

CO/1492/2007

Neutral Citation Number: [2008] EWHC 1442 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2A 2LL

Thursday, 3 April 2008

B e f o r e:

LORD JUSTICE LAWS

Between:

THE QUEEN ON THE APPLICATION OF SL

Claimant

v

COMMISSIONER OF POLICE FOR THE METROPOLIS

Defendant

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(Official Shorthand Writers to the Court)

Miss A Byrnes (instructed by Saunders) appeared on behalf of the Claimant

Mr M Holdcroft (instructed by DLS Metropolitan Police) appeared on behalf of the Defendant

J U D G M E N T
(As Approved by the Court)

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109. LORD JUSTICE LAWS: This is an application for relief by way of judicial review to challenge a decision of the Commissioner of Police for the Metropolis ("the respondent") not to amend the particulars contained in an Enhanced Criminal Record Certificate ("ECRC") which was issued by the Criminal Records Bureau ("CRB") to prospective employers of the claimant ("SL"). Judicial review permission was granted by Mr Justice Underhill on consideration of the papers on 20 April 2007.

109. An ECRC is a statutory term of art. The statutory provisions [set out in the Police Act 1997], leaving aside the Human Rights Act 1998 which are material to this application, are as follows:

"113B (1) The Secretary of State must issue an enhanced criminal record certificate to any individual who -

(a) makes an application *in the prescribed manner and form*, and

(b) pays in the prescribed manner any prescribed fee.

(2) The application must -

(a) be countersigned by a registered person, and

(b) be accompanied by a statement by the registered person that the certificate is required [for the purposes of an exempted question asked] for a prescribed purpose.

(3) An enhanced criminal record certificate which -

(a) gives the prescribed details of every relevant matter relating to the applicant which is recorded in central records and any information provided in accordance with sub-section (4), or

(b) states that there is no such matter or information.

(4) Before issuing an enhanced criminal record certificate the Secretary of State must request the chief officer of every relevant police force to provide any information which, in the chief officer's opinion -

(a) might be relevant for the purpose described in the statement under sub-section (2), and

(b) ought to be included in the certificate."

109. SL is a 54-year old homosexual male of good character. Since at least 1982 he had a partner called Gary Irvin. Gary Irvin was his partner at the time of the facts and events relevant to this application. I am told by Miss Byrnes this morning, and I have no reason to doubt the assertion, that they are together no longer. That may be relevant to any course of action to be taken in the future by the Commissioner in the light of this judgment.

109. Mr Irvin was employed by the Post Office. In March 2002 he and SL were arrested on suspicion of conspiracy to commit fraud. At length, no action was taken against SL. Indeed Miss Byrnes is at pains to point out that he was not even charged. Mr Irvin was prosecuted to conviction, as I understand it, for an offence or offences of false accounting. In January 2005 he was sentenced to 4 years' imprisonment.
109. In the course of the investigation a computer apparently belonging to Mr Irvin located at the house he shared with SL was interrogated. Pornographic material was found, not, I understand, on the computer but on discs. It consisted of 10 indecent images of children. However those images were among a very much greater amount of adult pornography on the discs, and Mr Irvin was to tell the police that he downloaded the adult material but did not know that the images of children were amongst those. There was also a video which contained some scene or scenes of a child or children in some kind of sexual position; but this seems to have been in the nature of a trailer to an adult pornographic piece of material which presumably formed the greater part of what was on the video.
109. In July 2002 Mr Irvin was cautioned for possessing an indecent photograph of a child and subjected to the requirements of the Sexual Offences Act 1997, the so-called sex offenders register. Those acts, the caution and the subjection to the statutory requirements, were applied solely in relation to the video of which he had been found in possession.
109. No charges as such were brought and no action of any kind was taken as regards this sexual material against SL.
109. In connection with the fraud investigation, SL was interviewed by the police. Before that was done he was asked if he was taking any medicine. He confirmed that he was taking anti-depressants. At the behest of the police he was assessed by a doctor who advised that he was fit to be interviewed but that an appropriate adult should be present.
109. SL has been a qualified teacher for some 30 years. For 10 years or so he worked for the London Ambulance Service; otherwise his whole working life has been as a teacher. He has served as a magistrate in the Youth Court. In early 2006 he applied for a teaching post in Brighton to an agency by the name of International Teachers Network Ltd. As I understand it, he received a conditional offer of employment. In the context of this application, in March and June 2006 application was made pursuant to Section 113B of the Police Act 1997 for an ECRC.
109. The decision as to what, if any, information might be relevant under the statute and so might be disclosed in such a certificate was delegated by the Commissioner to Mr Graham Morris, a former chief superintendent, now employed by the Operational Information Service. Mr Morris' statement dated 17 March 2008 is before the court. He has considered a very large number of ECRC applications and has developed what he calls a "decision making framework" (see his witness statement paragraph 2) which takes account of legislation, case law and the guidance contained in Home Office Circular 5/05.
109. The ECRC which was first produced and delivered to SL's prospective employers was dated 6 July 2006. Following a challenge by SL by means of a complaints procedure established through the Criminal Records Bureau, amendments were made on 1 August

2006 and 10 October 2006. The document in its final form dated 10 October 2006 is headed "other relevant information disclosed at the Chief Police Officer's discretion". It contained this information:

"The Metropolitan Police Service holds information concerning SL, born 7 October 1952, which might be relevant to this application:

In March 2002 SL was arrested with his business and relationship partner, with whom he lived, for conspiracy to commit fraud. SL was unable to be interviewed initially as he stated he was suffering from depression and anxiety. Following a medical examination it was established that he could be interviewed in the presence of an 'appropriate adult'.

During the fraud investigation indecent images of children were discovered on a computer belonging to SL's partner, and as a result a search warrant was issued under the Protection of Children Act, and their home was searched. A pornographic video of young boys was found.

Mr Gary Irvin, born 29 July 1957, whom police believe is the partner of SL may visit the address. Mr Irvin was imprisoned for four years in January 2005 for false accounting and in July 2002 was cautioned for possessing an indecent photograph or pseudo-photograph of a child. He is a registered sex offender.

No action was taken against SL in relation to either the fraud or the video.

This information has been released to enable a risk assessment to be made of a child or vulnerable person attending associated school activities to which Mr Irvin may have access."

109. It is common ground between the parties that given the material terms of the Police Act 1997 the first question is whether the defendant acted reasonably in concluding that the information contained in the revised ECRC might be relevant for the purpose of considering SL's suitability for a position involving regularly caring for, training, supervising or being in sole charge of young people aged under 18. That formulation, not least the words "might be relevant", is derived from the statute itself.
109. The application of these provisions or their unamended predecessor provisions, and indeed their link with the right to respect for private life guaranteed by Article 8 of the European Convention on Human Rights, was considered by the Court of Appeal in X v Chief Constable of West Midlands Police [2004] EWCA Civ 1068, [2005] 1 WLR 65. The case turned largely on its own facts. In briefest summary, the court opined that once the chief constable concluded that material might be relevant within the meaning of the sub-section, he was obliged to disclose it absent a good reason to the contrary; and the claimant's Article 8 rights were not violated given a clear public interest in making the disclosure.
109. The matter was further considered by the Court of Appeal in L v Commissioner of Police for the Metropolis and Another [2007] EWCA Civ 168 in which Lord Justice Longmore, with whom Lady Justice Smith and Lord Justice Moore-Bick agreed, said:

"27 The arguments under this head began with the proposition that any alteration by Parliament to the common law should be strictly construed, that before the 1997 Act the burden was on the police to justify any disclosure beyond the formal criminal record and that such disclosure was only justified if necessary for the protection of a member of the public who might otherwise become the victim of crime and who might be in need of protection. These propositions were said to derive from R v Chief Constable of North Wales Police ex parte Thorpe [1999] QB 396 and R v Local Authority in the Midlands ex parte LM [2000] 1 FLR 612.

28 It cannot be emphasised too strongly that this approach is entirely wrong. In the first place it is self-evident that Parliament intended to alter the common law position (whether consciously or otherwise is irrelevant) because the common law presumption against disclosure of relevant information has been turned on its head. If the information is, in the opinion of the relevant Chief Officer of Police, relevant and ought to be disclosed, then the police are bound to disclose it. One cannot, in these circumstances, assume that other aspects of the common law were necessarily intended to be preserved; one must just construe the statute with the assistance of any permissible aid to construction. In the second place Lord Woolf CJ said in terms in X [2004] EWCA Civ 1068, [2005] 1 WLR 65 at para. 36 that to apply the previous authorities except with the utmost of caution could be misleading."

109. In the present case Miss Byrnes, for SL, said that the reasonable decision maker could not have concluded that the information contained in the final form of the ECRC might be relevant to his prospective employer's consideration of his suitability for the post for which he applied.
109. It is instructive to note how the disclosed information is actually categorised by Miss Byrnes. In her oral submissions this morning she asserted that there were four matters disclosed in the revised ECRC: (1) that SL was arrested for fraud; (2) that he suffered from depression and anxiety; (3) that indecent images of children were found on his partner's computer; and, (4) that the pornographic video was also discovered. It is said by Miss Byrnes that none of this material "might be relevant" to the prospective employers.
109. I think it is very important to emphasise, as is accepted by the defendant, that of itself SL's homosexuality is of no relevance in the case, and if it were the sole fact in question would certainly not be disclosable. But the whole basis of the defendant's consideration of the case consists in the possible impact of SL's relationship with Mr Irvin, a circumstance itself omitted from Miss Byrnes' summary of the disclosed information, though in the course of argument she confronted it.
109. Miss Byrnes laid some emphasis on the Home Office guidelines to which I have already referred in passing. I should read only parts of paragraphs 6, 9 and 10 as follows:

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• A decision on whether information should be disclosed will turn to a large extent on considerations of relevancy. But other facts need to be weighed too - in particular, whether the nature of the information and its degree of relevance to the case in hand are such that its disclosure would be reasonable and proportionate, having regard to the applicant's right to respect for his or her private life.

.....

9 But, so far as the police are concerned, information should only be disclosed if there is clear reason to believe that it might be materially relevant - ie, not fancifully, remotely or speculatively relevant but materially relevant. For example, information should not be disclosed on the basis that, although there is no apparent reason to believe that it is relevant, it could conceivably turn out to be

10 The mere fact that a person has behaved badly, or is believed to have done so, is not relevant. The key purpose of disclosure is not a general 'character assessment' of the individual, but to consider the risk or likelihood of an offence being committed against the vulnerable. Therefore, information should not be provided unless it has a direct bearing on the matter in hand - ie, the job or position in connection with which the Disclosure is required

109. Miss Byrnes made a number of submissions as to the specific four points that she said were disclosed in the ECRC. She greatly objected to the reference to her client's arrest. She said that - apart from anything else - it was not made sufficiently clear that he was actually released without charge. She took exception to the other matters too. As regards the state of SL's mental health, she submitted that that was in no sense relevant to the proper consideration of the employment application. As regards the matters relating to sexual material, she had certain specific points to which I will come in a moment.
109. The defendant, by Mr Holdcroft, submits first of all that it is quite usual for teachers to involve their partners in extra-curricular activity with pupils. This is the basis on which it is said that there is a real, not a fanciful, risk that pupils at a school where SL is employed might come into contact with Mr Irvin. Miss Byrnes takes issue with this very strongly. She said there is no evidence for it. It seems to me that it is at least a possible, and by no means a fanciful, circumstance which the defendant was entitled to have in mind. These two persons were long-term partners - at any rate since 2002 - and it does not seem to me to accord with common sense to suppose that in some way SL's professional life would be hermetically sealed from his life at home. This is something which the defendant was entitled to consider.
109. Mr Holdcroft makes other points. As regards the paedophiliac material, he would say that speaks for itself. Moreover this is a man - that is to say Mr Irvin - who had been convicted of a very serious offence of dishonesty (as the length of the sentence demonstrates) and he was living with SL, as I have already indicated, during all the relevant events. SL's mental vulnerability, vouched by the requirement for the presence of an appropriate adult at his police interview, is really to be regarded as part and parcel of the context of his relationship with Mr Irvin, as is the fact that he was himself arrested

along with Mr Irvin for fraud.

109. There is certainly force in these submissions. But it seems to me that there are certain very troublesome aspects of the ECRC as it was finally drawn. It nowhere states that Mr Irvin had denied knowledge of the still pornographic images of children which were downloaded and found amongst a much greater quantity of adult pornography. No action of any kind was taken against Mr Irvin, let alone SL, as regards that material. And it may well be that it was thought that his explanation - he knew nothing of the child material - was thought, at any rate, to be possibly true.
109. The video containing child images was some kind of trailer, the primary content presumably being adult material; that is not referred to. The registration, as it is put, under the Sexual Offences Act 1997 related on the facts strictly and only to the video - that is not mentioned - and although Mr Holdcroft would say it is implicit and would be plain to the mind of any sensible person, for my part I am not so sure.
109. Those matters are left at least unclear in the ECRC. They seem to me to be of the first importance because they go to the weight to be attached to Mr Irvin's connection with child pornography. It is central to the proper exercise of the functions given by this Part of the Police Act that an ECRC be particularised, accurate and go no further than is strictly justified. The Home Office guidelines recognise as much. Plainly important individual rights arising under the European Convention on Human Rights may well be in play and, in short, the general law - quite apart from the Convention - would certainly insist on strict standards being maintained as to the accuracy of an ECRC being prepared and issued in circumstances like this.
109. I have concluded that this ECRC falls short of such a standard. I make it clear, as I did in the course of argument, that I do not find there could have been no ECRC at all lawfully issued on these facts. What I propose to do is to quash the existing ECRC. The Commissioner will then wish to consider whether to issue a fresh ECRC. He will want in particular to have in mind the observations I have made about the downloaded images, the video and the registration. He will also no doubt want to ascertain the position as regards the relationship between SL and Mr Irvin, to confirm or not whether it is at an end, and if it is he may well regard that as material to any action he takes hereafter. My decision has no greater reach than this: the terms of the existing ECRC are unsatisfactory and fail to comply with the standard which the law imposes for the reasons I have given.
109. Subject to any submissions by counsel, in addition to a quashing order it will be appropriate for me to declare that the ECRC in its present form is unlawful for want of clarity in relation to the downloaded images, the video and the registration. The purpose of such a declaration would be to enable Miss Byrnes to seek permission to appeal my judgment should she think fit to do so. Without the declaration she might be in difficulties because, on the face of it, she would have won the claim. Those are the forms of relief I apprehend will be appropriate. It goes without saying that it is obviously open to Mr Holdcroft to seek permission to appeal should he wish as matters stand. I am not suggesting that I am going to grant permission to anyone. It just seems to me, Miss Byrnes, that if you were to seek leave to appeal you should not be in any technical difficulty with the court coming along and saying, "You won the case. What are you beefing about?"

109. MISS BYRNES: I am grateful. I take it that your Lordship has concluded your judgment?
109. LORD JUSTICE LAWS: I have.
109. MISS BYRNES: There arises the issue of damages, your Lordship having found that the ECRC in this case was, in its present form, unlawful for want of clarity and having quashed the decision made by the defendant in this case. The situation in relation to damages and the legal framework is set out in my skeleton argument. In effect, the claimant seeks damages under two heads: first, pecuniary damages and, secondly, non-pecuniary damages pursuant to the breach which has occurred in relation to his Article 8 rights.
109. As far as pecuniary damages are concerned, the overview of the situation is this. You will be aware that by reference to his witness statement, and specifically paragraphs 13 and 14 at page 211, between July 2006 when the first application for employment with ITN (the agency) and May 2007 when he secured his current employment the claimant was out of work. He has, again by reference to his statement, sought to ameliorate his position by applying for many jobs, for some of which he did not receive interview and some of which he decided in the end not to proceed.
109. LORD JUSTICE LAWS: This is misconceived, is it not, because of the limited basis of my judgment? You are in no position to show that the specific defects of the ECRC which I have identified have caused any loss.
109. MISS BYRNES: In my submission it is perhaps not as plain as it might have been had the entire claim been successful. The fact of the matter is that on the basis of your observations the content and the form of the ECRC was unlawful.
109. LORD JUSTICE LAWS: If you like, to the extent that I have so held that is so. You have to recognise the reality of the position. My judgment is perfectly consistent with the Commissioner having issued lawfully a certificate that refers to all of these matters but in different terms. I would have thought it is impossible for you to establish that your client is in a worse position in pecuniary terms than he would have been if that had happened.
109. MISS BYRNES: It is difficult but the position remains that your Lordship has found that the terms of the certificate were, as far as the claimant is concerned, more prejudicial than any had been and should have been. And therefore it is likely to be difficult to prove in any circumstance.
109. LORD JUSTICE LAWS: I understand the argument.
109. MISS BYRNES: In respect of non-pecuniary damages, you will no doubt be familiar with the guidance issued by the House of Lords in Greenfield relating to damages for the Human Rights Act - - - -
109. LORD JUSTICE LAWS: That was referred to in somebody's skeleton argument somewhere. Was it yours?
109. MISS BYRNES: Yes. It is in my skeleton argument.

109. LORD JUSTICE LAWS: We had better have a look at that. Whereabouts in the skeleton argument?
109. MISS BYRNES: Page 72, internal page no. 9.
109. LORD JUSTICE LAWS: It is over the page, 73.
109. MISS BYRNES: Yes. That is the general section. Guidance in relation to Greenfield is set out at paragraph 28. Greenfield is copied behind tab 7d. In my submission the following points emerge: a domestic court may not award damages unless satisfied that it is necessary to do so, but if satisfied that it is necessary to do so it is hard to see how the court could consider it other than just and appropriate to do so.
109. What that is, in effect, is a reflection of the terms of Section 8 which require the court to consider what is described as just satisfaction where a Human Rights Act breach has been effected.
109. [As to] whether to do so is concerned, the court must consider whether the declaration or the relief already sought and granted is enough, in effect.
109. As to the amount, the court may have regard to European case law. That is not determinative of this issue.
109. In my submission the non-pecuniary aspect of this argument can be summarised in this way. The manner, the form in which this certificate has been issued, has been a matter of extreme frustration and distress to the claimant since he discovered it. My friend notes that the authorities to which I refer in my skeleton argument relate to publicised matters and Article 8 breaches of privacy. In my submission whilst that is not the case here, the position is in some ways worse for the claimant who has had to deal with this serious bar in the way of his professional and gainful employment. He has, since he discovered the contents of the certificate, endured extreme distress. The matters are set out at page 214 of the bundle. I think that rather than repeat or summarise it, you can see the situation.
109. LORD JUSTICE LAWS: Let me have another read of it. I have seen it.
109. MISS BYRNES: Paragraph 22. Would you mind passing your eyes over that?
109. LORD JUSTICE LAWS: I am doing so. (Pause) In the next paragraph it states that he has recently moved house.
109. MISS BYRNES: Yes. The impact of this and in particular his straitened financial circumstances have had a serious effect on his lifestyle. The content of his statement addressed both the pecuniary aspect of his claim for damages and the non-pecuniary aspect. In effect, what the claimant says is, "I have not been able to get a teaching job because of the contents of this ECRC. I have not been able to obtain a comparable job because these jobs require enhanced disclosure. The job that I have obtained is one for which I am over-qualified." (That is working for the Cats Protection League). "I cannot apply for promotion because that will of itself require enhanced disclosure." All of those matters have caused both pecuniary and non-pecuniary - - - -

109. LORD JUSTICE LAWS: Your claim for damages necessarily proceeds on the basis of there being a violation of Article 8.
109. MISS BYRNES: Yes.
109. LORD JUSTICE LAWS: Which I have not actually found.
109. MISS BYRNES: In my submission, your Lordship having found that the decision of the Commissioner not to amend the certificate - in effect quashing the decision not to amend the certificate - goes hand in hand with a finding that the decision led to an interference with the claimant's Article 8 rights.
109. LORD JUSTICE LAWS: It does not follow as night the day. It would depend on the case.
109. MISS BYRNES: In my submission this is such a case.
109. LORD JUSTICE LAWS: On the assumption that there is a violation of Article 8 here, or indeed more than an assumption I think, on the premise that there is such a violation, you say damages of both a non-pecuniary and a pecuniary nature flow given the guidance in Greenfield and the other authority that you set out in the skeleton argument.
109. MISS BYRNES: Yes. And the position is not as the defendant claims that the claimant has failed to mitigate his loss. On the contrary, he has tried to do everything he can to obtain employment but is unable to do so.
109. LORD JUSTICE LAWS: Thank you. I need not trouble you as regards damages, Mr Holdcroft.

R U L I N G

109. LORD JUSTICE LAWS: In light of the judgment I have just delivered, Miss Byrnes seeks damages for her client on the footing that my judgment discloses a violation by the defendant of his rights under Article 8 of the European Convention on Human Rights. I have not held there to be any such violation. I consider it would be a generous premise on which to proceed on the facts of this case. However out of respect for Miss Byrnes' argument, I will deal with this part of the claim on the basis that it is to be taken that there is a violation of Article 8.
109. The fatal difficulty which Miss Byrnes faces is that she cannot show that any pecuniary or non-pecuniary loss has been occasioned by the defects which I have found to exist in the existing form of the ECRC. The terms of my judgment are consistent with the Commissioner having issued an ECRC perfectly lawfully, but, in relation to the specific aspects I have discussed and described, in somewhat different terms. It seems to me quite impossible - everything else aside - for Miss Byrnes to show that her client would not have been in the same very difficult and unhappy position had that been done as in fact he finds himself, at any rate as it is described in his witness statement at paragraph 22. The claim for damages falls at the hurdle of causation.
109. Miss Byrnes has helpfully referred to guidance given in their Lordships' House

concerning damages and Article 8 in R v Secretary of State for the Home Department ex p Greenfield [2005] UKHL 14. Points upon which their Lordships have given assistance to lower courts are conveniently summarised by Miss Byrnes. The fourth [point] is:

"(iv) The European Court has repeatedly indicated that it will award monetary compensation under Article 41 only where it is satisfied that the loss or damage complained of was actually caused by the violation it has found. This includes general or non-pecuniary damage."

I am not able to be so satisfied in this case for reasons I have just given. Moreover I would not wish to be taken as deciding that even if the causation difficulty did not arise, just satisfaction would here require an award of damages given the narrow basis upon which Miss Byrnes has succeeded in her substantive application.

109. For those reasons it does not seem to me to be right to make an award of damages in the case. Is there anything else, Miss Byrnes?
109. MISS BYRNES: The issue of costs arises. It is not a particularly straightforward issue in this case for the simple reason that the claimant was legally aided until 18 March 2008 in respect of this matter. That certificate was discharged on that date.
109. LORD JUSTICE LAWS: Why?
109. MISS BYRNES: Because he was no longer financially entitled to it because of the employment which he had secured. Despite the fact that this is a hearing which is less than a day, we have not submitted a statement of costs. Before I deal with that, what I would invite your Lordship to grant is an order that the defendant pay the costs of the claimant here.
109. LORD JUSTICE LAWS: You should not have all of them, should you? You have only succeeded on a partial basis. You may be entitled to some costs.
109. MISS BYRNES: The position is that having issued a letter before action - a pre-action protocol letter - the defendant did effectively nothing. No substantive reply was received. The claimant has always tried to enter into a debate with the defendant as to the content of this ECRC to no avail.
109. LORD JUSTICE LAWS: I do not think you are going to submit that your client would have been satisfied if the defendant had offered to amend the certificate in the terms I have found should have been made.
109. MISS BYRNES: No, he would not have been. The fact of the matter is that this claim was based on an application for an order quashing this decision. That has been the order of your Lordship.
109. LORD JUSTICE LAWS: I will consider it after hearing Mr Holdcroft. What do you say should be done in relation to the fact that he was legally aided for part of the time?
109. MISS BYRNES: In respect of the time for which he was legally aided he is awarded the protection of Section 11 of the statute. What I would ask to be done is for a detailed

assessment of costs to be made.

109. LORD JUSTICE LAWS: Do I not make some order that reflects the fact he was legally aided for part of the time or not? Surely I do.
109. MISS BYRNES: I suppose in the circumstances - - I confess I have not been in this situation before. I am slightly feeling my way.
109. LORD JUSTICE LAWS: You are not alone, I suspect. Let us hear what Mr Holdcroft says.
109. MR HOLDCROFT: I say there should be no order as to costs.
109. LORD JUSTICE LAWS: What about if I think she should have some costs? What then?
109. MR HOLDCROFT: The difficulty on that is we are told today that Mr Irvin and the claimant may no longer be in a relationship.
109. LORD JUSTICE LAWS: Why is that relevant to the costs?
109. MR HOLDCROFT: It is relevant to the costs because today may have been an entirely unnecessary hearing. The defendant's stance has always been, as your Lordship has said right through the judgment, it is the relationship between the claimant and Irvin that has applied (?) to the certificate.
109. LORD JUSTICE LAWS: Are you suggesting that if you had been told earlier that Mr Irvin was off the scene you would have withdrawn the certificate or you might have withdrawn the certificate?
109. MR HOLDCROFT: We might have done.
109. LORD JUSTICE LAWS: You might have done, but I should think the Commissioner would want to consider - - - -
109. MR HOLDCROFT: I make clear we would have wanted to consider it. We would have required some sort of evidence from the claimant that there was no longer a relationship. But once satisfied that there was no longer a relationship that materially alters the position in relation to the claimant.
109. LORD JUSTICE LAWS: There is something in that.
109. MR HOLDCROFT: There is more than something in it because my Lord has also said in judgment that the certificate has been amended while representations have been made. Where representations have been made we have, to an extent, complied with that.
109. There has been no request that the form of this certificate be amended. The application has always been on the basis of the information contained within the certificate. My Lord has not said that the information contained in this certificate was handled improperly (?). My Lord has found it was insufficiently precise. Again that is an approach that had it been made may have met with considerable more sympathy, as I hope my Lord may have got from the fact that whilst in the course of my submissions to

you I suggested that my Lord make an order requiring us to amend the certificate. My Lord was not attracted by that.

109. LORD JUSTICE LAWS: That was only in answer to a question of mine. The premise was that Miss Byrnes was quite explicit to that extent.
109. MR HOLDCROFT: Absolutely. That is a premise that only started at about quarter-to-11 this morning.
109. LORD JUSTICE LAWS: It often happens.
109. MR HOLDCROFT: It does. The claimant's submissions neatly set out at paragraph 12 are all focussed on the information and not on the form of it. The claimant has not succeeded in relation to the information. There is been no approach to the defendant to tailor a certificate.
109. LORD JUSTICE LAWS: Perfectly fair. (To Miss Byrnes) Miss Byrnes has not told us - you may not have instructions - when this relationship came to an end.
109. MISS BYRNES: I am told that it came to an end in March 2007.
109. LORD JUSTICE LAWS: If that is right you certainly should have been telling the Commissioner. It may be none of us would have been here.
109. MR HOLDCROFT: That is plenty of time to have let the Commissioner know.
109. LORD JUSTICE LAWS: Miss Byrnes, do you want to say anything in reply?
109. MISS BYRNES: No.

R U L I N G

109. LORD JUSTICE LAWS: Miss Byrnes applies for costs. The case is unusual in a number of respects. The most important one is that her instructions today are that the relationship between SL and Mr Irvin, to whom I referred throughout the judgment, came to an end as long ago as March 2007. It seems to me that there is a great deal of force in Mr Holdcroft's submission that had the Commissioner been notified of that fact sometime shortly after it happened, it is very possible that he would have taken a wholly different view of the need to certify. It seems clear that that was not done.
109. In addition, the claimant was legally aided up to 18 March 2008.
109. Mr Holdcroft says that there should be no costs. I think that Miss Byrnes is entitled to a modest award of costs to reflect, in particular, the fact that the relationship has been at an end for such a long time. I propose to make an order that the claimant have 15 per cent of his costs subject to a detailed assessment, if not agreed.
109. As regards the legal aid position, Mr Holdcroft, can you help in relation to that? Do I need to make some special order in relation to the fact that he was legally aided until 18 March 2008?

109. MR HOLDCROFT: I do not think so.

109. LORD JUSTICE LAWS: No. I do not think I do. The order of the court is claimant's costs to be subject to a detailed assessment, if not agreed; 15 per cent of his costs.

109. MR HOLDCROFT: That is since presumably 18 March?

109. LORD JUSTICE LAWS: No.

109. MR HOLDCROFT: The entire costs of the claimant?

109. LORD JUSTICE LAWS: 18 March is the date when legal aid was withdrawn. Why should that have an impact on the costs order that I have made inter partes?

109. MR HOLDCROFT: So be it.

109. LORD JUSTICE LAWS: If there is some point, tell me. I am missing it presumably. I do not think there is. It is 15 per cent of all his costs of the claim to be subject to a detailed assessment, if not agreed. Are we clear? Thank you for your assistance.
