

SHERIFFDOM OF TAYSIDE CENTRAL AND FIFE AT FALKIRK

[2017] SC FAL 53

B208/16

JUDGMENT OF SHERIFF JOHN K MUNDY

In the cause

JT

Pursuer

Against

THE SCOTTISH MINISTERS

Defender

**Pursuer: Party**  
**Defender: Pang**

Falkirk, 1 February 2017

The sheriff, having resumed consideration of the cause, appoints a procedural hearing on a date to be afterwards fixed in order that parties be heard on further procedure in light of the conclusions in the Sheriff's Note issued of even date.

NOTE:

[1] This is a summary application raised by the pursuer which seeks to remove a spent conviction from the scheme record relating to him under the Protection of Vulnerable Groups Scheme ("PVG Scheme"), established under the Protection of Vulnerable Groups (Scotland) Act 2007 ("the 2007 Act").

[2] The conviction in question is recorded in the scheme record as one in 2008 in the Sheriff Court for "*assault-domestic*" for which the pursuer was fined.

[3] The matter arises in the context of an application to Disclosure Scotland in respect of the pursuer's temporary employment as a lecturer at a college. For present purposes, the issue in the case relates to the appropriate test which is to be applied by the Sheriff in deciding whether to remove the conviction from the record.

[4] The case came before me for debate on 10 November 2016 on the defenders' plea to the relevancy and specification of the pursuer's pleadings, it being said that the pursuer had failed to address the correct test. The debate was continued to 9 December 2016 for further submissions, I having asked to be addressed on certain specific matters. I then made *avizandum*. Appearing at debate was the pursuer, a party litigant, assisted by his wife who it was agreed could make submissions on his behalf; in effect a lay representative. Ms Pang, solicitor, appeared for the defenders.

[5] The provision with which we are immediately concerned is section 52A of the 2007 Act, which provides *inter alia*:

*(2) The scheme member may apply to the sheriff for an order requiring Ministers to remove from the scheme record the vetting information referred to in section 52(4).*

*(6) In determining an application under subsection (2) the sheriff must—*

*(a) if satisfied that the vetting information is **not relevant in relation to a type of regulated work in relation to which the scheme member participates in the Scheme**, allow the application,*

*(b) otherwise, refuse the application.*

The argument for the pursuer, as reflected in his pleadings, was that the test of relevance mentioned in section 52A(6) related specifically to the purpose for which the PVG Scheme record was requested. He contended that the sole reason he participated in the PVG Scheme was due to his employment with the college as a lecturer and that the type of "regulated work" against which the relevance of the conviction was to be tested was teaching. On the other hand, the defenders contended that the relevance of the conviction required to be

tested in relation to all regulated work in relation to which the scheme member participates in the scheme – in this case regulated work with children. This contrasted with the system of disclosure under the Police Act 1997 (“the 1997 Act”) and the issue of certificates by Disclosure Scotland in relation to which the Sheriff had power under section 116ZB of that Act to order the issuing of a fresh certificate not containing specific conviction information and where the test of relevance did relate to the specific role undertaken or to be undertaken by the applicant.

[6] It was evident from the discussions on the first day of the debate that it was of importance to consider the larger legislative scheme dealing with disclosure in order to properly deal with the issue in the instant case. That was the reason for the continuation. This ultimately involved consideration *inter alia* of the provisions of the Police Act 1997 as it applied to Scotland, the 2007 Act, the Police Act 1997 and the Protection of Vulnerable Groups (Scotland) Act 2007 Remedial (No. 2) Order 2015 (“the Remedial Order”) and *R (on the application of T and another) v Secretary of State for the Home Department and another* [2014] UKSC 35. I was also referred to the Policy Note to the Remedial Order and the Report of the meeting of the Scottish Parliament’s Education and Culture Committee on 26 January 2016 which recommended approval of the Remedial Order. I was informed that there was as yet no other decision of a Sheriff on the issue raised in this case.

[7] As background, the Rehabilitation of Offenders Act 1974 (“the 1974 Act”) altered the common law position of full disclosure by an employee to an employer by limiting the rights of an employer in this respect. Ordinarily, under the 1974 Act, an employer is not entitled to disclosure of “spent” convictions. It is accepted in this case that the pursuer’s conviction is spent. The 1997 Act innovated on this by creating a statutory scheme for disclosure of criminal records, and in limited circumstances, other information held by the

police relating to individuals, where required in order to assess the suitability of a person for employment in particular types of position of trust or sensitivity. The 2007 Act established a scheme in Scotland whereby Scottish Ministers collate and disclose information about individuals who do or wish to do regulated work with children or protected adults, or both. The disclosure under the 1997 and 2007 Acts could include convictions regarded as spent under the 1974 Act.

[8] For present purposes, the Sheriff's powers of review under the 1997 and 2007 Acts were introduced in their current form by the Remedial Order which made amendments to both statutes. The Remedial Order replaced an earlier Remedial Order of 2015, and came into force on 8 February 2016 (see below). I think it useful to outline the background to that Order and to set out the relevant provisions in more detail. In this respect, I am grateful to Ms Pang for the Note she provided on the second day of the debate and the materials lodged in court. The Policy Note to the Remedial Order, paragraphs 2 to 4, states as follows:

*2. On 18 June 2014, in the case R (on the application of T and another) (FC)(Respondents) v Secretary of State for the Home Department and another (Appellants) [2014] UKSC 35, the United Kingdom Supreme Court ("UKSC") made a declaration of incompatibility under section 4 of the Human Rights Act 1998 that the provisions of sections 113A and 113B of the Police Act 1997 (as applicable in England and Wales) were incompatible with article 8 (the right to respect for private and family life) of the European Convention on Human Rights ("the Convention") because the requirements in those sections in relation to blanket disclosure of all spent convictions were not in accordance with the law. In Scotland, similar provisions of the 1997 Act apply to the issue of disclosure certificates. These functions under the 1997 Act and related legislation are devolved to Scottish Ministers and are exercised through Disclosure Scotland.*

*3. In light of the UKSC ruling, the Scottish Government assessed the operation of the 1997 Act in Scotland and concluded that changes should be made to the 1997 Act to ensure that it strikes a fair balance between an individual's right to respect for their private life and the*

*interests of public protection. In addition, the Scottish Government concluded that the 2007 Act (an Act of the Scottish Parliament which established the Protecting Vulnerable Groups Scheme – “PVG Scheme”) should also be amended. These changes were effected by the 2015 Order which came into force on 10 September 2015.*

*4. The 2015 Order came into force at the same time as the Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Amendment Order 2015 which provided for associated changes to the system of self-disclosure of previous criminal convictions by an individual under the Rehabilitation of Offenders Act 1974 (“the 1974 Act”) and the Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Order 2013.*

As indicated, the 2015 order referred to above was modified by the Remedial Order with effect from 8 February 2016.

[9] The 1997 Act, as amended, now provides for a system of disclosure whereby certain spent convictions will always be disclosed due to the seriousness of the offence. Those are listed in schedule 8A of the Act. Other offences will be disclosed subject to rules – those listed in schedule 8B. There are also now certain convictions that will no longer be disclosed by Disclosure Scotland. It is accepted that the conviction in this case is one of those listed in schedule 8B.

[10] Under section 113A of the 1997 Act Disclosure Scotland issues criminal record certificates (often known as standard disclosures) to applicants where their application is countersigned by a potential employer who has signed a statement that the disclosure certificate is required for the purposes of an “exempted question” (exclusion of certain provisions of 1974 Act). Under section 113B of the 1997 Act, Disclosure Scotland issues enhanced criminal record certificates (often known as enhanced disclosures) to applicants where their application is countersigned by a potential employer who has signed a statement that the disclosure certificate is required for the purposes of an “exempted

question". Both types of disclosure certificate will contain details of 'every relevant matter' relating to the applicant which is recorded in central records (s.113A(3)). This definition of "relevant matter" now includes a conviction which is not a "protected conviction." A protected conviction is defined in section 126ZA of the 1997 Act (inserted by the Remedial Order) which provides as follows:-

- (1) *For the purposes of this Part a conviction is a protected conviction if –*
- (a) *it is a spent conviction, and*
- (b) *either –*
- (i) *it is not a conviction for an offence listed in schedule 8A or 8B, or*
- (ii) *it is conviction for an offence listed in schedule 8B and at least one of the conditions specified in subsection (2) is satisfied.*
- (2) *The conditions are –*
- (a) *the disposal in respect of the conviction was an admonition or an absolute discharge,*
- (b) *the person was aged under 18 on the date of conviction and at least 7 years and 6 months have passed since the date of the conviction,*
- (c) *the person was aged 18 or over on the date of conviction and at least 15 years have passed since the date of the conviction.*

[11] The import of the above is that an individual's spent conviction will no longer be disclosed by Disclosure Scotland provided it is for an offence which is not listed in either schedule 8A or 8B to the 1997 Act. If the conviction is listed in Schedule 8A it will always be disclosed. If the conviction is for an offence listed in schedule 8B then, if the individual satisfies one of the conditions set out in s.126ZA(2), the conviction will no longer be disclosed. If the individual committed the offence when they were aged 18 or over, and 15 years have passed since the date of the conviction, the offence will no longer be disclosed. Similarly, if the individual was under 18 at the time of the offence and 7 ½ years have passed since the date of the conviction, the conviction will not be disclosed. Finally, if the individual

was admonished or given an absolute discharge for their offence, the offence will no longer be disclosed. As will be seen, this definition of relevant matter is adopted in the 2007 Act (see para. 16).

[12] The Remedial Order also introduces a provision into the 1997 Act (s.116ZB) which allows an individual to make an application to the Sheriff for an order requiring Scottish Ministers to issue a new disclosure certificate that does not contain the conviction information that it currently holds. An individual can apply under this section if their certificate includes details of a conviction listed in schedule 8B to the 1997 Act and is a (i) spent conviction but (ii) not a protected conviction. The test to be applied by the Sheriff is provided for in s.116ZB(6) which provides as follows:-

- (6) In determining an application under subsection (2) the Sheriff must –*
- (a) if satisfied that the details are **not relevant to the purpose for which the certificate was required**, allow the application,*
  - (b) otherwise, refuse the application.*

[13] The purpose for which criminal record certificates and enhanced criminal record certificates can be requested under the 1997 Act is that the individual is applying for a specific role and because of the sensitive nature of that role the operation of the 1974 Act has been excluded by way of the Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Order 2013 (as amended) (“the 2013 Order”). As indicated, ordinarily, in terms of the 1974 Act employers or interested organisations are only entitled to ask for, and individuals are only required to provide, information about unspent convictions. Individuals are not required to disclose spent convictions if asked by a prospective employer or an interested organisation (such as a licensing body). What the 2013 Order does is provide that individuals applying for certain, specified occupations or

employment positions do require to disclose their spent convictions if asked. This higher level of background scrutiny of individuals is deemed to be necessary to protect the public as these types of occupations and positions covered by the 2013 Order include work with children or vulnerable persons as well as membership of certain occupations and professions. It seems clear that the purpose of the disclosure under the 1997 Act relates to the suitability of a person for specific role e.g. advocate or solicitor (Schedule 3, paragraph 3(1)(a) read with Schedule 4, Part 1, paragraph 2 of the 2013 Order) or to hold a firearms licence (Schedule 3, paragraph 3(1)(d) of the 2013 Order). In applying the test in section 116ZB(6) in the context of employment, the Sheriff must therefore test the relevancy of the conviction against the role the individual is applying for. I was informed that if the Sheriff were to order removal of the conviction from the disclosure certificate, then the conviction would be removed for the specific purpose for which the disclosure certificate had been requested and from any future disclosures for that same purpose. So that if an individual's conviction was removed from a disclosure certificate obtained in connection with consideration of their suitability to hold a firearms licence, it would not in future be included on a disclosure certificate relating to another firearms licence. But if at a subsequent date they applied for a disclosure certificate in connection with becoming a solicitor, then that conviction would still appear on the disclosure certificate. That appears to be the effect of sections 113A(3A) and 113B(3A) of the 1997 Act.

[14] The Remedial Order made similar changes to the operation of the 2007 Act. As indicated, the 2007 Act establishes a scheme whereby Scottish Ministers collate and disclose information about individuals who do or wish to do regulated work with children and/or protected adults – known as the PVG Scheme (section 44).

Section 45 of the 2007 Act provides as follows:-

**Participation in Scheme**

(1) *An individual may apply to Ministers to join the Scheme in relation to –*

- (a) regulated work with children,*
- (b) regulated work with adults, or*
- (c) both types of regulated work.*

(2) *Ministers must allow an individual to be a member of the Scheme (a “scheme member”) in relation to a type of regulated work if the individual is not barred from doing that work*

The pursuer in this case is not barred and is a scheme member in relation to regulated work with children.

[15] “Regulated work” is defined in section 91 of the 2007 Act as follows:-

**Regulated work**

- (1) Regulated work means regulated work with children or protected adults.*
- (2) Regulated work with children is work of the type described in schedule 2.*
- (3) Regulated work with adults is work of the type described in schedule 3.*
- (4) References in this Act to types of regulated work are to be construed accordingly.*

Schedule 2, provides *inter alia*:

**PART 1**

**PRELIMINARY**

**1 Regulated work with children**

*Regulated work with children is [work done in Scotland] in–*

- (a) a position whose normal duties include carrying out an activity mentioned in Part 2,*
- b) a position –*
  - (i) which is not a position mentioned in sub-paragraph (a),*
  - (ii) whose normal duties include work in an establishment mentioned in Part 3, and*
  - (iii) which gives the holder of the position, when doing anything permitted or required in connection with the position, the opportunity to have unsupervised contact with children,*
- (c) a position mentioned in Part 4, or*
- (d) a position whose normal duties include the day to day supervision or management of an individual doing regulated work with children by virtue of sub-paragraph (a) or*
  - (b).*

Part 2 “Activities” include caring for children, teaching, instructing, training or supervising children, being in sole charge of children; unsupervised contact with children. Part 3 “Establishments” include children’s detention institutions, children’s hospitals and educational establishments (i.e. schools, further education institutions and hostels) and Part 4 “Positions” include managers of educational establishments, members of children’s panels, etc.

[16] Scottish Ministers, in administering the Scheme, compile what is known as a Scheme Record (section 48). The scheme record is a document comprising the scheme member’s statement of scheme membership and any vetting information about the scheme member.

Vetting information is defined in section 49 as follows:-

- (1) Vetting information, in relation to a scheme member, is –*
- (a) the information referred to in section 113A(3)(a) of the 1997 Act (prescribed details of every **relevant matter** relating to the scheme member which is recorded in central records)...*

In this case, it is accepted that the conviction in question is vetting information and that it is a conviction under Schedule 8B of the 1997 Act but that it is not a protected conviction. It is accordingly a “relevant matter” for the purposes of this provision (see paragraph [11] above).

[17] In terms of section 52, disclosure of a PVG scheme record can be requested provided that disclosure conditions A to D in section 55 of the Act are met.

The disclosure conditions are

- Condition A - The scheme member requests Ministers to make the disclosure to a person, and in relation to a type of regulated work, specified in the request.*
- Condition B - The scheme member participates in the Scheme in relation to that type of regulated work.*

*Condition C - The person to whom the disclosure is to be made declares that the disclosure is requested for the purpose of enabling or assisting the person (or any other person for whom the Condition C person acts) to consider the scheme member's suitability to do, or to be offered or supplied for, that type of regulated work.*

*Condition D - The person to whom the disclosure is to be made is a registered person for the purposes of Part 5 of the 1997 Act.*

Following a request for disclosure of a scheme record, Scottish Ministers are required under section 52(5) of the 2007 Act to provide scheme members with a copy of their scheme record, who may then make an application under section 52A. That is what has happened in this case.

[18] Section 52A of the 2007 Act, which I mentioned at the outset, was inserted by the Remedial Order and provides individuals with the ability to apply to the Sheriff in a similar fashion to the application under section 116ZB of the 1997 Act. Section 52A of the 2007 Act provides as follows:-

*(2) The scheme member may apply to the sheriff for an order requiring Ministers to remove from the scheme record the vetting information referred to in section 52(4).*

The vetting information referred to in section 52(4) is information about a conviction for an offence listed in schedule 8B of the 1997 Act which is (a) a spent conviction but (b) not a protected conviction. As indicated, the pursuer falls into this category.

[19] The test to be applied by the Sheriff in relation to PVG applications is set out in section 52A(6):-

*(6) In determining an application under subsection (2) the sheriff must –*  
*(a) if satisfied that the vetting information is **not relevant in relation to a type of regulated work in relation to which the scheme member participates in the Scheme,** allow the application,*  
*(b) otherwise, refuse the application.*

[20] It is to be noted that the language of this provision differs from the equivalent provision of the 1997 Act (section 116ZB) which directs the Sheriff to allow an application for a new certificate "...if satisfied that the details [conviction] are **not relevant to the purpose for which the certificate was required...**" As noted above, "the purpose", in the context of employment, would appear to relate to a specific role. The question in this case is whether that approach differs from the approach I must take under section 52A(6) of the 2007 Act. The pursuer effectively contends that the approach is the same and is role specific, in this case teaching. The defenders contend that the relevancy of the conviction is to be tested in relation to the type of regulated work, which in this case is regulated work with children and is not role specific.

[21] In submitting that there was a distinction between the two approaches, Ms Pang referred me to an exchange in the Education and Culture Committee Report of 26 January 2016 (referred to above) between Ailsa Heine from the Scottish Government Legal Directorate and the Convener:-

*Ailsa Heine: Disclosure Scotland does not know the details of each individual job that people apply for. It looks to see whether jobs fall within the scope of regulated work, and the job of youth football coach would. On the appeal provisions, if somebody had appealed against the disclosure and the driving conviction was removed from it on appeal, the conviction would be removed from their PVG scheme record in relation to the type of regulated work that they had applied for. If it was regulated work with children, their scheme record in relation to regulated work with children would have that conviction removed.*

*The Convener: Irrespective of what job they subsequently applied for. The conviction would always be removed.*

*Ailsa Heine: It would always be removed because the disclosure relates to the type of regulated work. That is why the list of offences covers various types of offence, because it applied across the ambit of regulated work.*

*The Convener: If it is ruled that the conviction does not have to be disclosed, I am asking the questions – or rather, I asked the questions – would that permanently be the situation? The answer was yes, so I am asking you whether you think it is reasonable – if I am correct on my interpretation of the reply – that, given that in the first job no driving of vulnerable groups of children or anybody else was involved but in the second job driving was involved, the previous driving conviction would not be disclosed in either circumstance.*

*Ailsa Heine: That is right. It could not be disclosed because the sheriff has ordered that it be removed from the person's scheme record in relation to regulated work with children. **The sheriff, in making the decision to remove the driving conviction from the record, has to be satisfied that the driving conviction would not be relevant, not to the job that the person applied for at the time but to the type of regulated work in which they participate in the scheme. It is for the Sheriff to consider, when he or she is looking at removing something from someone's record, that although at the moment they are not doing a job that involves driving, at some point in the future they could be doing regulated work with children that involves driving.***

[22] It was submitted that the exchange demonstrated the correct approach. Where someone is a PVG scheme member (rather than simply applying for a disclosure in terms of the 1997 Act) and applies for the Sheriff to remove the vetting information from their scheme record, the test to be applied by the Sheriff relates to the type of regulated work for which they have applied for disclosure of their PVG scheme record, not simply the specific role the individual is currently doing or hoping to carry out in the future. The PVG Scheme is not, it was submitted, concerned with individual jobs but rather individuals becoming a member

of the scheme in respect of either regulated work with children, regulated work with protected adults or both.

[23] This situation, it was submitted, is different from disclosures under the 1997 Act since the purpose for which a disclosure of a scheme record can be requested under the 2007 Act is that an employer wants to consider suitability of an individual to do regulated work with children; regulated work with adults; or both regulated work with children and adults. Because of the sensitive nature of regulated work the application of the 1974 Act had been excluded by way of the 2013 Order. By virtue of article 4 and Schedule 3, paragraph 3(1)(b) read with Schedule 4, Part 2, paragraphs 11 and 25 of the 2013 Order, '*any regulated work with children*' and '*any regulated work with adults*' were excluded from the application of the 1974 Act. What the 2013 Order did was provide that individuals applying for regulated work require to disclose certain spent convictions if asked. This higher level of background scrutiny of individuals was necessary to protect the public as this is work with vulnerable groups as defined in the 2007 Act. By virtue of the provisions of the 2007 Act (and the 2013 Order), the purpose of a request for disclosure of a scheme record will be for the purposes of an employer considering a person's suitability to do regulated work with children or regulated work with adults or both, but not to do a specific job or role falling within regulated work. The Sheriff, therefore, must, it was submitted, test the relevancy of the offence against the type of regulated work in relation to which the individual has made the disclosure request. If the individual had requested disclosure of a scheme record in relation to regulated work with children and the sheriff were to order removal of the vetting information, it would be removed from the individual's scheme record in relation to regulated work with children. It could not in future be disclosed in any scheme record of that individual for regulated work with children as that vetting information would no

longer form part of their scheme record in that respect and this notwithstanding a change in role.

[24] It was quite rightly pointed out on behalf of the pursuer that the guidance accompanying the PVG Scheme record informing him of the options open, including the right to apply to the Sheriff, states in terms *“The sheriff can order removal of a spent conviction only if they (sic) think that it is not relevant to the purpose for which your disclosure was requested.”* This of course echoes the language under the 1997 Act which, it is accepted, tests the relevance of a conviction against a specific role. If the test of relevance is in relation to regulated work with children and or adults and is not role specific, then this is not a helpful way of putting it. The pursuer also founded on excerpts from a Statement of the Scottish Ministers summarising written observations on and modifications to the original 2015 Order and specifying proposed changes. This was the precursor to the Remedial Order. The statement was not produced. The passages founded upon are underlined below. I have included fuller passages to give context.

***Lists of offences in schedules 8A and 8B of the Police Act 1997 – General comments***

*Staff within Disclosure Scotland will not determine whether convictions on an individual application are relevant to the particular role they are applying for. The rules will apply automatically for all disclosures. Once the employer receives the disclosure, it is for the employer to risk assess the applicant’s suitability. The 2015 Order did not change this position.*

***Application to the sheriff for removal of conviction information – General Comments***

*From a practical point of view, it would be very difficult to allow an application to the sheriff for removal of conviction information from a disclosure prior to any recruitment process, as it would be almost impossible for a sheriff to make a decision on the relevance of a conviction without knowing anything about the type of job for which the individual would be wanting to request a disclosure.*

### ***Application to the Sheriff – General comments***

*The Scottish Government note Recruit with Conviction's suggestion of having some kind of review process prior to an application being made to a sheriff. This option was investigated thoroughly by the Scottish Government in developing the approach implemented by the 2015 Order, however, it was determined to be infeasible as it would have introduced an element of discretionary decision-making by Scottish Ministers that was considered not to be appropriate in the circumstances. It was considered, for example, that it could be difficult for an internal review mechanism to access sufficient information about convictions or about the intended employment role of an applicant in order to be able properly to take decisions about the relevancy of convictions, particularly given the high volume of applications received by Disclosure Scotland. It was considered that a sheriff would be best placed to take any decisions about whether convictions should be removed from a disclosure if they were no longer relevant to the purpose of the disclosure.*

The pursuer contended that the statement supported his position that the relevancy of the conviction should be tested against his role as a teacher. The averments in his application proceed on that basis.

### **Conclusions**

[25] The legal basis upon which the scheme of disclosure rests is, to say the least, labyrinthine and complex, comprising primary legislation, subordinate legislation and many amendments thereof, not all of which have been mentioned. This does not lend itself to an easy understanding of this area. While the issue in this case is essentially one of statutory interpretation and, in particular, the correct meaning of section 52A of the 2007 Act, and while that might, superficially, seem a relatively straight forward exercise, the way in which the various statutory provisions have been put together and some of the phraseology used, both in the statute and other materials, can lead to confusion.

[26] The question in this case is what is meant by the Sheriff being satisfied that the vetting information is *not relevant in relation to a type of regulated work in relation to which the scheme member participates in the Scheme*. In this case, the relevance of the conviction clearly

must be tested against the “type of regulated work” in relation to which the pursuer participates in the scheme. He is registered in relation to regulated work with children, one of the areas of regulated work mentioned in section 45 of the 2007 Act, but it is not immediately obvious from the statute that the “type of regulated work” referred to in section 52A equates to the general areas of regulated work referred to in section 45 rather than a particular type of work referred to in Schedules 2 and 3. The “type of regulated work” is not defined in that section but is elsewhere. The provisions of section 91 of the Act have already been noted. In terms of subsection (1) it is stated *inter alia* that “regulated work” means “regulated work with children or protected adults and in terms of subsection (2) that regulated work with children is work *of the type* described in schedule 2”. Further subsection (4) provides “References in this Act to types of regulated work are to be construed accordingly”. That, it seems to me, leaves it open to construe a “type of regulated work” as either the general type of work with children or protected adults, or a specific type mentioned in schedules 2 or 3, for example teaching. That begs the question of which of the “types of regulated work” is meant in section 52A of the 2007 Act. I think the difficulty is overcome by the reference in section 52A to the type of regulated work *in relation to which the scheme member participates in the Scheme*. Condition B of the disclosure conditions (section 55) employs the same terminology of *participating in the scheme in relation to that type of regulated work* (para. [17] above). In terms of section 45 a scheme member *participates* in the scheme in relation to either regulated work with children or protected adults or both – in other words the general areas of regulated work referred to in section 91. The member does not participate in the scheme in relation to a particular job description e.g. teaching. That appears to be the way in which Disclosure Scotland regard the scheme. The pursuer’s Statement of Scheme Membership included in the PVG Scheme Record issued to him refers

to his “membership status” as follows: ...*The applicant is a PVG Scheme member in respect of regulated work with children and, therefore, not barred from that type of regulated work.*”

[27] I accordingly conclude, as a matter of construction, that the relevancy of the conviction must be tested against the general area of regulated work with children, rather than against the particular role of the pursuer. However, in making that assessment, the Sheriff will need to have regard to the various types of regulated work in Schedule 2.

[28] If am wrong in construing the statute in that way from its terms and that therefore there is some ambiguity in or doubt as to the meaning of “type of regulated work” referred to in section 52A, then it would be relevant to consider extrinsic material as an aid to construction, the purposes of the legislation and also the consequences of the alternative interpretation.

[29] The Statement from Scottish Ministers in the run up to the Remedial Order is relevant. It refers to the need for a Sheriff to know something about the job for which an individual would be requesting disclosure (see para. [24]). That was in the context of ruling out the suggestion an application for removal of a conviction being made to the sheriff prior to any recruitment process. Clearly, I think it is relevant for the court to know the role to be undertaken by an individual, in order that it can be identified whether or not it is one of the types of regulated work mentioned in one of the Schedules, but that would be just one of the pieces of information to be considered and could not, it seems to me, be central to the decision-making process. The Statement also indicates that a sheriff would be best placed to decide whether convictions should be removed from a disclosure *if they were no longer relevant to the purpose of the disclosure*. I have already indicated that the use of that terminology is not helpful. It echoes the phraseology in applications under the 1997 Act, which, it is accepted, tests relevance against specific roles. It is used in the guidance enclosed

with the scheme record. It is liable to confuse. However, in the context of an application for removal from the PVG Scheme Record, the “purpose” of disclosure is to disclose vetting information included in the scheme record. The purpose is not related to a specific role, rather a variety of prescribed roles within the general type of work – in this case regulated work with children. As the Statement makes clear, Disclosure Scotland do not decide whether convictions in a particular case are relevant to a particular role.

[30] The approach I have adopted is consistent with the view expressed on behalf of the Scottish Government at the meeting of the Education and Culture Committee and the passage highlighted in bold (at para. [21] above) makes the point that in considering an application, the sheriff looks beyond the scope of an applicant’s existing or proposed role. Once vetting information is removed from the scheme record, it cannot be disclosed at any future time, even though the individual may change roles within the general area of regulated work. That seems to be the logical result of removal from the record. That is why it is necessary to consider the various roles set out in the schedules when testing relevance and not merely the role presently proposed. The consequences of the alternative argument are obvious and would not be consistent with the purposes of the scheme under the 2007 Act. The purpose is to ensure the suitability of individuals in relation to regulated work with children and adults because of the perceived sensitive nature of that work. That is why the operation of the 1974 Act is excluded by the 2013 Order. If an individual’s conviction was to be removed from the scheme record as not being relevant to a specific role, then it could not be disclosed subsequently even where there was a change of role in relation to which the conviction may be of relevance. That would be contrary to the statutory purpose.

[31] For these reasons I consider the point made on behalf of the defenders at debate is well made and that any adjudication of this application can only properly proceed by testing

the relevancy of the vetting information in relation to the area of regulated work with children, rather in relation to the pursuer's specific role as a teacher. Accordingly, the pursuer's averments in that regard, as they presently stand, are not relevant for enquiry. It was agreed that if I found in favour of the defenders, then the pursuer would be given the opportunity to consider his position and seek to amend the application, if so advised, and that I would appoint the matter to a hearing. I have issued an interlocutor with that in mind.

#### **Note**

Following a subsequent hearing on the merits of the application, the court decided on the evidence, having regard to the nature of the offence, the context in which it occurred and the length of time since the conviction, that the vetting information was not relevant in relation to regulated work with children. It was discovered that the reference to "*assault-domestic*" in the scheme record was an error, the conviction in fact being "*breach of the peace (domestic)*" following amendment of the summary complaint in the criminal proceedings, and the hearing proceeded on that footing.