

OPINIONS
OF THE LORDS OF APPEAL
FOR JUDGMENT IN THE CAUSE

Regina v. Durham Constabulary and another (Appellants) *ex parte* R (FC) (Respondent) (Criminal Appeal from Her Majesty's High Court of Justice)

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(Conjoined Appeals)**

ON
THURSDAY 17 MARCH 2005

The Appellate Committee comprised:

Lord Bingham of Cornhill
Lord Steyn
Lord Rodger of Earlsferry
Baroness Hale of Richmond
Lord Brown of Eaton-under-Heywood

HOUSE OF LORDS

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[2005] UKHL 21

LORD BINGHAM OF CORNHILL

My Lords,

1. In sections 65 and 66 of the Crime and Disorder Act 1998 Parliament legislated to replace the non-statutory procedure which then existed for the cautioning of children and young persons (“young offenders”) believed to have committed crimes by a new procedure for reprimanding or warning such offenders. There were a number of similarities between the two procedures, but two differences significant in this appeal: whereas cautions could be given to adult and young offenders alike, reprimands and warnings may only be given to young offenders; and whereas a caution could be given to a young offender only if the young offender’s parent or guardian consented to its being given, no such requirement is imposed, at any rate expressly, in relation to reprimands and warnings. In the present case the appellant was given a warning under the 1998 Act to which neither he nor his stepfather, acting as an appropriate adult, consented, and in these proceedings he challenged the lawfulness of the warning given to him on the ground that the procedure was, without consent, incompatible with article 6 of the European Convention on Human Rights. That challenge was upheld by the Queen’s Bench Divisional Court (Latham LJ and Field J: [2002] EWHC 2486 (Admin); [2003] 1 WLR 897), which accordingly quashed the decision to warn the appellant. The Chief Constable of the Durham Constabulary and the Secretary of State for the Home Department contend that that decision was wrong in law.

2. The age of criminal responsibility established in this country is, in comparison with that in most European countries, low. This has made it possible to prosecute young offenders who have not, or who have scarcely, entered their teens. But it has long been recognised as undesirable in many cases for young offenders to be drawn into the process of the criminal courts (including juvenile and youth courts) unless this is really necessary. So informal procedures grew up to deal with cases which were not so serious as to leave no realistic alternative to prosecution. There were always, of course, some cases which, although disclosing a breach of the criminal law, were so trivial as to be properly ignored or dealt with by way of informal and unrecorded advice or admonition. But there were other cases which were too serious to be dealt with in that way but not so serious as necessarily to call for prosecution.

3. In their submissions to the House, counsel did not attempt to trace the source of the caution as a procedure applied to young offenders, but it seems likely that it was devised by the police as a constructive and pragmatic response to the class of case I have just mentioned. From 1978 at the latest the procedure for cautioning young offenders was guided by a series of Home Office Circulars, and the House was referred to Circulars 14/1985, 59/1990 and 18/1994. These circulars need not be quoted. All made clear that there were three essential conditions to be met before a young offender could be cautioned: there had to be evidence judged to be sufficient to support a successful prosecution; the young offender had to admit the offence; and the parent or guardian of the young offender had to give informed consent to the giving of a caution. If these conditions were met, and a caution was given, the young offender would not be charged, summoned or prosecuted, and there would be no court hearing. But the caution could be cited in court proceedings if the young offender were to offend again.

4. As time passed, many cautions came to be given to young offenders in England and Wales (109,700 in 1998). But the procedure, as applied to young offenders, was seen to be subject to two major weaknesses. First, a significant number of persistent young offenders were cautioned time after time. They inevitably came to appreciate that if they ignored one caution and offended again the likely consequence was that they would receive another caution, which they could again ignore with impunity, and so on. Thus the procedure did not achieve its intended object of stopping young offenders in their tracks before they had had time to become habituated to a life of crime. The second weakness was even greater: that the opportunity was not routinely taken

on a young offender's first offending, leaving trivial offences aside, to intervene constructively so as to address any personal, family or other problems which a young offender might have and so obviate the risk of further offending by diverting the young offender away from crime into lawful and fruitful activity. The failure to exploit this opportunity in such a way was seen as gravely damaging to the welfare of the young offenders themselves, whose lives could be wrecked by persistent commission of crimes, but damaging also to their families and their communities. These weaknesses were fully and explicitly recognised in the Home Office consultation paper "Tackling Youth Crime" of September 1997 and its White Paper "No More Excuses – A New Approach to Tackling Youth Crime in England and Wales" (CM 3809) of November 1997, which heralded the 1998 Act.

5. The overall aim of the youth justice system was defined in section 37 of the 1998 Act:

- “(1) It shall be the principal aim of the youth justice system to prevent offending by children and young persons.
- (2) In addition to any other duty to which they are subject, it shall be the duty of all persons and bodies carrying out functions in relation to the youth justice system to have regard to that aim.”

Central to this appeal are sections 65 and 66 of the 1998 Act which, as amended by section 56 of the Criminal Justice and Court Services Act 2000 and section 165(1) of and para 198 of Schedule 9 to the Powers of Criminal Courts (Sentencing) Act 2000, provide:

“65 Reprimands and warnings

- (1) Subsections (2) to (5) below apply where—
 - (a) a constable has evidence that a child or young person ('the offender') has committed an offence;
 - (b) the constable considers that the evidence is such that, if the offender were prosecuted for the offence, there would be a realistic prospect of his being convicted;
 - (c) the offender admits to the constable that he committed the offence;

- (d) the offender has not previously been convicted of an offence; and
 - (e) the constable is satisfied that it would not be in the public interest for the offender to be prosecuted.
- (2) Subject to subsection (4) below, the constable may reprimand the offender if the offender has not previously been reprimanded or warned.
- (3) The constable may warn the offender if—
- (a) the offender has not previously been warned; or
 - (b) where the offender has previously been warned, the offence was committed more than two years after the date of the previous warning and the constable considers the offence to be not so serious as to require a charge to be brought;
- but no person may be warned under paragraph (b) above more than once.
- (4) Where the offender has not been previously reprimanded, the constable shall warn rather than reprimand the offender if he considers the offence to be so serious as to require a warning.
- (5) The constable shall—
- (a) where the offender is under the age of 17, give any reprimand or warning in the presence of an appropriate adult; and
 - (b) explain to the offender and, where he is under that age, the appropriate adult in ordinary language—
 - (i) in the case of a reprimand, the effect of subsection (5)(a) of section 66 below:
 - (ii) in the case of a warning, the effect of subsections (1), (2), (4) and (5)(b) and (c) of that section, and any guidance issued under subsection (3) of that section.
- (6) The Secretary of State shall publish, in such manner as he considers appropriate, guidance as to—
- (a) the circumstances in which it is appropriate to give reprimands or warnings, including criteria for determining—
 - (i) for the purposes of subsection (3)(b) above, whether an offence is not so serious as to require a charge to be brought; and

- (ii) for the purposes of subsection (4) above, whether an offence is so serious as to require a warning;
 - (aa) the places where reprimands and warnings may be given;
 - (b) the category of constable by whom reprimands and warnings may be given; and
 - (c) the form which reprimands and warnings are to take and the manner in which they are to be given and recorded.
- (7) In this section ‘appropriate adult’, in relation to a child or young person, means—
- (a) his parent or guardian or, if he is in the care of a local authority or voluntary organisation, a person representing that authority or organisation;
 - (b) a social worker of a local authority social services department;
 - (c) if no person falling within paragraph (a) or (b) above is available, any responsible person aged 18 or over who is not a police officer or a person employed by the police.
- (8) No caution shall be given to a child or young person after the commencement of this section.
- (9) Any reference (however expressed) in any enactment passed before or in the same Session as this Act to a person being cautioned shall be construed, in relation to any time after that commencement, as including a reference to a child or young person being reprimanded or warned.

66 Effect of reprimands and warnings

- (1) Where a constable warns a person under section 65 above, he shall as soon as practicable refer the person to a youth offending team.
- (2) A youth offending team—
 - (a) shall assess any person referred to them under subsection (1) above; and
 - (b) unless they consider it inappropriate to do so, shall arrange for him to participate in a rehabilitation programme.
- (3) The Secretary of State shall publish, in such manner as he considers appropriate, guidance as to—

- (a) what should be included in a rehabilitation programme arranged for a person under subsection (2) above;
 - (b) the manner in which any failure by a person to participate in such a programme is to be recorded; and
 - (c) the persons to whom any such failure is to be notified.
- (4) Where a person who has been warned under section 65 above is convicted of an offence committed within two years of the warning, the court by or before which he is so convicted—
- (a) shall not make an order under subsection (1)(b) (conditional discharge) of section 12 of the Powers of Criminal Courts (Sentencing) Act 2000 in respect of the offence unless it is of the opinion that there are exceptional circumstances relating to the offence or the offender which justify its doing so; and
 - (b) where it does so, shall state in open court that it is of that opinion and why it is.
- (5) The following, namely—
- (a) any reprimand of a person under section 65 above;
 - (b) any warning of a person under that section; and
 - (c) any report on a failure by a person to participate in a rehabilitation programme arranged for him under subsection (2) above,
- may be cited in criminal proceedings in the same circumstances as a conviction of the person may be cited.
- (6) In this section ‘rehabilitation programme’ means a programme the purpose of which is to rehabilitate participants and to prevent them from re-offending.”

6. In pursuance of his duty under section 65(6) of the Act, the Secretary of State in April 2000 (before the Act came generally into force in June) published a document entitled “Final Warning Scheme – Guidance for Police”. This emphasised the preventative purpose of the Act in relation to young offenders and rehearsed the conditions which section 65(1) requires to be satisfied before a young offender may be

reprimanded or warned. Guidance was given on the circumstances in which it may be appropriate to give a reprimand or warning, and it was recognised (para 62) that the behaviour of the young offender might be such as to show that a reprimand or warning would not be appropriate. Paras 72 and 73 of the guidance summarised the duty of the police officer in giving a reprimand and a warning respectively:

- “72. In giving a reprimand the officer should specify the offence(s) which has led to it and make clear that:
- the reprimand is a serious matter
 - any further offending behaviour will result in a warning or prosecution in all but the most exceptional circumstances
 - a record of the reprimand will be kept by the police at least until the offender is 18
 - the young person’s reprimand may be cited in any future criminal proceedings
 - if the offence is one covered by the Sex Offenders Act 1997, the young person is required to register with the police for inclusion on the sex offenders register (paragraph 77 below)
73. In giving a warning, the officer should specify the offence(s) which has led to it and make clear that:
- the warning is a serious matter
 - any further offending behaviour will result in charges being brought, in all but the most exceptional circumstance
 - a record of the warning will be kept by the police until the offender is 18 or the warning is more than two years old, whichever is later
 - the warning may be cited in any future criminal proceedings
 - if the young person is convicted of a further offence within two years of getting the warning, the option of conditional discharge will only be open to the courts in exceptional circumstances. The young person can in most cases expect a more serious sentence
 - if the offence is one covered by the Sex Offenders Act 1997, the young person is required to register with the police for inclusion

on the sex offenders register (paragraph 77 below)

- the warning will trigger referral to a local youth offending team
- the youth offending team will assess the young person and, unless they consider it inappropriate, prepare a rehabilitation (change) programme designed to tackle the reasons for the young person's offending behaviour, prevent any future offending and to help repair some of the harm done
- unreasonable non-compliance with the rehabilitation (change) programme would be recorded and could be cited in any future criminal proceedings
- referral to the youth offending team will be immediate and the young person can expect to be contacted by the team within five working days
- any questions about what will happen next should be put to the youth offending team (the officer shall also give contact details for the team)."

The guidance made plain (para 75) that a reprimand or warning is not a conviction and does not constitute a criminal record, but repeated (para 74) that reprimands, warnings and any report on a person's failure to participate in a rehabilitation programme might be cited in court in the same circumstances as convictions. Reprimands and warnings were not covered by the Rehabilitation of Offenders Act 1974 but would be recorded by the police (para 75) and those reprimanded or warned for certain sex offences were required to register with the police under the Sex Offenders Act 1997 (para 77). Fingerprints would be taken (para 80). Reprimands and warnings are recorded on the Police National Computer (PNC) (paras 82-83).

7. The Divisional Court observed in para 38 of their judgment that "There is nothing in the Act which requires the police to proceed without the consent of the offender". This is true. But it is plain that the Act did not envisage or require that the consent of the young offender or an appropriate adult should be sought or required, as the Divisional Court acknowledged when they said (in para 31 of their judgment) that "the Scheme, as defined by the Act and the guidance, does not require

the young offender's consent." It would be remarkable, given that informed consent had been explicitly required before a young offender could be cautioned, not to specify this condition in section 65(1) if it were intended to include it. The only reasonable inference is that Parliament intended to dispense with the need for such consent. This inference is strengthened by the absence of any indication in the 2000 guidance that the young offender's consent to a reprimand or warning is to be sought. In Annex G to the 2000 guidance, which sets out the text of a standard leaflet on "A Final Warning and How it might Affect You" the question is posed "Do I have to accept a Final Warning?" and the answer given is:

"Final Warnings are only for people who accept they committed the offence being investigated. If you don't accept that you committed the offence you should talk to the Police or the Youth Offending Team about seeking legal advice".

This answer is plainly inconsistent with any right not to accept a warning if the offence is admitted. This question and answer were repeated in guidance issued in November 2002, after the events giving rise to this appeal, which also stated (in para 4.13):

"Unlike adult cautions, the young person does not 'consent' to the reprimand or final warning. Under the legislation, it is a matter for the police to decide the appropriate disposal in accordance with the statutory criteria".

8. Save in one respect, the warning procedure laid down in the 1998 Act and the 2000 guidance was followed in the case of the appellant R. He was aged 14 when, in November 2001, a number of girls at his school complained to the staff that he had indecently assaulted them. R was suspended, then permanently excluded, from the school, and the matter was reported to the police, who interviewed and took statements from the girls. On 11 January 2002 (R's 15th birthday) he and his stepfather attended at a police station in Durham by arrangement. They had (as the Divisional Court held in para 23 of their judgment) been given no indication what the outcome of the interview was likely to be. R was arrested on suspicion of indecently assaulting the girls, and was cautioned by an officer in the Child and Family Protection Unit of the Durham Constabulary. He and his stepfather were asked if they wanted

a solicitor present, and they did not. In the course of the interview, as is accepted on his behalf, R admitted acts which amounted in law to indecent assault, although he described them as horseplay and said (which may of course have been true) that other boys had also been involved. At the end of this interview R was bailed and the file was referred to an officer in the Administrative Support Unit for the case to be assessed and a decision taken on future action. Having considered the Home Office guidance issued in 2000, this officer concluded that a final warning would be appropriate, and later that day he duly gave a warning to R in the presence of his stepfather. R was not asked if he consented to the warning, but he and his father were willing that it should be given. At this stage the stepfather was recorded as being supportive of police action, which had taught R a lesson and possibly prevented him getting into more serious trouble. In an unfortunate departure from para 73 of the guidance, neither R nor his stepfather had at this stage been warned that R was obliged to register (for a period of 2½ years) under the 1997 Act. This came to their attention on 6 February 2002, a week after the warning, when a police officer and a probation officer from the Youth Offending Team visited R at home and explained to R in the presence of his mother the consequences of the warning, including the obligation to register. R's mother told his stepfather, and they were both upset that the warning had this (for them, unexpected) consequence.

9. The Divisional Court, in para 31 of their judgment, did not consider

“that failure to warn of the consequences of a reprimand or a final warning could render the decision to reprimand or administer a final warning unlawful as a matter of domestic law.”

That conclusion was not challenged before the House. Thus the lawfulness of the decision to warn depended on whether it complied with R's rights under the European Convention, and primarily on his rights under article 6. R contended that the decision did not comply. The main steps in the argument of Mr Davey QC on behalf of R were these:

- (1) the process to which R was subjected involved the determination of a criminal charge within the autonomous meaning given by the Strasbourg jurisprudence to that expression in article 6 of the Convention, since it was triggered by suspicion that R had

- committed criminal acts and culminated in a finding that he had committed such acts;
- (2) article 6 required such determination to be by an independent and impartial tribunal, which the police officer was plainly not, unless R gave his informed consent to being warned and so validly waived his right to a fair trial; but
 - (3) R did not know of his obligation to register under the 1997 Act before the warning was given and so did not give his informed consent to being warned and did not validly waive his fair trial right, and so
 - (4) the decision to quash did not comply with article 6.

10. Mr Crow for the Secretary of State and Mr Freeland QC for the Chief Constable attacked this argument at three points. First, they submitted, there was no criminal charge in existence once the relevant police officer had decided that it was not in the public interest to prosecute, since that brought any possibility of criminal proceedings to an end, and the officer's decision to warn could not be thwarted by R's withholding of consent since his consent was not required. Secondly, there was no determination, because there was nothing in the nature of an adjudication whether R had committed a crime. Even if, thirdly, there was a determination, it was not a determination of a criminal charge since it was a decision with no possible punitive consequence for R.

11. Before the Divisional Court the Secretary of State accepted (para 34 of the judgment) that article 6 was engaged on the facts, but submitted that it was engaged only until such time as the police were satisfied under section 65(1)(e) of the 1998 Act that it would not be in the public interest for R to be prosecuted. The court had no doubt (para 35) that the Secretary of State was right to concede that article 6 was engaged. In his written case to the House it was again accepted (para 12)

“that [R] was, for these purposes, facing a ‘criminal charge’ once he had been formally notified by the police that allegations of criminal conduct against him were being investigated”

This was also accepted in oral submissions, and neither appellant sought to resile from this position. I have some doubt on this point. The European Court has explored the Convention meaning of “criminal charge” in a number of cases. In *Attorney General's Reference (No 2 of 2001)* [2003] UKHL 68, [2004] 2 AC 72, paras 26-28, 31, 43, 44, 45,

128, 129, 140 and 141, the House held, attempting to distil the essence of the European Court's reasoning, that a person became subject to a criminal charge at the earliest time when he was officially alerted to the likelihood of criminal proceedings against him. Sharing the opinion of the Court of Appeal in the same case ([2001] EWCA Crim 1568, [2001] 1 WLR 1869, para 10), the House held that in this country a person would ordinarily become subject to a criminal charge from the time when he is formally charged or served with a summons. Arrest would not ordinarily mark the beginning of the period. In the present case, R was never charged and never served with a summons or any criminal process. He was never officially alerted to the likelihood of criminal proceedings against him, and since the parents of his victims preferred that there should be no court proceedings it would seem that a prosecution was always unlikely. The Divisional Court was not referred to the Court of Appeal's judgment, and the House had not given judgment when the Divisional Court decided the case; in any event, the appellants adhere to their submission. This being so, and having sounded a note of reservation, I shall, although with some reluctance, assume that there was a criminal charge against R at the beginning of the process.

12. Making that assumption, I nonetheless think it inescapable that the criminal charge ceased to exist when a firm decision was made not to prosecute. For good and understandable reasons, the protection given to criminal defendants by article 6 covers not only the trial itself but extends back to the preparatory and preliminary processes preceding trial and forwards to sentence and appeal. But the primary focus of the right is the trial itself, because that is the stage at which guilt is decided with the possibility of condemnation and punishment. I find it hard to see how a criminal charge can be held to endure once a decision has been made that rules out the possibility of any trial, or condemnation, or punishment. This was, I think, the essential reasoning of the Commission in *X v United Kingdom* (1979) 17 DR 122, when, in ruling the application to be inadmissible, it said:

“67. ... It is moreover the view of the Commission that Article 6.1 of the Convention cannot be so construed as to bar the Prosecution from formally discontinuing criminal proceedings or from simply dropping charges. This is in fact a daily practice in member states. It is in cases where the Prosecution has the intention of proceeding to a trial on an indictment that they are under an obligation to do

so within a reasonable time. This is the very purpose of Article 6.1.

68. The Commission is of the opinion that, insofar as the present case is concerned, the undertaking made by the Prosecution on 29 March 1979 not to try the applicant on the three remaining charges on the F. indictment must be considered as being tantamount to saying that these charges have been effectively dropped. Consequently, the applicant thereby also ceased to be affected by the charges on the said indictment. Thus, as from that date, there are in fact no longer any charges against the applicant which require a determination within the meaning of Article 6.1 of the Convention.”

In *S v Miller* 2001 SC 977 the Court of Session similarly held that criminal proceedings against the child (who had in that case been charged) came to an end when the procurator fiscal decided not to proceed with the charge: see the Lord President (Rodger), para 23; Lord Penrose, para 6; Lord Macfadyen, para 42. That decision was, in my respectful opinion, correct and consistent with the rationale of article 6.

13. While there is ample Strasbourg authority on the meaning of “criminal charge”, there is little on the meaning of “determination”, the expression used in relation to civil rights and obligations as well as criminal charges. Certain of the authorities cited gave rather limited assistance. The central concept in either case is, however, of an issue, whether between prosecution and defendant or between civil parties, which culminates or may culminate in an adjudication by the court or tribunal. The issue may of course be resolved on the defendant pleading guilty or submitting to judgment, but in either event there will be an adjudication and an entry of judgment, the conviction of the defendant on his own confession or judgment for the claimant, and certain consequences are likely to follow. The appellants gain some support from the judgment of the European Court in *Fayed v United Kingdom* (1994) 18 EHRR 393. In that case the Secretary of State had appointed inspectors to investigate and report on a company takeover. In their report, which was published, the inspectors made findings which were critical of and damaging to the applicants, who relied on the civil limb of article 6(1) to complain that they had been denied effective access to the courts to challenge the determination made against them. The application failed because, as the Court ruled in para 61 of its judgment:

“ ... The Inspectors did not adjudicate, either in form or in substance. They themselves said in their report that their findings would not be dispositive of anything. They did not make a legal determination as to criminal or civil liability concerning the Fayed brothers, and in particular concerning the latter’s civil right to honour and reputation.

... the object of the proceedings before the Inspectors was not to resolve any dispute (*contestation*) ...

In short, it cannot be said that the Inspectors’ inquiry ‘determined’ the applicants’ civil right to a good reputation, for the purposes of Article 6(1), or that its result was directly decisive for that right.”

The facts here are quite different. But the police officer, having satisfied himself that he had evidence that R had committed offences, having formed the opinion that the evidence was such that there would be a realistic prospect of R’s conviction, having satisfied himself that R had admitted the offences, and having satisfied himself that R had not been convicted before, had only two decisions to make: whether it would be in the public interest for R to be prosecuted, and whether, if not, he should be reprimanded or warned, or no further action taken. It was no part of his duty to decide or determine or adjudicate whether R was guilty or not, and had Parliament envisaged the exercise of such a function it would not have entrusted it to a police officer.

14. It was contended on behalf of R that the giving and recording of a warning in effect established R’s guilt of what was alleged against him, and it is of course true that a person who admits commission of an offence without any inducement or pressure to do so would ordinarily be assumed to have committed it. There was here no suggestion of any inducement or pressure, and had there been such it would have invalidated the admission: *R v Commissioner of Police of the Metropolis, Ex p Thompson* [1997] 1 WLR 1519. But the determination of a criminal charge, to be properly so regarded, must expose the subject of the charge to the possibility of punishment, whether in the event punishment is imposed or not. A process which can only culminate in measures of a preventative, curative, rehabilitative or welfare-promoting kind will not ordinarily be the determination of a criminal charge. In *Ibbotson v United Kingdom* (1998) 27 EHRR CD 332 the Commission held that the obligation to register under the 1997 Act was not a penalty within the meaning of article 7 of the Convention since the

requirement was preventative, not punitive, and the Court reached a similar decision in *Adamson v United Kingdom* (1999) 28 EHRR CD 209. In *Porter v United Kingdom* (2003) 37 EHRR CD 8 the Court held, in agreement with the House of Lords (*Porter v Magill* [2001] UKHL 67, [2002] 2 AC 357, para 85) that a large surcharge imposed on the applicant was compensatory, not punitive, and that the criminal limb of article 6 was not engaged. A measure of special police supervision imposed on the applicant in *Raimondo v Italy* (1994) 18 EHRR 237, while criminal proceedings were prosecuted against him, was held by the Court in para 43 of its judgment to be “not comparable to a criminal sanction because it is designed to prevent the commission of offences.” It was held to follow that the proceedings concerning the supervision did not involve the determination of a criminal charge. Our domestic courts have followed a similar approach in relation to sex offender orders (*B v Chief Constable of Avon and Somerset Constabulary* [2001] 1 WLR 340), anti-social behaviour orders (*R (McCann) v Crown Court at Manchester* [2002] UKHL 39, [2003] 1 AC 787, paras 28-34, 72, 77, 109-111, 116, 117), disqualification orders (*R v Field* [2002] EWCA Crim 2913, [2003] 1 WLR 882, para 58), and parenting orders (*R (M) v Inner London Crown Court* [2003] EWHC 301 Admin, [2003] 1 FLR 994, para 35). In *R (S) v Chief Constable of the South Yorkshire Police* [2004] UKHL 39, [2004] 1 WLR 2196, paras 40, 66, 78, 80, 86-88, the retention of fingerprints was held, if an interference with the subject’s right under article 8(1) of the Convention, to be one clearly justified by the strong public interest in preventing crime.

15. The appellants’ argument is further strengthened, in my opinion, by the decision in *S v Miller* 2001 SC 977 to which I have already referred. Following an assault on a victim (L) the child (S), aged 15, was detained, arrested and charged with assaulting L. The procurator fiscal quickly decided not to prosecute, and the police, as they were bound to do, reported the matter to the relevant authority reporter. The reporter was obliged to refer the case to a children’s hearing unless he considered that compulsory measures of supervision were not required in relation to S. He was not of that opinion, and was accordingly obliged to refer the case to a children’s hearing for determination of the merits if satisfied that compulsory measures of supervision were necessary and also (relevantly to the case of S) that he had committed an offence. The reporter was satisfied on both grounds, the second relating to the alleged assault of which particulars were in due course given. It was open to S to contend that the second condition was not met (ie he had not committed an assault), and he did so. That meant that the question whether S had committed an assault had to be referred to a sheriff for determination. Such a proceeding before the sheriff had certain of the characteristic features of a criminal proceeding, in that the criminal

burden of proof applied and a finding adverse to the child would be a conviction to which the Rehabilitation of Offenders Act 1974 applied. It was accepted by S in the Court of Session that the children's hearing would determine S's civil rights and obligations within the meaning of article 6; the question was whether, as S contended, it would determine a criminal charge against him within the meaning of the article. It was plain that the reporter was seeking to show that S had committed a criminal assault, but also plain that the proceedings were categorised as civil and not criminal in Scots domestic law. In ruling against S on this issue my noble and learned friend Lord Rodger of Earlsferry, then Lord President, said in para 20 of his judgment:

“[20] In itself the character which the proceedings have in our domestic law is not, of course, conclusive of the character which they should have under the Convention. Nevertheless, if one asks why, ultimately, Parliament has provided for civil rather than criminal proceedings, then the answer must be that, even though they may involve establishing that the child has committed an offence, there is no possibility of the child being punished, having a penalty imposed. On the contrary, in a sec 52(2)(i) case, as in any other, the aim of all the measures in chap 3 of the 1995 Act is, as its title proclaims, the ‘Protection and Supervision of Children’. More particularly, sec 52 deals with ‘Children requiring compulsory measures of supervision’ and so the aim of all such proceedings is for the hearing to determine whether the child concerned requires such compulsory supervision in his own interests, the decision always being taken with the child's welfare as the paramount consideration (sec 16(1)). Similarly, the reporter can refer a case to a hearing under sec 65(1) for determination on the merits only if he is satisfied, not merely that the child has committed an offence, but also that compulsory measures of supervision are necessary. In my view such proceedings which are instituted to promote the child's welfare and have no penal element at all do not involve ‘the determination ... of any criminal charge against’ the child in terms of art 6.”

Lord Penrose, in paras 45 and 50 of his judgment, and Lord Macfadyen in para 45 of his judgment, similarly concluded that the proceedings did not involve the determination of a criminal charge since they were not of a penal character but were designed to promote the welfare of the child.

16. In his written case, but not in oral argument, R relied on the decision of the European Court in the relatively early case of *Adolf v Austria* (1982) 4 EHRR 313. In that case an elderly lady complained to the public prosecutor that the applicant had assaulted her. The police investigated and reported back to the prosecutor who, on receiving the report, referred the matter to the Innsbruck District Court. The court registered the case under the heading “punishable act” and the entry made reference to section 83 of the Penal Code which deals, among other things, with the infliction of bodily harm. In a decision relating to the costs of a medical opinion the court referred to “the criminal proceedings” against the applicant, who was described as “the accused”. Later, at the request of the prosecutor, the court terminated the proceedings under a provision of the Penal Code which provided for such termination if the offence carried no more than a moderate penalty, the guilt of the subject was slight, the act had no more than trifling consequences and punishment was not necessary to deter the subject from committing criminal offences. In giving the reasons for its decision the court recounted the facts of the assault, with no indication that these were the subject of challenge by the applicant (as they were) and ruled that the injury caused was insignificant, that “the fault ... of the accused may be described as insignificant” and that the character of the applicant “gives cause to expect that he will conduct himself properly in future”. On these facts the Court concluded that there was a criminal charge, although it was unnecessary (para 31 of the judgment) to determine the precise moment at which the applicant was charged, and that article 6 was engaged. But there was held to be no breach of the article, since the applicant had been in effect exonerated by the Supreme Court. In contrast with the present case, however, there were formal proceedings against the applicant in a criminal court; he was “the accused”; the proceedings could have culminated in his being punished, although in the event they did not; and there was a reasoned judicial decision which, on its face, found that he had committed an assault, although his fault was said to be minor. I do not think that *Adolf* is legally analogous to the present case.

17. The Divisional Court did not refer in their judgment to the cases of *Ibbotson*, *Adamson*, *Porter v Magill*, *Raimondo*, *B*, *McCann and S v Miller*, most of which, I am told, were cited to them. Thus the court did not allude to the weight of authority suggesting that the warning of R, following a firm decision that it was not in the public interest to prosecute him and in circumstances where R was exposed to no possibility of punishment but was the subject of measures designed to promote his welfare, did not involve the determination of a criminal charge. What weighed with the court appears from para 36 of the judgment:

“36 Prima facie, therefore, the claimants were entitled to a fair trial of the allegations made against them attended by all the guarantees which are required by the Convention. There is, however, no doubt that that is not an absolute right. The police would have been entitled to decide not to prosecute and discontinue the proceeding: see *Deweer’s* case, at pp 460-461, para 49. But that is not what happened in the present case. Although the decision was taken not to prosecute, the claimants were required to subject themselves to a procedure which had the effect of publicly pronouncing their guilt of the offence of indecent assault. That was the consequences of the final warnings being recorded on the PNC, so that the fact of the final warnings became available not only in the event of future offending, but also to all those who have access to the PNC. It seems to us that these consequences prima facie constituted a breach of article 6(1) and (2). The claimants were denied a right to a trial of the charges against them, and declared guilty by an administrative process.”

This conclusion reflected the submission made on behalf of R, as recorded in para 33, that the scheme resulted in what was in effect a public declaration of guilt by an administrative process and so breached article 6(1), the right to a fair trial, and 6(2), the presumption of innocence. But the recording of the warning on the PNC is far from a public announcement or declaration of guilt. Access to it is limited to a relatively small number of authorised police, prison service and probation officers, and a small number of agencies with a need to have access for the proper performance of their public functions. Access to the Sex Offenders Register is similarly controlled and limited. In neither case do members of the public have access, and in both the availability of this information to authorised persons for the prevention of crime has been judged to serve the public interest.

18. Counsel for R drew the attention of the House to concerns expressed by the Joint Committee on Human Rights (“Scrutiny of Bills: Further Progress Report”, Twelfth Report of Session 2002–03, HL Paper 119, HC 765, paras 2.26–2.37) at the registration requirements imposed on young offenders reprimanded or warned for sex offences, and to that Committee’s approval of the Divisional Court’s decision in this case. He also drew attention to article 40(2)(b)(iii) and (v) of the

United Nations Convention on the Rights of the Child, 1989. This provides:

- “(b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees:
 - (iii) To have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law ... ;
 - (v) If considered to have infringed the penal law, to have this decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law; ... ”

The Convention, however, continues in article 40(3)(b) and (4):

- “(3) States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognised as having infringed the penal law, and, in particular,
 - (b) Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected.
- (4) A variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.”

19. For all the reasons I have given, I am of the clear opinion that neither the warning of R nor the decision to warn him involved the determination of a criminal charge against him. Had they done so, as the appellants acknowledged, there would have been no valid waiver by him of his fair trial right. But as it was, his fair trial rights were not engaged.

It was not argued, and I would not in any event accept, that the obligation to register under the 1997 Act for 2½ years was disproportionate. Nor was there any breach of the spirit or the letter of the Convention on the Rights of the Child. Sections 65 and 66 of the 1998 Act were not establishing a system of criminal trial and punishment to be administered by policemen. They were aiming to keep first-time young offenders like R out of court while seeking to prevent future offending in their own interests and that of society. They involved no breach of article 6.

20. I mention briefly two points raised in the Divisional Court although not the subject of decision and not pursued in oral argument before the House:

- (1) It was said that some of the measures imposed on R interfered with R's article 8(1) right to respect for his private life. I am willing to accept, without deciding, that they did or may have done. But, for reasons similar to those given by the Divisional Court in *R (M) v Inner London Crown Court*, above, and by the House in *R (S) v Chief Constable of the South Yorkshire Police*, above, I have no doubt that they were in accordance with the law, pursued a legitimate aim and were necessary in a democratic society in the interests of public safety, the prevention of disorder or crime, the protection of health or morals or the protection of the rights and freedoms of others.
- (2) It was said that sections 65 and 66 discriminated unjustifiably against young offenders since the sections did not apply to adults, who could refuse to be cautioned and who, if cautioned and later convicted, could be conditionally discharged with no restriction on the convicting court's power to discharge conditionally. Counsel for R were wise to abandon this contention. Children and young persons are, *ex hypothesi*, immature, and so liable to be more vulnerable than adults and more amenable to education, training and formative influences. That is why statutes habitually distinguish between children and young persons on the one hand and adults on the other. It is unnecessary to explore the differences between the regime for reprimanding and warning young offenders and that for cautioning adult offenders, itself the subject of recent change, since the importance of diverting offenders from a life of crime at a very early stage is even greater and more urgent in the case of young than of adult offenders and can readily justify such differences as there are. Moreover, in the case of an adult, the question of who should give any consent does not arise.

21. I would allow these appeals and quash the order of the Divisional Court. R is now aged 18, and no further order is called for. If the parties wish to make written submissions on costs they should do so within 14 days.

LORD STEYN

My Lords,

22. I share the misgivings about the disposal of this appeal which have been so carefully explained by my noble and learned friend Baroness Hale of Richmond. I agree with the opinion of Baroness Hale. I too do not press my doubts to a dissent. Reluctantly, I too assent to the order proposed by my noble and learned friend Lord Bingham of Cornhill.

LORD RODGER OF EARLSFERRY

My Lords,

23. I have had the advantage of considering the speech of my noble and learned friend, Lord Bingham of Cornhill, in draft. For the reasons he gives I too would allow the appeals and quash the order of the Divisional Court.

BARONESS HALE OF RICHMOND

My Lords,

24. It is in everyone's interests that children should be brought up to be decent law-abiding members of society. Both national and international law recognise that the criminal justice system is part of that process of bringing them up. The straightforward retributive response which is proper in the case of an adult offender is modified to meet the

needs of the individual child. In national law, this is still reflected in section 44(1) of the Children and Young Persons Act 1933:

“Every court in dealing with a child or young person who is brought before it, either as an offender or otherwise, shall have regard to the welfare of the child or young person and shall in a proper case take steps for removing him from undesirable surroundings, and for securing that proper provision is made for his education and training.”

25. In international law, it is clearly stated in the *United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules)* 1985, rule 5:

“The juvenile justice system shall emphasise the well-being of the juvenile and shall ensure that any reaction to juvenile offenders shall always be in proportion to the circumstances of both the offenders and the offence.”

The notes explain that the first objective of juvenile justice is the promotion of the well-being of the juvenile, whether or not they are dealt with in family courts or the criminal justice system. The second objective, the principle of proportionality, aims to limit what might otherwise be the excessive interventions motivated by the welfare principle.

26. The Beijing Rules are not binding on Member States, but the same principle is reflected in the *United Nations Convention on the Rights of the Child* 1989 (UNCRC), which has been ratified by all but two of the Member States of the United Nations. This is not only binding in international law; it is reflected in the interpretation and application by the European Court of Human Rights of the rights guaranteed by the European Convention: see, for example, *V v United Kingdom* (1999) 30 EHRR 131; to that extent at least, therefore, it must be taken into account in the interpretation and application of those rights in our national law. Article 3.1 of the UNCRC provides:

“In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law,

administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”

Two other articles are particularly relevant to the criminal justice system. Article 37 deals with cruel punishments and deprivation of liberty:

“States Parties shall ensure that:

- (a) no child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;
- (b) no child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;
- (c) every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child’s best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;
- (d) every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.”

Article 40 deals with the criminal justice system generally:

- “1. States Parties recognise the right of every child alleged as, accused of, or recognised as having infringed the penal law to be treated in a manner

consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.

2. To this end, and having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that:
 - (a) no child shall be alleged as, be accused of, or recognised as having infringed the penal law by reason of acts or omissions that were not prohibited by national or international law at the time they were committed;
 - (b) every child alleged as or accused of having infringed the penal law has at least the following guarantees:
 - (i) to be presumed innocent until proven guilty according to law;
 - (ii) to be informed promptly and directly of the charges against him or her; and, if appropriate, through his or her parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of his or her defence;
 - (iii) to have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best interest of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians;
 - (iv) not to be compelled to give testimony or to confess guilt; to examine or have examined adverse witnesses and to obtain the participation and examination of witness on his or her behalf under conditions of equality;

- (v) if considered to have infringed the penal law, to have this decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law;
- (vi) to have the free assistance of an interpreter if the child cannot understand or speak the language used;
- (vii) to have his or her privacy fully respected at all stages of the proceedings.

3. States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognised as having infringed the penal law, and, in particular:

- (a) the establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law;
- (b) whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected.

4. A variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.”

27. Of particular relevance to this case are article 40.3 and 40.4. Article 40.3 encourages measures for dealing with children alleged as, accused of or recognised as having infringed the criminal law without resort to judicial proceedings, ‘providing that human rights and legal safeguards are fully respected’. Article 40.4 encourages educational and

welfare based community disposals ‘to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence’. But this has to be read alongside article 40.1, which recognises the child’s right to be treated ‘in a manner consistent with the promotion of the child’s sense of dignity and worth, which reinforces the child’s respect for the human rights and fundamental freedoms of others’.

28. This focus on prevention and diversion is reinforced by the *United Nations Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines)* 1990. The fundamental principles emphasise that ‘Young persons should have an active role and partnership within society and should not be considered as mere objects of socialisation or control’ (I.3); delinquency prevention policies should ‘avoid criminalising and penalising a child for behaviour that does not cause serious damage to the development of the child or harm to others’ (I.5); and that official interventions should be ‘pursued primarily in the overall interest of the young person and guided by fairness and equity’ (I.5(c)).

29. There can be no doubt, therefore, that constructive diversion policies and practices are thoroughly consistent with the fundamental principles of all these international instruments. However, diversion is not to be bought at the cost of basic fairness to the child. The child is a human being, not a mere object of social control. As Dame Elizabeth Butler-Sloss memorably put it in her Report on *Child Abuse in Cleveland 1987*, ‘the child is a person and not an object of concern’. Children will not be brought up to obey the law and respect the rights of others if they perceive that the system is treating them arbitrarily or unfairly. The fundamental issue in this appeal is whether it is fair to subject a child to a formal diversion process with mandatory legal consequences without first obtaining his informed consent.

30. The high water mark of the welfare-based approach to juvenile offending in the United Kingdom was the introduction of the Scottish children’s hearing system under the Social Work (Scotland) Act 1968 (and now contained in the Children (Scotland) Act 1995). This diverts children from the criminal justice system into a specialist child care system which also caters for children who have been ill-treated or neglected or present other causes for concern. The 1968 Act was followed in England and Wales by the Children and Young Persons Act 1969 which as originally designed would have replaced the prosecution and punishment of children under 14 with care proceedings where only welfare disposals were possible and restricted the prosecution of young

persons of 14 but under 17. This aspect of the scheme was never brought into force. But the Act also replaced most of the overtly punitive disposals for the younger offenders with supervision, with or without intermediate treatment requirements, and care orders. These were administered by local social services departments, along with the services they administered for other children in need, rather than by the probation and prison services.

31. Combined with this more welfare based approach to court disposals was an increased emphasis on dealing with children without taking them to court at all. The police caution was part of this approach. At first this was a matter of local policy or discretion, with each police force developing its own criteria. However, Watson and Austen, in *The Modern Juvenile Court*, 1975, p 80, suggest that most forces would caution only if the juvenile freely admitted the offence; his parents were content with the admission, agreed to his being cautioned and appeared co-operative; enquiries revealed no grave social or psychological problems in his background; and the complainant was willing to leave matters to the police. Some also added that the offence must be capable of being proved in court and that if there were two or more offenders they should all be dealt with in the same way: one of the problems with a welfare-based approach is that children who have committed the same offence may be dealt with in different ways.

32. The Home Office first gave guidance in Home Office Circular No 70/78, *The Citing of Police Cautions in the Juvenile Courts*. This pointed out that an increasing proportion of children and young persons were being dealt with in this way: in 1976, of all children found guilty or cautioned for indictable offences, 65% were cautioned; the corresponding figure for young persons was 35%. All those responsible for treating young people in the juvenile courts now thought that these cautions should be cited if the juvenile later appeared in court for another offence. That being so, there was a need for uniformity in the criteria adopted in deciding to caution. There already was a high degree of consistency in these: that the evidence available was sufficient to support a prosecution; that the juvenile admitted the offence; and that his parent or guardian agreed to a caution being administered. If these three conditions were met, the decision to caution would take into account the background of the offender; the gravity of the offence; the wishes of the aggrieved person; and any recommendations of social services and other agencies. The need for close working liaison with local social services departments was stressed. Many forces already had juvenile liaison bureaux for that purpose.

33. The same criteria were repeated, with some refinements, in the three circulars which followed. Home Office Circular 14/1985, *The Cautioning of Offenders*, dealt separately with the cautioning of juveniles and adults. Juveniles should not be prosecuted unless it was absolutely necessary. But there was also a concern that cautioning led to 'net-widening' with more juveniles being drawn into the formal system than was necessary. Hence cautioning should not be used unless the circumstances of the case were sufficient to justify it. An informal word of advice or warning might be more appropriate. The minimum criteria were as before: that the evidence complied with the Attorney-General's guidelines on criteria for prosecution; that the juvenile admitted the offence; that it was not enough that he admitted all or some of the facts, he should recognise his guilt; and that his parent or guardian consented, having had explained to them that a record would be kept, that it might influence the decision to prosecute if the juvenile offended again, and that it might be cited in court. If those criteria were met, a quick decision to caution should be possible if both the offence and the offender's record were not serious. Otherwise the police might wish to consult other agencies and should take into account the interests of the aggrieved party, the offender's circumstances, and the need for consistency with others in a group of offenders, although this should not prevent consideration of each on an individual basis.

34. Research by the University of Birmingham however revealed that there were uncertainty and wide variations in the use of 'no further action' and informal warnings rather than formal cautions. There was also concern about the use of multiple cautions, although their use was less than was often claimed. Hence Home Office Circular 59/90, *The Cautioning of Offenders*, laid down national standards for cautioning both juvenile and adult offenders. These included the same three minimum criteria of sufficiency of evidence, admission of guilt and informed consent. If a person met the first two criteria but refused consent to a caution, prosecution need not be the only realistic option, particularly if the offender was thought to be in need of help. The circular went on to elaborate upon the public interest considerations and the views of the victim, to be taken into account if the first two criteria were met. It drew a distinction between formal cautions, formally recorded and cited in any later proceedings; instant cautions, administered very soon after the offence and without consultation; informal warnings or cautions, where the criteria were met, but which would not be recorded or cited in court; and no further action, when even this was not thought appropriate. Once again, in cases of doubt, the police might wish to consider consulting the juvenile liaison panels established in some but by no means all forces. The effectiveness of cautions was likely to be enhanced if they were backed up by

arrangements for referral to appropriate agencies of voluntary organisations for support, guidance or involvement in the community.

35. This guidance was highly effective in keeping children out of the criminal justice system: in 1993, 90% of boys and 97% of girls were diverted from court through police cautioning: see L Gelsthorpe and A Morris, “Much ado about nothing – a critical comment on key provisions about children in the Crime and Disorder Act 1998” (1999) 11 CFLQ 209, at 210. The national standards were slightly revised and reissued with Home Office Circular 18/1994, *The Cautioning of Offenders*, which again dealt with juvenile and adult offenders together. This was the beginning of a tightening up process, for example emphasising that ‘Nor does the presumption in favour of diverting juveniles from the courts mean that they should automatically be cautioned, as opposed to prosecuted’. There was concern that the cautioning system was being brought into disrepute, first by using it for really serious offences even including attempted murder and rape, and second by the use of multiple cautions. More than one caution should only be considered where the second offence was trivial or there was a sufficient time lapse since the first to suggest that it had had some effect. Nevertheless, the general principles were essentially unchanged, as were the three minimum criteria for a formal caution.

36. Several features emerge clearly from these circulars. We see a developing encouragement of the use of cautions, not only for juvenile but also for adult offenders; an explicit policy that juveniles should not be prosecuted unless this was necessary; the encouragement of consultation with and referral to other agencies, but no formal link between cautioning and more constructive interventions to help the young offender change his ways. But we also see a consistent requirement that the offender admit his guilt and that his parent or guardian consent to the caution being administered. The context for this was an explicit recognition of a ‘do nothing’ option which had no further consequences, whereas the caution would be recorded and cited in court. We also see a requirement that there be sufficient evidence to warrant a prosecution. This too is an important safeguard against the danger inherent in all formal diversion schemes: the pressure, whether implicit or explicit, which is put upon the young person to ‘admit it and we’ll let you off with a caution’. Explicit pressure would invalidate the admission and thus the caution: see *R v Commissioner of Police of the Metropolis, ex parte Thompson* [1997] 1 WLR 1519. But the implicit pressure is always there.

37. Thus the provisions of the 1998 Act were not a brand-new diversionary scheme which leapt onto the statute book with the brand-new aim of diverting children away from a life of crime. They were, as is clear from the Home Office Consultation Paper, *Tackling Youth Crime, 1997*, and White Paper, *No More Excuses – A New Approach to Tackling Youth Crime in England and Wales, 1997*, Cm 3809, a very considerable toughening up upon what had gone before. They put what had previously been left to variable police practice on a statutory footing. Formal action could only be taken under the statute; the 2000 and 2002 Guidance, paras 12 and 4.1, make clear that there will remain only very limited discretion to take informal action; the statutory scheme itself limited the number of times there could be resort to formal reprimands and warnings thus catapulting repeat offenders into the courts much earlier than previously; the immediate consequences of these formal processes were also expanded – the options for the court should the offender later be prosecuted for another offence were reduced; in addition to finger-printing and recording on the police national computer, there was the possibility of a requirement to notify one's whereabouts to the Sex Offenders Register.

38. It is also worth bearing in mind what would face these children once they got to court. The welfare based disposals of the 1969 Act had by now been replaced with a much more specifically punitive range of sentencing criteria and disposals, including custodial sentences, the use of which has rocketed in recent years. Thus the Joint Committee on Human Rights, in its report on *The UN Convention on the Rights of the Child*, Tenth Report of Session 2002-2003, HL Paper 117, HC 81, para 39, points out that on 31 January 2003 there were nearly 3000 children under 18 locked up in England and Wales, almost twice as many as ten years ago, during a period when recorded offending by children had been in decline. On the other hand, the new scheme was linked to a much more systematic system of constructive intervention through referral to the Youth Offending Team, and might well involve a restorative conference enabling the young offender to understand the impact of the offence upon his victim and to make amends. A reprimand or warning was no longer just a diversion *away* from the criminal courts but also a diversion *towards* something which might do some good.

39. Set against the consistent approach in the previous circulars, the lack of any requirement for the consent of either the child or his parent, guardian or other appropriate adult is striking and must have been deliberate. It appears inconsistent with rule 11 of the *Beijing Rules*:

“11. Diversion

- 11.1. Consideration shall be given, wherever appropriate, to dealing with juvenile offenders without resorting to formal trial by the competent authority, referred to in rule 14.1 below.
- 11.2. The police, the prosecution or other agencies dealing with juvenile cases shall be empowered to dispose of such cases, at their discretion, without recourse to formal hearings, in accordance with the criteria laid down for that purpose in the respective legal system and also in accordance with the principles contained in these Rules.
- 11.3. Any diversion involving referral to appropriate community or other services shall require the consent of the juvenile, or her or his parents or guardian, provided that such decision to refer a case shall be subject to review by a competent authority, upon application.
- 11.4 In order to facilitate the discretionary disposition of juvenile cases, efforts shall be made to provide for community programmes, such as temporary supervision and guidance, restitution, and compensation of victims.”

40. Professor Geraldine Van Bueren, in *The International Law on the Rights of the Child*, 1998, at p 174, suggests that it is also inconsistent with article 40(3)(b) of the UNCRC:

“Diversionary methods can only be implemented in a manner consistent with a child’s human rights and legal safeguards. Consequently it is a fundamental principle of diversions that referral to appropriate community or other services should require the consent of the child and where appropriate the consent of his parents or guardians.”

41. This issue was not addressed by the Joint Committee on Human Rights in their report on the UN Convention on the Rights of the Child. This is not surprising, because they were addressing the concerns raised by the UN Committee on the Rights of the Child when examining the UK’s compliance with UNCRC based on the UK’s 1999 report. The 1997 and 1998 Acts were only just on the statute book and hardly

mentioned in that report. But the issue is addressed in the Joint Committee's Twelfth Report of Session 2002-03, *Scrutiny of Bills: Further Progress Report*, HL Paper 119, HC 765; this draws special attention to the Sexual Offences Bill, including the mandatory period of notification to the police of young sexual offenders. The Committee points out that this requirement is within the ambit of UNCRC article 40.1, requiring States parties to recognise the right of children who have violated the penal law to be treated in a way which takes account of their age, and article 40.4, providing that the dispositions available for dealing with young offenders should aim to ensure that children are dealt with 'in a manner proportionate both to their circumstances and the offence'. The Committee was not satisfied that the automatic one year notification requirement following a reprimand or final warning would always be a fair and proportionate result (para 2.33). Their concern was 'somewhat eased' by the decision of the Divisional Court in this case, which required informed consent to be given in full knowledge of the consequences (paras 2.34 to 2.36).

42. For these reasons, I have grave doubts about whether the statutory scheme is consistent with the child's rights under the international instruments dealing with children's rights. The rigidity of the scheme undermines the emphasis given to diverting children from the criminal justice system, propels them into it and on a higher rung of the ladder earlier than they would previously have arrived there, and thus seriously risks offending against the principle that intervention must be proportionate both to the circumstances of the offender and of the offence.

43. There is also a risk that it is arbitrarily applied in the individual case. This particular case was not handled in the most sensible way. In particular, the failure to tell the child and his step-father the full consequences of the warning, including the sex offender registration requirement, obviously upset them both and left them with a considerable sense of injustice. They are also concerned that the record on the police national computer does not accurately reflect the admissions made. Any educational benefit to be gained from diversion is severely jeopardised if the offender feels unjustly treated. We are also told that no further steps were taken by the Youth Offending Team to work with the child in ways which might have helped him to see why his conduct was unacceptable and to engage with girls in a more sensible and ultimately more successful way.

44. But that does not mean that it was in breach of the child's rights under the European Convention on Human Rights. These are less extensive than his rights under UNCRC, although the European Court would undoubtedly take those rights into account when interpreting and applying articles 6 and 8 in this case. The parties are agreed that the child did face a criminal charge for the purpose of article 6 at the time when he was given the warning. He had not been formally charged, but he had been arrested, interviewed under caution and bailed to return. Neither the Secretary of State nor the Durham Police wish to withdraw that concession in the light of the decision of this House in *Attorney General's Reference (No 2 of 2001)* [2003] UKHL 68; [2004] 2 AC 72. We should, therefore, approach the case on the basis that the child was facing a criminal charge.

45. Did it cease to be a criminal charge when the police decided not to prosecute? If there were no further consequences from a decision not to prosecute, that would obviously be so. Police and prosecuting authorities drop charges every day and it would make little sense for the person charged to be able to insist on a public determination of the issue: see *X v United Kingdom* (1979) 17 DR 122. But reprimands and final warnings do carry consequences. Individually each of these can be explained away as preventive rather than punitive. Cumulatively, however, they amount to a considerable modification of the child's legal status. He and many others might consider it punitive. He faces a higher penalty should he offend again, he must notify the police of his whereabouts for some time, and his details are on a computer to which a very large number of people have access, albeit under carefully controlled circumstances. This is not the public pronouncement of guilt which the Divisional Court thought it to be, but it is the widespread dissemination of the knowledge of that guilt. Had it indeed had the effect of 'publicly pronouncing his guilt', I would have found it difficult not to regard it as the determination of a criminal charge. The domestic characterisation of a measure as preventive rather than punitive cannot always be the end of the story. Nor can the perception of an offender and his family that he is being punished, as well as being helped, be completely irrelevant to the interpretation of an autonomous Convention concept.

46. However, as there was no public pronouncement of guilt, was there a 'determination' of the charge? Two important decisions were made in this case. The first was the child's decision to make the admissions he did. The second was the police officer's decision to administer a final warning rather than to prosecute him. It is good for children to learn to take responsibility for their actions: that is part of

growing up to be responsible members of society. It is therefore good for children to 'own up' when they have done wrong. But it is absolutely vital that children's admissions, like adults', should be voluntary and reliable. Corners should not be cut just because the offender is a child. They must not be under any pressure to 'admit it and we'll let you off with a caution'. In essence that is why the case of U, which was decided together with this, was successful in the Divisional Court and there has been no appeal. His case, like the earlier case of *R v Commissioner of Police for the Metropolis, ex parte P* [1996] 3 Admin LR 6, demonstrates that judicial review can be an effective safeguard in such cases.

47. Once a reliable admission has been made, however, the decision whether or not to prosecute is for the authorities rather than the accused. It is not clear to me why, in principle, the accused should have any voice in the matter, as long as the consequences of a decision not to prosecute do not amount to a penalty. Indeed, it is not clear to me why there should be any distinction drawn between adults and children in this respect. The willingness of the offender to participate in diversionary programmes is obviously relevant to whether or not it would be appropriate to prosecute, but it is clear that he cannot be compelled to do so, nor are they likely to work if he is. The requirement of consent in rule 11.3 of the Beijing Rules (para 16 earlier) specifically relates to 'any diversion involving referral to appropriate community or other services'.

48. For those reasons, it seems to me that the point at which it is important to be clear that the child is a volunteer is when he is asked to admit the offence or to participate in a rehabilitation programme. Sensibly, the revised guidance now requires that the child and his parents, carers or other appropriate adult have access to information about the options available including the final warning scheme and its consequences before they are asked whether they admit the offence: see *Final Warning Scheme: Guidance for the Police and Youth Offending Teams*, 2002, para 4.14.

49. As things stand, therefore, although not without considerable misgivings because of the potentially serious effects upon the child's future, I have reached the conclusion that this aspect of the scheme is compatible with the child's Convention rights and that these appeals should be allowed.

LORD BROWN OF EATON-UNDER-HEYWOOD

My Lords,

50. I have had the advantage of considering the speech of my noble and learned friend, Lord Bingham of Cornhill, in draft. For the reasons he gives I too would allow the appeals and quash the order of the Divisional Court.