amendment was introduced by the Deputy Minister for Education and Young People, as follows:

“Regulatory bodies have an important role to play in ensuring that vulnerable groups are not placed at risk of harm by the professionals who provide services to them. Amendment 42 allows the Scottish ministers to provide relevant regulatory bodies with information on decisions relating to listing to assist them effectively to regulate their workforce. That will apply when it has and has not been decided to list an individual”.

The petitioner argued that this supported its construction by making it clear that the intention was to assist regulatory bodies; the respondent, that information to regulatory bodies was to be provided only where a decision had been made to list or not to list. I confess that I would not have derived any great assistance from this statement had I found there to have been an ambiguity (nor have I had regard to it in considering the purpose of the Act). Indeed the statement is itself highly ambiguous, since on any view, not having decided to list an individual is not the same as having decided not to list that individual. The statement therefore does not provide a great deal of assistance to either party.

Remedy

[33] The question remains as to what remedy should be granted. The petitioner seeks both reduction of the decisions complained of, and declarator that:

“Section 30 (5) (b) of the Protection of Vulnerable Groups (Scotland) Act 2007 provides the respondent with a power to share with the petitioner appropriate information *relevant to the petitioner’s functions to investigate allegations regarding the fitness to teach of a teacher registered in Scotland*, including disclosure of the information received by the respondent when [T] [or, as the case may be, W] was referred to the respondent for consideration for inclusion on the children’s and adults’ list.”

Senior counsel for the petitioner submitted that a declarator in those terms accurately reflected the power conferred on the respondent by section 30(5)(b). Senior counsel for the respondent submitted that, should the petitioner’s construction be preferred, the only remedy which should be granted was that of reduction. The declarator sought was too wide. The first part sought disclosure of information relevant to the petitioner’s regulatory functions, which were a matter for it, not the respondent; while the second part placed a gloss on the statutory language in the section, and purported to include all of the information provided to the respondent, regardless of the role of that information in the respondent’s decision to list.

[34] Since the issue between the parties has festered for some ten years, and the respondent’s primary position is that it has no discretion to disclose information, which I have held to be erroneous, I consider that there is merit in the law being clarified by a declarator. That said, I do not consider that the words which I have italicised add anything, and so those will fall to be deleted. Beyond that, the proposed declarator perhaps does not fully reflect the respondent’s point that the consideration for listing may have come about by a route other than a referral (although a referral was made in the cases of both T and W) and I consider that the wording may benefit from further adjustment. As counsel suggested, I

will put the case out by order for further discussion of the precise terms of the declarator.

Although parties were agreed that expenses should follow success, I will also formally deal with expenses at that hearing.