Privy Council Appeal No 11 of 2009.

Her Majesty's Advocate *Appellant*

v.

John Murtagh *Respondent*

FROM

THE HIGH COURT OF JUSTICIARY
SCOTLAND

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JUDGMENT OF THE LORDS OF THE JUDICIAL
COMMITTEE OF THE PRIVY COUNCIL

Delivered the 3rd August 2009

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Present at the hearing:-

Lord Hope of Craighead
Lord Scott of Foscote
Lord Rodger of Earlsferry
Lord Brown of Eaton-under-Heywood
Lord Collins of Mapesbury

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Lord Hope of Craighead

1. This is a reference by the High Court of Justiciary under para 33 of Schedule 6 to the Scotland Act 1998 of a devolution issue which has arisen in proceedings in that court. It has been required by the Advocate General for Scotland for answers to be given to the following questions:

2.

(i) Whether the right to a fair trial which is guaranteed by article 6 of the European Convention on Human Rights requires the Crown to disclose to the accused all previous convictions and outstanding charges of Crown witnesses or whether it requires the disclosure of only such previous convictions and outstanding charges (if any) as materially

weaken the Crown's case or materially strengthen the case for the defence.

(ii) Whether it is consistent with an accused's right to a fair trial for the Crown itself to take the initial decision as to whether or not such previous convictions and outstanding charges materially weaken the Crown's case or materially strengthen the case for the defence.

(iii) Whether calling the indictment for trial in circumstances where the Crown has disclosed only such previous convictions and outstanding charges (if any) as fall to be disclosed in light of the Crown's decision mentioned at (ii) above would be an act of the Lord Advocate incompatible with the accused's Convention rights.

(iv) Whether article 6(1) requires disclosure of a warning by the prosecutor or a measure offered and accepted as an alternative to prosecution by the prosecutor, the police or a specialist reporting agency which reports to the procurator fiscal.

3. Questions 1 to 3 are concerned with the disclosure of previous convictions and outstanding charges of Crown witnesses. The principal issue which they raise is whether the Crown is obliged to disclose to an accused person all the previous convictions and outstanding charges of Crown witnesses as a class, or whether its obligation is to disclose only such information about them as materially weakens the Crown's case or materially strengthens the case for the defence. As Lord Rodger of Earlsferry points out in para 48, it is directed to the scope of the Crown's duty to disclose such information spontaneously, without having been ordered to do so by the Court. The answer to that issue will determine the extent of an incriminee's criminal history that must also be disclosed. The Advocate General has asked for these questions to be referred because of his concern that differences may be developing between the laws of Scotland on the one hand and England and Wales on the other as to the extent to which the accused's article 6(1) Convention rights require this information to be disclosed to the defence.

4. Question 4 is concerned with the disclosure of alternatives to prosecution. Various alternatives are available to the Crown and the police and, under certain statutes, to other public authorities. It is unnecessary to distinguish between them for present purposes. The Lord Advocate's current position is that such information is subject to the normal materiality test. But she suggests that, having regard to the nature of these measures and the use to which the information could be put, a proper application of the materiality test would not require any of this part of the witnesses' criminal history to be disclosed at all.

The procedural background

5. The reference originates from a prosecution that is being brought against the accused, John Murtagh, in the sheriff court at Glasgow. He was indicted for trial on 13 October 2008 on a charge of assaulting Marie Anne McGregor to her severe injury and permanent disfigurement and on several other minor charges. The Crown has intimated that it intends to adduce evidence from five civilian witnesses, including the complainer. The accused's solicitors asked the Crown to provide them with a schedule of previous convictions and outstanding charges of those witnesses and of an incriminee named Amanda Hogg. The schedules which the Crown produced in response to this request were heavily redacted either by ink or paper overlay. The entries which have not been redacted contain information about previous convictions and outstanding charges which are plainly relevant to any questions that the defence may wish to raise about the witnesses' character and credibility. But it is impossible to tell what the numerous redacted entries refer to.

6. The accused maintains that the information that has been provided in this form is incomplete. So prior to the first diet his solicitors lodged a petition for a commission and diligence for the recovery of documents. An order was sought for the production of any records in the hands of the Procurator Fiscal showing or tending to show the nature and extent of any previous convictions and/or pending charges in respect of the five Crown witnesses and the incriminee. The sheriff granted an order in the terms sought by the accused. It was not qualified by reference to the relevance or materiality of the convictions and charges. The Crown lodged an appeal against this decision and gave notice to the clerk of court, the accused's solicitors and the Advocate General of its intention to raise a devolution issue, as in his turn did the accused. The Advocate General intimated that he intended to intervene in the proceedings. A hearing then took place before the High Court of Justiciary on 18 and 19 November 2008 at which the devolution minutes were received and the Advocate General, as he has power to do under the statute, required the court to make this reference.

7. Prior to the hearing in the High Court of Justiciary the Crown wrote to the accused's solicitors advising them that the criminal history record of one of its witnesses contained a procurator fiscal fixed penalty which the witness had accepted. This was for an attempt to pervert the course of justice whilst the witness was on bail. They were also informed that none of the other redactions in the criminal history records that had been disclosed to them related to any fixed penalties issued by the Crown.

The main issue

8. We are concerned in this case with the extent of the duty of disclosure that is required of the Lord Advocate about a Crown witness's criminal history if she is to act compatibly with the accused's rights under article 6(1). The general duty of disclosure is not itself called into question. It is well settled,

and it has not been suggested that it is in need of reconsideration. The issue is whether a consequence of that duty is that the witness's entire criminal history must be disclosed or only such part or parts of it as are material. In essence the accused's argument is that the witness's criminal history constitutes information of a kind that does not permit that kind of selection. It is already the case that the police statements of all the Crown's civilian witnesses must be disclosed without redaction. As a class, that information is always disclosable. So too, it is submitted, is the whole of the Crown witnesses' criminal history.

9. In order to address this issue it may be helpful if I were to say something about how the law on disclosure has developed, the principles on which it is based and where matters stand at present as to the disclosure of a witness's criminal history.

10. The jurisprudence of the European court on the issue is very well known, and I need do no more than sketch in the main points. In *Edwards v United Kingdom* (1992) 15 EHRR 417, para 36 the European Court said that article 6(1) requires that the prosecution authorities should disclose to the defence all material evidence in their possession for or against the accused, and that failure to do so in that case gave rise to a defect in the trial proceedings. Elaborating on this proposition in *Rowe and Davis v United Kingdom* (2000) 30 EHRR 1, para 60, the court said that it is a fundamental aspect of the right to a fair trial that criminal proceedings should be adversarial and that there should be equality of arms between the prosecution and the defence and that article 6(1) requires that the prosecution authorities should disclose all material evidence in their possession for or against the accused: see also *Jasper v United Kingdom* (2000) 30 EHRR 441, para 51. I am grateful to Lord Collins of Mapesbury for pointing out that the position is similar in Australia, New Zealand, Canada and the United States. The rule established in *Brady v Maryland*, 373 US 83 (1963), deriving from the due process clause of the Fifth Amendment, is that the right to a fair trial requires that the prosecution must disclose all information which is material in the sense that there is a reasonable probability that, had it been disclosed to the defence, the result would have been different. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome of the trial: *United States v Bagley*, 473 US 667, 682 (1985). The rule extends to the criminal history records of prosecution witnesses: eg *Crivens v Roth*, 172 F 3d 991, 996-997 (7th Cir 1999); *United States v Price*, 566 F 3d 900, 903 (9th Cir 2009).

11. It is now well settled in Scots law that, in order to meet these requirements, the Crown must disclose any statements or other material of which it is aware which either materially weakens the Crown case or materially strengthens the case for the defence: *McLeod v HM Advocate (No 2)*1998 JC 67, 79F-G, 80E-F; *Holland v HM Advocate* [2005] UKPC D1, 2005 SC (PC) 3, para 64; *Sinclair v HM Advocate* [2005] UKPC D2, SC (PC) 28, para 33; *McDonald v HM Advocate* [2008] UKPC 46, 2008 SLT 993, para 50. As Lord Rodger of Earlsferry said in *McDonald*, para 50, the rule which is expressed in these terms looks both to the possible negative effect of material on the

Crown's case and its possible positive effect on the defence case. In his *Review of the Law and Practice of Disclosure in Criminal Proceedings in Scotland* (August 2007), para 5.46, Lord Coulsfield accepted the materiality test as the one that should be applied to determine the material that should be disclosed. He recommended that, to minimise the risk of failure to disclose it, there should be a statutory definition of the duty of disclosure. He said that it should provide that, with a view to implementing the requirement of fair trials in criminal matters, the duty of the prosecutor in both solemn and summary cases is to disclose to the defence all material evidence or information which would tend to exculpate the accused whether by weakening the Crown case or providing a defence to it.

12. Provisions which are designed to give effect to Lord Coulsfield's recommendation have been included in Part 6 of the Criminal Justice and Licensing (Scotland) Bill which is currently under consideration by the Scottish Parliament. Clause 89 requires the prosecutor, as soon as practicable after the accused's appearance on petition or indictment or the recording of plea of not guilty if he is charged on summary complaint, to review all information that may be relevant to the case for or against the accused of which the prosecutor is aware and to determine whether it would materially weaken or undermine the prosecution case, would materially strengthen the accused's case, or is likely to form part of the prosecution case. If it does, he must disclose that information to the accused. The following examples are given in clause 89(4) of information to which that duty applies:

> "(a) information that tends to exculpate the accused,
> (b) information that would be likely to be of material assistance to the proper preparation or presentation of the accused's defence,
> (c) information that relates to a material line of the accused's defence and which is likely to form part of the prosecution case."

Clause 90 requires the prosecutor to keep his duty of disclosure under review until the proceedings against the accused have been concluded.

13. As for the position in England and Wales and Northern Ireland, in *R v Brown (Winston)* [1998] AC 367 it was held that the Crown was not under a legal duty to disclose to the defence material which was relevant only to the credibility of defence witnesses. But fairness required that material in its possession which might cast doubt on the credibility or reliability of those witnesses whom the Crown wished to lead, such as previous convictions for crimes which imply dishonesty or disrespect for the law, must be disclosed: pp 377-378. In *R v H* [2004] UKHL 3, [2004] 2 AC 134, para 14 Lord Bingham of Cornhill said that fairness ordinarily requires that any material held by the prosecution which weakens its case or strengthens that of the defendant should be disclosed to the defence. The golden rule, he said, is that there should be full disclosure. But in para 35 he said that if material does not weaken the

prosecution case or strengthen that for the defendant, there is no requirement to disclose it. The prosecutor's duty of disclosure is set out in section 3(1)(a) of the Criminal Procedure and Investigations Act 1996 as amended by the Criminal Justice Act 2003. It provides:

> "The prosecutor must –
>
> (a) disclose to the accused any prosecution material which has not previously been disclosed to the accused and which might reasonably be considered capable of undermining the case for the prosecution or of assisting the case for the accused."

Section 7A provides that the duty of disclosure is to be a continuing duty.

14. Two features of the materiality test need to be emphasised in the present context. The first is the obvious point that the test is designed to meet the requirements of the accused's article 6(1) Convention right. This means that the Crown will be acting compatibly with article 6(1) so long as it satisfies its requirements. It must do that much, but it need not do more. The second is that it is for the prosecutor in the first instance to decide what information must be disclosed to satisfy the materiality test and what need not be. It may be necessary for the Crown to apply to the court for an order restricting the disclosure if the prosecutor considers that disclosure of an item of information which he would otherwise have to disclose would be likely to cause serious prejudice to the public interest. But the system that is in place throughout the United Kingdom assumes that is for the Crown to conduct a review of all the information that is available to it and to determine what is and what is not disclosable.

15. The Crown's practice was reviewed in *McDonald v HM Advocate* in view of concerns that had been expressed that the obligation was not being performed by those who were responsible for its performance: see para 19. It is inevitable in any system that depends on human effort, however well directed, that mistakes will occur from time to time. The best that can be done is to minimise the risk of mistakes as far as possible. For the reasons that I gave in that case I accepted the assurance that was offered by the Solicitor General that everything that could be done by way of instruction, organisation and training to eliminate the possibility of error is being done: para 33. It has not been suggested in this case that the general rule is in need of review or that, where the materiality test applies, its application to material that is in the hands of the Crown should be transferred from the Crown to some other party.

16. Mr Kerrigan QC for the accused said however that an exception should be made in the case of previous convictions and outstanding charges and that the sheriff was right to order full disclosure of all such items relating to Crown witnesses and of all information as to their receipt of alternatives to prosecution. He submitted that if this was not done the principle of equality of arms would be breached. Full disclosure ought to be made of all such information to enable the accused to decide for himself what parts of it he should use at the trial. This, he said, was the accused's right under article 6(1)

of the Convention. He referred also to article 6(3)(d), which provides that everyone charged with a criminal offence has the right to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.

Police Statements

17. It is true that the rule now is that all police statements, as a class, must be disclosed to the accused: *Sinclair v HM Advocate* 2005 SC (PC) 28, paras 48-49. But this is not an exception to the materiality rule. On the contrary, it is an application of the principle. The obligation is to disclose all material evidence for and against the Crown: *Edwards v United Kingdom* (1992) 15 EHRR 417, para 36. It can be assumed that all of these statements will contain material evidence for the Crown, otherwise those who provided them would not be on the list of its witnesses. Their disclosure will help to ensure that there is equality of arms. But, more importantly, they may contain information which materially weakens the Crown case or materially strengthens the case for the defence, as the case of *Sinclair* demonstrates. It is principally because they must always be regarded as containing material evidence for or against the Crown that the Crown's obligation of disclosure will always apply to them.

Criminal History

18. The same reasoning does not apply to previous convictions or outstanding charges or to fixed penalties or other alternatives to prosecution. The European Court recognised in *Jasper v United Kingdom* (2000) 30 EHRR 441, para 52, that the right of disclosure is not an absolute right and that in some cases it may be necessary to withhold certain evidence from the defence so as to preserve the fundamental right of another individual or to safeguard an important public interest: see also *Brown v Stott* 2001 SC(PC) 43, 74. Lord Coulsfield noted in his *Review of the Law and Practice of Disclosure*, para 6.2, that the Crown is under an obligation to comply with articles 2 and 8 of the European Convention. Article 2 states that everyone's right to life shall be protected by law, and article 8(1) states that everyone has the right to respect for his private life. In consequence, he said, the Crown must have regard to the interests of victims, witnesses and any other parties involved in the investigation and prosecution of crime. It has an obligation to protect their safety and their right to respect for their private lives. In para 6.3 he observed that disclosure of a previous conviction of a victim or a witness may do harm to the reputation or standing of a witness which is out of proportion to any significance which the conviction may have for the relevant proceedings, and that a disclosure system which regularly and repeatedly failed to protect the rights of witnesses could have severe adverse consequences for the system of justice as a whole if it deterred witnesses from coming forward. In para 6.4 he accepted that the accused's right to a fair trial must take precedence over any other person's right to privacy and that material whose disclosure is necessary for a fair trial must always be disclosed. Equally, it is imperative that sensitive

information whose disclosure is not required for a fair trial should be kept confidential. I agree with this analysis.

19. A detailed examination of the application of the materiality rule to previous convictions and outstanding charges must begin with *Maan, Petitioner* 2001 SLT 408. In that case Lord Macfayden departed from the previous rule that criminal history was not disclosable on the basis that such disclosure might deter Crown witnesses: *HM Advocate v Ashrif* 1988 SLT 567. In *Maan* the accused, who was charged with assault, sought to recover the previous convictions of the complainer, two Crown witnesses and a third witness who had been cited by the defence. His request was opposed by the Crown but Lord Macfadyen ordered their production. In para 27 he said:

> "In my opinion, provided the witnesses' previous convictions are relevant to a legitimate attack on character or to their credibility, the material sought would plainly be relevant to his defence. It is therefore material which the petitioner is prima facie entitled to have disclosed to him."

He added that matters of credibility and character depend very much on the impressions made on the jury, and that cross-examination might well be less effective if embarked on without knowledge of the detail of the witnesses' records. Endorsing this line of reasoning in *Holland v HM Advocate* 2005 SC (PC) 3, para 72 Lord Rodger of Earlsferry said:

> "What use, if any, the agent or counsel chooses to make of the information is a matter for him and he may well not be able to decide until he has it. But, at the very least, the information will help in assessing the strengths and weaknesses of the witness. Therefore, information about the previous convictions of any witness to be led at the trial 'would be likely to be of material assistance to the proper preparation or presentation of the accused's defence.' "

He did not in that passage suggest that any exceptions could be made in the case of this class of disclosable material. But the question whether there could be an exception was not in issue in that case.

20. In *McDonald v HM Advocate* 2008 SLT 993, as I noted in para 35, there was some discussion about the extent of the Crown's obligation of disclosure in regard to previous convictions and outstanding charges. I went on to say this:

> "The Solicitor General said that Lord Macfadyen's opinion in *Maan v HM Advocate* suggested that only those convictions and outstanding charges that were material should be disclosed. He was not willing to commit himself to an obligation to disclose them all, whether or not they were material, as he had not had an opportunity to examine the article 8 implications for the person concerned if embarrassing or damaging information was revealed which had no bearing on his credibility or reliability. I too would

> prefer to leave this issue over until it requires to be decided in another case."

In the same case, in para 51, Lord Rodger said:

> "While the general description of the duty is now settled, questions can still arise about what that duty involves and how it applies in various circumstances. The decisions of the Board in *Holland v HM Advocate* and *Sinclair v HM Advocate* answered two such questions. Included within the general description of disclosable material are two classes of material: the police statements (as opposed to precognitions) of any witness on the Crown list and – subject to the Crown's argument on article 8 which it is unnecessary to determine in these proceedings – the previous convictions and outstanding charges relating to those witnesses."

The questions that are before the Board in this reference seek an answer to the question that these passages in *McDonald* left open for consideration in another case.

The article 8 issue

21. The first question is whether the general description of disclosable material gives rise to an article 8 issue at all. An unfortunate, but probably unavoidable, aspect of the way this question is presented to the Board in this case is that the content of the redacted material is unknown. It is possible to imagine cases where the release to the defence of information about a witness's previous convictions or outstanding charges could be very damaging to his or her private life. A long-standing previous conviction for a homosexual act performed with consent between two adults in private, which the law no longer regards as criminal, of which a current partner was unaware, could lead to the break-up of a relationship. Other examples could be imagined where the information, if it leaked out, could damage the witness's relations with his neighbours or expose him to ridicule. There is no suggestion that anything of that kind is present in this case. It seems much more likely that the explanation for so much redaction lies in a desire to confine the disclosure to what was thought to be necessary rather than to exclude only material that could be damaging to the witness's private life. In this situation the issue as to how the general rule applies to this class of material must be examined as one of principle.

22. Mr Kerrigan submitted that article 8 was not engaged by the disclosure of a witness's criminal history. As I have already indicated, however, the European court has recognised that ~~that~~ in some cases it may be necessary to withhold certain evidence from the defence so as to preserve the fundamental right of another individual: *Jasper v United Kingdom* (2000) 30 EHRR 441, para 52. Among those rights is the right to respect for private life which is guaranteed by article 8(1). In *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 AC 457, para 50, Lord Hoffmann said that human rights law has identified

private information as something worth protecting as an aspect of human autonomy and dignity. The fact that someone has been convicted of a crime is not of itself private information the publication of which would be incompatible with his right to privacy. What takes place in public in the courtroom has nothing to do with his private life: *In re British Broadcasting Corporation* [2009] UKHL 34, [2009] 3 WLR 142, para 20. Criminal trials are held in public, and the general rule is that the media are at liberty to publish details of what goes on there. But information that is held in the Criminal History System about a person's previous convictions and outstanding charges by the Scottish Police Services Authority, which provides police support services under section 3 of the Police, Public Order and Criminal Justice (Scotland) Act 2006, is not open to the public in that way.

23. The system for the collection and dissemination of criminal history recorded in central records was placed on a statutory basis by Part V of the Police Act 1997. A legislative framework was thought to be desirable to balance two conflicting concerns: the need for reliable information about the criminal records of a growing number of people in employment requiring some form of protection of society from abuse of trust, and to allow reformed criminals to be able to put their past behind them through principles of confidentiality except in the clearest case where the public interest requires disclosure. Information held in the criminal history database of the Scottish Criminal Record Office, now part of the Scottish Police Services Authority, for the use of police forces generally is prescribed as central records for the purposes of section 112(3) of the Act: The Police Act 1997 (Criminal Records) (Scotland) Regulations 2006 (SI 2006/96), regulation 7(1). Since 2002 the disclosure service in Scotland has been operated by Disclosure Scotland, a service provided by the Scottish Ministers for the purposes of Part V of the 1997 Act. It is a data controller for the purposes of the Data Protection Act 1998, and as such it is obliged to comply with the data protection principles set out in Part I of Schedule 1 to the Act. Personal data are exempt from the non-disclosure provisions of the Act where the application of those provisions would be likely to prejudice the prosecution of offenders: sections 27(1) and 29(3). Disclosure for that purpose must nevertheless satisfy the first data protection principle in Part I of Schedule 1 to the extent to which it requires compliance with the conditions in Schedules 2 and 3: section 27(4)(a). Among the conditions that may be relevant are those that provide that the first data protection principle is met if the processing is necessary for the administration of justice: Schedule 2, para 5(a); Schedule 3, para 7(1)(a). The Lord Advocate submits that disclosure of information which did not satisfy the materiality test would not be necessary to secure a fair trial, and accordingly that it would not be necessary for the administration of justice within the meaning of those provisions.

24. In my opinion all that needs to be said about the provisions of the Police Act 1997 and the Data Protection Act 1998 Act for present purposes is that they serve to underline the point that the records held centrally are not generally available for public scrutiny. The question as to the extent to which

they are disclosable in order to satisfy the accused's rights under article 6 must depend on an analysis of the effect of article 8.

Article 8(1)

25. In *R v Chief Constable of the North Wales Police, Ex p Thorpe* [1999] QB 396 it was held that, although the convictions of the applicants for serious offences against children had been in the public domain, the police as a public authority could only publish that information if it was in the public interest to do so. It was recognised that to disclose the identity of paedophiles to members of the public was a highly sensitive decision and that disclosure should only be made where there was a pressing need for disclosure. The case is of interest as Lord Bingham of Cornhill CJ said in the Divisional Court that he was prepared to accept (without deciding) that disclosure of personal information that the applicants wished to keep to themselves could in principle amount to an interference with the right protected by article 8: [1999] QB 396, 414. At p 416 Buxton J put the point more strongly when he said:

> "I do however consider that a wish that certain facts in one's past, however, notorious at the time, should remain in that past is an aspect of the subject's private life sufficient at least to raise questions under article 8 of the Convention."

Buxton J's observations were endorsed by Lord Woolf MR, delivering the judgment of the Court of Appeal: [1999] QB 396, 429.

26. The Convention was not, of course, then part of domestic law and Buxton J's observations in *Ex p Thorpe* were not supported by reference to any decisions in Strasbourg. But subsequent decisions by the European Court do, I think, provide support for them. In *Rotaru v Romania*, Application No 28341/95, 4 May 2000, the applicant who was a lawyer by profession complained of a violation of his right to respect for his private life on account of the use against him by the Romanian Intelligence Service of a file which contained information about his conviction when he was a student of insulting behaviour because he had written ~~to~~ two letters of protest against the abolition of freedom of expression when the communist regime was established in 1946. In para 43 the court said, referring to its judgment in *Leander v Sweden* (1987) 9 EHRR 433, para 48, that the storing of information relating to an individual's private life in a secret register and the release of such information come within the scope of article 8(1). Referring also to *Amann v Switzerland* (2000) 30 EHRR 843, it said that this broad interpretation corresponded with that of the Council of Europe's Convention of 28 January 1981 for the Protection of Individuals with regard to Automatic Processing of Personal Data which came into force on 1 October 1985:

> "Moreover, public information can fall within the scope of private life where it is systematically collected and stored in files held by the authorities. That is all the truer where such information concerns a person's distant past."

Article 8 therefore applied, and it was held after considering article 8(2) that there had been a violation of it.

27. In *Segerstedt-Wiberg and others v Sweden,* Application no 62332/00, 6 June 2006, para 72, the court said, having regard to its case law in *Amann* and *Rotaru*, that information about the applicants that was stored on the Secret Police register and was released to them clearly constituted data pertaining to their private life:

> "Indeed, this embraces even those parts of the information that were public since the information had been systematically collected and stored in files held by the authorities."

In *Cemalettin Canli v Turkey*, Application no 22427/04, 18 November 2008, the applicant alleged that records kept and disseminated by the police about two sets of criminal proceedings which had been brought against him in the past had violated his right to respect for his private life. Referring as before to its previous decisions in *Amann* and *Rotaru*, the court again said that public information can fall within the scope of private life when it is systematically collected and stored in files held by the authorities: para 33. In *S v United Kingdom* (2008) 48 EHRR 1169, considering the application of its principles to the storage of DNA profiles, the Grand Chamber said that the concept of private life covers the physical and psychological integrity of a person and can embrace multiple aspects of the person's physical and social identity. In para 67 it said that the mere storage of data relating to the private life of an individual amounts to an interference within the meaning of article 8, but that in determining whether the personal information retained by the authorities involves aspects of private life it will have due regard, among other things, to the specific context in which the information at issue has been retained, the nature of the records and the way in which these records are used and processed.

28. The conclusion that I would draw from these cases is that information about a witness's previous convictions and outstanding charges which is systemically collected and stored in the Criminal History System by the Scottish Police Services Authority falls within the scope of the witness's private life even though it relates to proceedings that, at least in the case of previous convictions, took place in public. Release of that information to the accused or his solicitor by the Lord Advocate will therefore engage the witness's article 8(1) right. Its release will be incompatible with that right unless the interference can be justified under article 8(2).

Article 8(2)

29. Article 8(2) states that there shall be no interference with the rights guaranteed by article 8(1) except such as is in accordance with the law and is necessary in a democratic society for, among other things, the protection of the rights and freedoms of others. It is here that the balance between an accused's article 6(1) right to disclosure and the witness's right to respect for private life

is to be found. While the accused has an absolute right to a fair trial, the right to disclosure is not one that article 6 provides for expressly. As it is an implied right, it is a qualified right: *Brown v Stott* 2001 SC(PC) 43, 74. So there is a balance that must be struck. It is clear that where the materiality test applies there must be disclosure otherwise the accused will not have a fair trial. To that extent the balance lies firmly in favour of disclosing the information to the accused. The question is whether an absolute rule that all previous convictions and outstanding charges must be disclosed, irrespective of whether or not they are material, can be justified under article 8(2). If it cannot, the disclosure of sensitive or potentially damaging information about a witness's criminal history which is not material will be incompatible with his rights under that article.

30. Materiality in this context must depend on whether the information could have any possible bearing on the witnesses's credibility or character. As Lord Macfadyen said in *Maan v HM Advocate* 2001 SLT 408, 416D-E, previous convictions which would be relevant to a legitimate attack on their character or to their credibility would plainly be relevant to the accused's defence. The nature of the crime with which he is charged and the witnesses's involvement in it, if any, will need to be taken into account. In cases of assault, for example, the question whether the complainer is of a violent or quarrelsome disposition is likely to be relevant and any aspects of his criminal history that may have a bearing on that issue will be disclosable. Records of convictions or outstanding charges for crimes of violence will fall into this category: *Maan*, p 417C-D. Records of convictions for crimes of dishonesty or of attempts to pervert the course of justice will plainly be relevant to an attack on credibility. But it has long been accepted that not all crimes and convictions are properly to be regarded as reflecting on credibility. The relevance of convictions or outstanding charges for crimes other than crimes of dishonesty is, as Lord Macfadyen said in that case at p 417D-E, less obvious:

> "Nevertheless, the authorities, although expressed in what may be thought to be somewhat old fashioned terms, support the proposition that a history of violence may affect the witness's credibility on the basis of general depravity. That must be a matter of degree."

31. It would be wrong for the Crown, when deciding what aspects of a witness's criminal history should be disclosed, to subject the information to a test which excluded everything to which objection might possibly be taken on the ground that it was not relevant. The decision as to what may be used to support an attack on credibility or character is a matter for the sheriff or the judge at the trial. A generous approach should therefore be taken to what might be relevant. But there are some limits to this approach that need to be recognised, bearing in mind the witness's right to respect for his or her private life. There is, as the Solicitor General submitted, a threshold that must be crossed.

32. For example, a conviction for an offence many years ago which was, on any view, of a trivial nature only and was not repeated would fall well outside the threshold of what was relevant. Other cases where care will need to be taken are where the conviction that might not be material was for an offence of a sensitive nature, disclosure of which could seriously affect the witness's relationship with others such as his neighbours, employer or members of his family. Convictions of a prostitute under section 46 of the Civic Government (Scotland) Act 1982 for loitering or soliciting in a public place, for consensual sexual acts committed by men in private before such acts were decriminalised and for shamelessly indecent conduct which falls outside the limits of public indecency as described in *Webster v Dominick* 2005 JC 65 and does not otherwise remain criminal provide examples of cases of that kind. A rule that all criminal history must be disclosed would make even information that was of that kind disclosable. It would be hard to justify such a rule under article 8(2). A rule which required only such parts of the history to be disclosed as was material, albeit generously interpreted, would not be.

33. The Solicitor General very frankly acknowledged that a rule that required all previous convictions and outstanding charges as a class to be disclosed would be simple and easy to administer. It would be easy to explain to witnesses and would save the Crown a lot of work. Attractive as this approach might seem, however, it would be likely to lead to problems in practice. He gave the example of a case where a shopkeeper from an ethnic minority background was assaulted by a group of local youths. He would, of course, be a key witness for the Crown. But the disclosure of an offence of indecency committed when he was a young man many years ago which was no longer criminal, or of a single but relatively minor sexual offence relating to children, could be both embarrassing and damaging. It could provide his attackers with another ground for harassing him. Also, a victim of domestic violence could be damaged by the release of information about sexual conduct such as prostitution ~~in~~ long before she began her current relationship. He pointed out that an accused who is not represented is entitled to the same information as an accused who is represented, and that a represented accused would be entitled to see the information which is disclosed to his solicitor.

34. In my opinion a rule that the entire criminal history of a witness must be disclosed goes too far. It is open to the criticism that the release of such information without regard to its materiality to the case in hand would be arbitrary, as no legitimate purpose would be served by the release of information that was not material. It would go beyond what was necessary for the protection of the accused's right to a fair trial, so it would not be justifiable under article 8(2). It can, of course, be said that in most cases it will not matter one way or the other if more information is released than the application of the materiality test indicates is disclosable. That may very well be the position in this case. But there could be cases where it would matter a great deal to the witness. It is in such cases that the right to respect for private life comes into focus. The right to a fair trial does not require information to be disclosed

unless it is material. Where it is not, the balance lies in favour of withholding the information from the accused.

The initial decision

35. The question who is to take the initial decision is capable of only one answer. The records that are collected and stored by the Criminal History System are not open to public scrutiny. If the witness's article 8 right is to be protected there has to be a system for sorting out those parts of his criminal history which are material and those which are not. Mr Kerrigan's solution was that the entire criminal history should be disclosed to the accused's solicitor so that he could make his own selection. This was because he was best placed to decide what parts of it he should put to the witness when challenging his character or credibility. But the potential for embarrassing or damaging information to leak out if this solution were to be adopted is obvious. As I have already said, an accused who is not represented is entitled to the same information as an accused who is represented, and a represented accused is entitled to see the information which is disclosed to his solicitor. The only way of protecting the article 8 right is for the selection to be made before the information is released to either of them. It must be for the Crown to make the selection, having obtained the information from the Scottish Police Services Authority. That will ensure that such parts, if any, of the history that are not disclosable are not disclosed.

36. There must, of course, be a system for making the selection and it must be reliable. The Solicitor General drew the Board's attention to the Crown's principles of disclosure in the June 2009 edition of the Crown Office *Disclosure Manual*. Para 1 states that the Crown is obliged to disclose all material information for or against the accused, and para 2 states that "material" means information which is likely to be of real importance to any undermining of the Crown case, or to any casting reasonable doubt on it, and of positive assistance to the accused. Para 5 is in these terms:

> "Compliance with the duty requires the Crown, without having to be requested to do so, to disclose all material previous convictions and outstanding charges for all witnesses on the Crown lists, including section 67 notices."

In para 21 of the summary of the Crown's approach which follows it is stated that criminal history information must be disclosed where it meets the materiality test in *McLeod* and *McDonald.* Advice is given as to the approach that should be taken in summary and sheriff and jury cases on the one hand and High Court cases on the other, and what should be done where there is material which is disclosable but it is considered ought not to be disclosed to the public because of its sensitive nature.

37. That advice should be reviewed in the light of the opinions that have been delivered in this case. Greater emphasis needs to be placed on the need for a generous approach to be taken. Para 5 of the Crown's principles of

disclosure as to what the materiality test means should, to avoid any possible confusion, follow more closely the wording used by Lord Rodger of Earlsferry in *McDonald v HM Advocate* 2008 SLT 993, para 50 where he said:

> "Put shortly, the Crown must disclose any statement or other material of which they are aware and which either materially weakens the Crown case or materially strengthens the defence case ('disclosable material')."

If a statutory definition is provided, as Lord Coulsfield recommended at para 5.46, it should of course repeat the words of the statute. Careful training and monitoring are obvious safeguards against the making of mistakes. The quantity of the material has been reacted from the schedules produced in this case tends to excite suspicion which may, if one were permitted to see the redacted material, prove to have been unjustified. But it excites suspicion nevertheless. It suggests that the balance is in need of adjustment towards a general working rule that only those parts of the criminal history should be withheld that are likely to be embarrassing or damaging to the witness if disclosed to the defence and do not satisfy the test of materiality. Should a dispute arise which the parties cannot resolve for themselves, the procedure which Lord Rodger recommends in para 69 should be adopted so that the decision can be made by the Court.

Alternatives to Prosecution

38. As has already been mentioned (see para 6), one example of this aspect of a witness's criminal history has been disclosed in this case. This was for a fixed penalty for an attempt to pervert the course of justice. It is no doubt true that in almost every case in which an alternative to prosecution has been resorted to the offences will be trivial and of no materiality because they will have no real bearing on the witness's character or credibility. But, as this one example illustrates, there can be no fixed rule on this point. I would hold that the materiality principle applies to this aspect of a witness's criminal history in the same way as it does to the rest.

Defence witnesses

39. As Lord Rodger says (see para 70 the approach that ought to be taken to the criminal history of defence witnesses, other than those whom the accused wishes to incriminate, was not raised in the course of the hearing before the Board. The current position in England is that the Crown are under no legal duty to disclose information that goes only to the credibility of defence witnesses: *R v Brown (Winston)* [1998] AC 367. But I agree with Lord Rodger, for the reasons he gives, that the practice of Crown in Scotland which is to disclose this information where possible before trial is fully justified and that it should be maintained.

Conclusion

40. For the reasons I have given I would answer the questions in the reference as follows:

> (i) The accused's right to a fair trial requires the disclosure only of such previous convictions and outstanding charges, if any, as materially weaken the Crown's case or materially strengthen the case for the defence.
>
> (ii) It is consistent with the accused's right to a fair trial for the Crown itself to take the initial decision as to whether or not such previous convictions and outstanding charges satisfy the test of materiality.
>
> (iii) Calling the indictment for trial in circumstances where the Crown has disclosed only such previous convictions and outstanding charges (if any) as fall to be disclosed in the light of its initial decision would not be an act of the Lord Advocate incompatible with the accused's Convention rights.
>
> (iv) Article 6(1) requires the disclosure of a warning by the procurator fiscal or a measure offered by and accepted as an alternative to prosecution by the prosecutor, the police or a specialist reporting agency which reports to the procurator fiscal, but only if they materially weaken the case for the Crown or materially strengthen the case for the defence.

Lord Scott of Foscote

41. I have had the advantage of reading in draft the opinion of my noble and learned friend Lord Hope of Craighead and am in full agreement with the answers he would give to the questions in the reference. I want, however, to add just a few words of my own.

42. My noble and learned friend, in paragraph 12 of his opinion, has cited section 3(1)(a) of the Criminal Procedure and Investigations Act 1996, as amended by the Criminal Justice Act 2003, and, in paragraph 13, has commented that the materiality test expressed in section 3(1)(a) is designed to meet the requirements of article 6(1) of the Convention. My Lords there should be no doubt at all that that statutory test does meet the requirements of article 6(1) of the Convention but its provenance is, in my opinion, firmly in the common law. In *R v Brown (Winston)* [1994] 1WLR 1599 Steyn LJ (as he then was) referred to "The right of every accused to a fair trial" and observed that "in our adversarial system, in which the police and prosecution control the investigatory process, an accused's right to fair disclosure is an inseparable part of his right to a fair trial" (p.1606). When the case reached the House of Lords the appeal was dismissed [1998] AC 367 and Lord Hope, at 379, referred to "the principle of fairness [that] lies at the heart of all the rules of the common

law about the disclosure of material by the prosecutor" and to the "common law rules which … are designed to ensure the disclosure of material in the hands of the prosecutor which may assist the defence."

43. It is, of course, the case that the question whether particular documents or information held by the prosecutor would be "capable of undermining the case for the prosecution or of assisting the case for the accused" requires the exercise of an element of judgment. I suspect that in relation to most items the presence or absence of the requisite capability will seem obvious. But it is inevitable that in some cases the answer to the question will not seem obvious and in these cases the prosecuting authority ought, in my opinion, to incline in favour of disclosure. In the event that the item in question is of only marginal materiality at best and its disclosure would be likely to be embarrassing to some third party, the procedure suggested by my noble and learned friend Lord Brown of Eaton-under-Heywood in his opinion (which, too, I have had the advantage of reading in draft) seems to me, if I may respectfully say so, thoroughly sensible. But I would emphasise that, in my opinion, the choice between embarrassment to a third party and the need to ensure a fair trial for the accused is not a matter of balance. If it were, the balance would always come down in favour of a fair trial.

Lord Rodger of Earlsferry

44. This is the latest episode in the long-running saga of disclosure in solemn criminal cases in Scotland. Once a topic with little case law, in the last few years disclosure has become one of the most litigated. The pace of change is reflected in the appearance of two new editions of the Crown Office *Disclosure Manual* already this year. A third will surely follow before too long. On this occasion the matter has been brought before the Board on a reference by the Advocate General, the details of which have been explained by Lord Hope of Craighead.

45. Part of the motivation behind the reference was the Advocate General's concern that, as a result of the decisions of the Board in *Holland v HM Advocate* [2005] UKPC DRA 1; 2005 SC (PC) 3 and *McDonald v HM Advocate* [2008] UKPC 46; 2008 SCCR 954,the disclosure regime in Scotland might appear to have got out of alignment with the position under statute in England and Wales.

46. It is, however, no part of the Board's functions to keep English and Scottish criminal procedures in alignment. There have long been substantial differences between them – the most notable being the size of juries and the range of available verdicts. In general, such differences cause no particular difficulty. If they do, the solution lies with the legislature. See, for example, *Burns v HM Advocate* [2008] UKPC 63; 2009 SLT 2, para 19. By contrast, part of the Board's statutory jurisdiction is to determine whether a failure by the Lord Advocate to act is incompatible with any of the Convention rights: Scotland Act 1998, Schedule 6, para 1(e). More particularly, on the present

reference, the question for the Board is whether a failure by the Lord Advocate to disclose certain previous convictions of witnesses on the Crown list is incompatible with the accused's article 6(1) Convention rights. If it is not incompatible, then the Board has no locus to interfere with the Lord Advocate's conduct of the prosecution, whatever the position as to disclosure may be south of the border; equally, if it is incompatible, the Board must say so and put the matter right, irrespective of the position in England. Of course, consideration of the position in England and in other jurisdictions may help inform the debate as to what article 6(1) requires. And Lord Collins of Mapesbury has referred to case law on the point from various English-speaking jurisdictions.

47. Three points should be borne in mind.

48. First, the questions in the reference concern the scope of an accused's right under article 6(1) to have *spontaneous* disclosure of material in the possession of the Crown. It is now accepted that the Crown's duty is to disclose any material in their possession, of which they are aware and which either materially weakens the Crown case or materially strengthens the defence case: *McDonald v HM Advocate* 2008 SCCR 954, 972B.

49. Secondly, as was pointed out in *McDonald v HM Advocate* 2008 SCCR 954, 975-977, paras 62-68, the accused's right to spontaneous disclosure of this material is to be distinguished from his right to ask the court to order the Crown to produce material which has a bearing on the issues of fact in the case but which the Crown are not under any antecedent duty to disclose spontaneously. The distinction is unlikely, however, to be of practical significance in the case of previous convictions.

50. The third point to remember is that the focus of the discussion in this reference is on the Crown's article 6(1) duty to disclose previous convictions of *Crown* witnesses. I shall say a brief word at the end about the disclosure of the convictions of defence witnesses.

51. Traditionally, the Crown in Scotland took what may now appear to be a somewhat outmoded approach to (spontaneous) disclosure generally. More particularly, the Crown treated information about the previous convictions of the witnesses on the Crown list as confidential: it was not to be disclosed in advance of trial. In practice, if defence counsel asked, the trial advocate depute, who had a copy of the previous convictions of any given prosecution witness at the back of the relevant precognition, would either show him the schedule, or describe its contents. Failing which, the advocate depute was duty bound in re-examination to correct any false impression which a witness might have given in cross-examination as to his previous convictions. The Crown representatives took these duties seriously and, for long enough, there was no challenge to a system which appeared to work satisfactorily.

52. When in *HM Advocate v Ashrif* 1988 SLT 567 a challenge did come, the Crown managed to persuade the High Court that there should be no change and

that handing over the convictions of Crown witnesses in advance of trial was not only unnecessary but positively undesirable. The defence application to recover schedules of the previous convictions of prosecution witnesses in advance of trial was accordingly refused. The *Ashrif* decision makes it difficult to argue that, under the common law of Scotland, the Crown were under any stricter duty of disclosure.

53. In reality, however, change was in the air and *Ashrif* was the last spurt of a system that was doomed to disappear. Already, despite the court's endorsement of their traditional position, the Crown sometimes preferred to make the previous convictions of particular witnesses available in advance of trial. In this way they avoided having to defend an uncompromising stance, the alleged justifications for which were looking increasingly untenable. Everyone knew that in England, without any undue difficulty, the Crown regularly disclosed prosecution witnesses' convictions; more generally, everyone was aware of the high-profile disasters that had occurred in England due to failures by prosecuting counsel to make adequate disclosure of other material.

54. The first outward and visible sign of a change in Crown thinking came with *McLeod v HM Advocate (No 2)* 1998 JC 67, 71A-H, when the Solicitor General announced that the Crown would no longer make a class claim of confidentiality for police statements of Crown witnesses. So they would usually be recoverable by the defence. Although the European Convention had not yet entered our domestic law, the judgment of the court, at pp 74B-77C, shows that it was already exerting an influence. And, then, from May 1999, by virtue of the Scotland Act 1998 the Lord Advocate and his representatives became bound to respect the accused's Convention rights. By 2002, as I explained in *Holland v HM Advocate* 2005 SC (PC) 1, 22, para 66, the Crown had modified their stance on the disclosure of the convictions of Crown witnesses. They still did not acknowledge that they were bound to disclose them spontaneously. Procurators fiscal were, however, now instructed that previous convictions could be disclosed in advance of trial - but only if the accused's representatives asked for them and showed that they were relevant to his defence. In other words, procurators fiscal and Crown counsel were meant to take individual decisions as to the potential relevance of the witnesses' previous convictions (or some of them) to the particular defence which the accused would advance at trial. This was the system which I described, 2005 SC (PC) 1, 24, para 72, as putting procurators fiscal and Crown counsel "in the invidious position of having to judge the relevance of previous convictions to a defence, the lines of which the accused's representatives were under no obligation to reveal."

55. The Board's decision in *Holland* was based on the accused's article 6(1) Convention right as interpreted by the European Court of Human Rights in cases such as *Rowe and Davis v United Kingdom* (2000) 30 EHRR 1. The effect of the decision was to do away with the need for the accused's representatives to explain the relevance of the previous convictions to his particular defence. This simultaneously freed procurators fiscal from the need

to judge that matter in the context of the specific case. Henceforth, the system would work on the more generalised basis that previous convictions of prosecution witnesses would be likely, at the very least, to help the defence solicitor or counsel to assess their strengths and weaknesses: 2005 SC (PC) 1, 24, para 72.

56. The reasoning in the relevant passage presupposes that knowledge of the convictions or outstanding charges in question will be of potential practical assistance to the defence – as was clearly the case with the outstanding charges in *Holland* itself. More particularly, the right to spontaneous disclosure of information about these convictions or outstanding charges in the Crown's possession arises because they have the potential to weaken the Crown case – in particular, by casting doubt on the character or credibility of the witnesses to be called by the Crown to support their case. Article 6(1) gives the accused an implied right to have these convictions disclosed spontaneously so that his representative is put on an equal footing with the Crown in this respect ("equality of arms"). Knowing about the convictions, the accused's counsel or solicitor can decide what use, if any, should be made of them for the purposes of his defence. Ex hypothesi, other convictions will not assist the defence in any material way and so a right to their spontaneous disclosure cannot be implied into article 6(1). In short, the accused is entitled to disclosure of any material convictions of Crown witnesses. The relevant passages in *Holland* and *McDonald* should be read in this sense.

57. In the present case the Crown have spontaneously disclosed many convictions relating to witnesses on the Crown list. For obvious reasons, I do not go into detail. But the fact of the matter is that defence counsel has already been supplied with a mass of material convictions of Crown witnesses for crimes of violence or dishonesty or both. The appellant does not suggest that the Crown have failed in their duty to disclose any material convictions. Despite this, the parties are in dispute - because, in accordance with the prevailing practice laid down by Crown Office, a considerable number of other convictions were painstakingly blacked out from the schedules before these were supplied to the accused's representatives. His representatives are, in effect, asking for disclosure of those entries.

58. The stance of both the Crown and the defence is somewhat unreal.

59. The Crown seem to have embarked on their elaborate and time-consuming exercise of redaction under some kind of belief that they were under a duty to delete all the trivial and immaterial convictions. But the duty on the Crown to disclose material convictions does not imply that they are under an additional parallel duty positively to suppress other trivial and immaterial convictions. Such a duty would often serve no real purpose. After all, when the schedules already reveal convictions for offences of dishonesty or violence, witnesses are scarcely going to be concerned if the Crown also reveal some trivial conviction for, say, breach of the peace.

60. Equally, the reality for defence counsel in the present case is that the redacted schedules already contain more than enough convictions for dishonesty and violence for counsel to be able to assess the Crown witnesses in question and decide how to handle them. A few more, trivial, convictions for, say, breach of the peace or some statutory offence are unlikely to make any practical difference.

61. That said, even if revealing the hidden convictions is unlikely to make any practical difference, blacking them out tends to give them an undeserved prominence. Forbidden fruits always appear that bit more tempting than those which are freely available. And, while no individual minor conviction may be of any significance, a long trail of even minor infractions may sometimes point to a certain disregard for the law that may be of legitimate interest to the defence. So it is not entirely surprising that the application to recover the complete schedules was made in this case. For these reasons, in my view, the Crown can properly and prudently proceed on the basis that, unless some particular conviction is both immaterial and potentially sensitive, the wiser and appropriate course is to disclose all the previous convictions of witnesses on the Crown list. The Solicitor General candidly admitted that he saw the advantages of such an approach for the Crown, not least because staff would not require to make large numbers of routine but time-consuming deletions from the schedules supplied to the defence. That is an entirely legitimate consideration for the Crown to take into account.

62. At the hearing of the appeal in *McDonald v HM Advocate* 2008 SCCR 954, however, the Solicitor General had laid down a marker that the duty to disclose the previous convictions of a Crown witness might be subject to the witness's article 8 Convention right to respect for his private life. I should add that, in the present case, he rightly pointed out that the duty of the State to protect a witness's life (article 2) and to protect him from inhuman or degrading treatment (article 3) could also come into play if there were reason to think that the witness might be subjected to such treatment if a particular previous conviction were revealed. See, for instance, *Jasper v United Kingdom* (2000) 30 EHRR 44.

63. In a very real sense, the issue about the effect of article 8 does not arise in this case since the Crown do not suggest that they made the deletions from the schedules because revealing the convictions would show a lack of respect for the witnesses' private or family lives. Indeed, any such submission would be pretty unrealistic, given that so many other convictions have been revealed.

64. The Solicitor General was also careful to emphasise that, in practice, article 8 would call for consideration only where the conviction in question was not material. If it was material, then revealing it would be necessary for a fair trial under article 6(1) - and so would be justified under article 8(2) as being necessary in a democratic society for the prevention of disorder or crime.

65. So the Solicitor General had to focus the article 8 issue by putting forward more or less hypothetical examples where the point might arise: the victim of an assault who has an ancient conviction for a homosexual offence which is no longer even a crime, but which might cause him anguish or even harassment if it were revealed; the victim of domestic violence who was long ago convicted of an offence relating to prostitution which might now come to light. The convictions would not have any legitimate effect on the strength of the Crown case, but they could properly be regarded as sensitive. Would their disclosure by those acting on behalf of the Lord Advocate engage article 8? And, if so, would it be incompatible with the witnesses' article 8 rights?

66. It is one of the hallmarks of a fair hearing under article 6(1) that it is held in public. For these purposes the "hearing" includes the stages of both conviction and sentence. So, at first sight, it might seem hard to say that the disclosure of a conviction that occurred in public could be said to engage article 8, which concerns respect for private and family life. Nevertheless, having regard to the case law of the European Court which Lord Hope has analysed, I am satisfied that, especially where the conviction has receded into the individual's past, it can. As he points out, article 6 of the Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data of 28 January 1981 equates criminal convictions with other sensitive information relating to individuals. Moreover, *Rotaru v Romania* (application no 28341/95), 4 May 2000, para 43, *Amann v Switzerland* (2000) 30 EHRR 843, and *Segerstedt-Wiberg and others v Sweden* (application no 62332/00), 6 June 2006, para 72, proceed on the basis that, by itself, the storage, especially the electronic storage, of some public information (including previous convictions) relating to an individual can engage article 8. Since the mere storage of information relating to previous convictions by a public authority can engage article 8, the same must apply to their disclosure.

67. If the disclosure of a witness's conviction would serve no legitimate purpose, it would not be justified in terms of article 8(2). It follows that, in the kinds of situation involving sensitive convictions envisaged by the Solicitor General, the Crown should not disclose the conviction in question. As he very frankly accepted, such situations are unlikely to occur very often in practice, but procurators fiscal and other officials should take care that, when they do, disclosure is not made.

68. So far as outstanding charges, fiscal fines and other alternatives to prosecution are concerned, the same general approach should be applied. As the Solicitor General accepted, article 6(1) requires that they should all be disclosed when they are material, but not otherwise. Again, however, the Crown can in their discretion disclose other non-sensitive material.

69. If in cases of doubt the Crown favour disclosure and if they abandon their current practice of obliterating all the convictions which they are not strictly obliged to disclose, then there should be few disputes about disclosure in future. If, however, a dispute arises which the parties cannot resolve, it must

be decided by the judge. It is not for the Board to devise the appropriate procedure, beyond saying that it should not be elaborate. Basically, the Crown should place the conviction(s) before the judge with a brief indication, agreed with the defence, of the matter on which the witness is expected to give evidence. It is then up to the judge to decide whether the conviction is material and should therefore be disclosed. There should be no need for submissions by either side.

70. Finally, I come back to the matter of convictions etc of defence witnesses. The point was not explored separately at the hearing before the Board. Clearly, this is because the Crown treat defence witnesses in the same way as prosecution witnesses. Paragraph 17.11.2 of the Crown Office *Disclosure Manual*, dated 15 June 2009, begins: "Where the Crown obtains a defence witness's record, it **must** be disclosed to the defence in the same way as that of a Crown witness." Often the records for defence witnesses come into the hands of the procurator fiscal or advocate depute only shortly before, or even during, the trial. But prudent defence counsel usually check with the Crown for previous convictions before deciding whether to call, say, a friend of the accused to give evidence in support of an alibi. If available, the relevant information has always been supplied. The passage in the *Disclosure Manual* reflects an updated version of this policy, under which disclosure of these convictions will be made, where possible, before trial. It is perhaps hard to describe the convictions of defence witnesses as being likely to weaken the Crown case or to strengthen the defence case. Nevertheless, their spontaneous disclosure is fully justified on the basis that it ensures equality of basic relevant information and, hence, of arms between the Crown and the defence.

71. In these circumstances it is unnecessary to say anything about the decision of the House of Lords in *R v Brown (Winston)* [1998] AC 367, to the effect that in England the common law does not require the Crown to disclose the convictions of defence witnesses. The decision antedates the Human Rights Act 1998.

72. For these reasons, and in agreement with all of your Lordships, I would answer the questions in the reference as proposed by Lord Hope.

Lord Brown of Eaton-under-Heywood

73. I have had the advantage of reading in draft the opinion of my noble and learned friend Lord Hope of Craighead with which I agree. Consistently with it, as I believe (see particularly paragraph 36), I wonder whether the best and simplest solution to the problem raised by this reference may not perhaps be as follows: disclose all previous convictions and outstanding charges, whether material or not, unless the Crown takes the view in respect of any particular such conviction or charge that it is both (a) embarrassing to the witness and (b) immaterial. In this, presumably very rare, event, the Crown should so indicate to the defence and place the facts *ex parte* before the Court for it to make a final decision on materiality and, consequentially, disclosure. The advantages

of such an approach are, first, that the Court rather than the prosecution will be making the critical decision on materiality in respect of any withheld material (so that no suspicions can possibly arise) and, secondly, that the process of giving disclosure of this category of material can be made altogether easier.

Lord Collins of Mapesbury

74. I am in full agreement with the opinion of my noble and learned friend Lord Hope of Craighead. As he himself pointed out in *R v Brown (Winston)* [1998] AC 367, 377 "the question whether one or more of the Crown witnesses is credible or reliable is frequently one of the most important 'issues' in the case."

75. The test is materiality. Fairness requires that previous convictions of prosecution witnesses which might cast doubt on their credibility or reliability should be disclosed. Failure to disclose a material criminal record. may make a conviction unsafe. In *R v Farrell* (unreported 2000, quoted in *R v Underwood* [2003] EWCA Crim 1500, at [28]) Lord Bingham of Cornhill CJ said:

> "7. Thus we have a clear and simple case in which the convictions of the prosecution witness were not disclosed when they should have been as a result of inadvertence or oversight. What is the effect of such non-disclosure if a defendant is convicted and evidence of convictions on the part of the prosecution witness then comes to light? There is no simple and straightforward answer to that question. The answer will depend on the weight of evidence in the case, apart from the evidence of the witness whose convictions have not been disclosed. The greater the weight of the other evidence the less significance, other things being equal, the non-disclosure is likely to have had. The answer will also depend on the extent to which the credibility and honesty of the prosecution witness whose convictions have not been disclosed is at the heart of the case. If, as here, the prosecution witness whose convictions have not been disclosed is the only witness against a defendant, and his credibility and honesty are squarely in issue, and the jury are led to believe that that witness is of good character when such is not the case, then there is strong ground for contending that the conviction is unsafe.…"

See also *R v Vasilou* [2000] Crim LR 845; *R v McCallan* [2004] EWCA Crim 463.

76. In Canada the position is that the prosecution must disclose all relevant material, including information in the possession of the police: *R v Stinchcombe* [1991] 3 SCR 326; *R v McNeil* 2009 SCC 3. This includes prior convictions of prosecution witnesses: see e.g. *R v Hobbs*, 2008 ABPC 230. The law is the same in Australia and in New Zealand: *R v Garofolo* [1998] VSCA

145; *Wilson v Police* [1992] 2 NZLR 533, 542, where Cooke P said (at 537): "As to the kind of conviction within the scope of the duty, the test must be whether a reasonable jury or other tribunal of fact could regard it as tending to shake confidence in the reliability of the witness.".

77. The position is similar in the United States. The rule established in *Brady v. Maryland*, 373 U.S. 83 (1963), deriving from the Due Process Clause of the Fifth Amendment, is that the right to a fair trial requires that the prosecution must disclose all information which is material in the sense that there is a reasonable probability that, had it been disclosed to the defence, the result would have been different. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome of the trial: *United States v. Bagley*, 473 U.S. 667, 682 (1985). The rule extends to prior convictions of prosecution witnesses: e.g. *Crivens v. Roth*, 172 F. 3d 991, 996-997 (7th Cir. 1999); *United States v. Price*, 566 F. 3d 900, 903 (9th Cir. 2009).