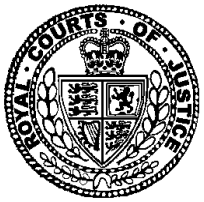

Neutral Citation Number: [2014] EWHC 1436 (Admin)

Case No: CO/7905/2012

**IN THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**
**ADMINISTRATIVE COURT**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/05/2014

**Before** :

**MR JUSTICE FOSKETT**

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**Between :**

**THE QUEEN**
**on the application of**

**'P'** **Claimant**

**-v-**

**CHIEF CONSTABLE OF THAMES VALLEY POLICE** **Defendant**

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**Jessica Dickason-Mitra** (instructed by **Polpitiya & Co**) for the **Claimant**
**Cicely Hayward** (instructed by **Head of Legal Services, Thames Valley Police**) for the **Defendant**

Hearing date: 19 March 2014

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# Approved Judgment

**MR JUSTICE FOSKETT:**

1. For reasons that will become apparent I have anonymised this draft judgment and will entertain favourably an application on behalf of the Claimant that the judgment handed down should also be anonymised.

2. The Claimant complains that the decision by the Chief Constable of Thames Valley Police to include certain information in the Enhanced Disclosure of the Enhanced Criminal Record Certificates ('ECRC') provided by the Criminal Records Bureau ('CRB') and his decision to refuse to amend or remove the information are unlawful (i) as a disproportionate interference with his Article 8 right to a private life and (ii) as being in breach of the common law right to fairness.

3. The initial decision to include information within the "Other Relevant Information" section of his ECRC was made in October 2011 and the subsequent decision not to remove the information was made on in April 2012. I will identify the information in paragraph 13 below.

4. This judicial review claim was issued in July 2012. Permission to apply for judicial review was originally refused on the papers by Mr Robin Purchas QC, sitting as a Deputy High Court Judge, in October 2012 but permission was granted following an oral renewal hearing before His Honour Judge Anthony Thornton QC in March 2013.

5. All I need to say for present purposes is that at some stage in his working history the Claimant, now in his 50's, had worked as a chef, but also had experience in care work. At the material time he was employed through a recruitment agency as an agency worker at a residential community drugs stabilisation and structured treatment programme. The residential centre worked with adults with alcohol, drug or related mental health problems and provided a residential community drug and alcohol detoxification service. The "service users", as they are described in the papers, were plainly individuals with problems and some at least could fairly be described as vulnerable.

6. The Claimant worked a few shifts at the centre before the material events occurred. It appears that his abilities as a cook, which he drew on to help some of the service users to learn some basic cooking, went down well with the residents and led to requests for him to return. The manager's report to which I will refer below indicates that all the service users wrote a letter to him after the first day on which the Claimant had attended the centre asking that he be taken on full-time. The manager recorded that this was unprecedented.

7. On about the fourth occasion he attended he was asked by the manager at the end of his shift not to return because certain complaints had been made. The Claimant's case is that he did not know what the complaints could have been and the manager would not tell him at the time. He learned shortly after through the recruitment agency that a "sexual allegation" had been made. It had been made by a female resident at the centre called 'A'.

8. Just over two weeks later the Claimant was arrested and interviewed under caution about an alleged sexual assault on A. Because this matter does not now form the basis of any complaint on the Claimant's behalf I can deal with the circumstances

very briefly. The allegation made by A (which was not corroborated by any other witness) was of an action by the Claimant towards her which, if true and if it occurred without her encouragement or consent, would have amounted to (in the scale of these matters) a relatively minor sexual assault. He was questioned about it by the police, he denied it vigorously and in the course of the interview gave some explanation of why A might have made up such a story. I should say that, in the disclosure that has been made in the context of these proceedings, the notes of the manager who carried out his own investigation record aspects of A's history and relationships with men (including her own role as a prostitute) which do, at least to some extent, reflect what the Claimant had suggested to the police about her reliability and veracity. At all events, in due course after the police had investigated further, the Claimant was told that no further action was to be taken. In fact the notice he received said that he was "no longer being investigated by police and there [was] no case for [him] to answer."

9. I should say that during the police interview the Claimant was asked about certain things he was alleged to have said to A and to others which had sexual connotations. I will deal with those in due course because it is those matters that are now recorded on his ECRC about which his complaint in these proceedings is founded. There was no suggestion that any of the comments he was alleged to have made amounted to a criminal offence.

10. To complete the picture in relation to the alleged sexual assault, from the Claimant's point of view, he thought that when the police told him that no further action was intended, that was the end of the matter. A few months after the police had informed him in the manner I have indicated, he applied for a position with an agency in the care field and he was accepted subject, inter alia, to a "satisfactory enhanced disclosure from the [CRB]."

11. In due course he learned that the enhanced disclosure had not been satisfactory and so was not engaged by the agency. The disclosure gave details of the alleged sexual assault on A and that he "had made several sexual comments towards her", albeit the precise words or even the gist of the comments were not particularised.

12. The Claimant took issue with the CRB and then in due course the Information Commissioner's Office (enlisting the support of his MP along the way) about this, but the CRB indicated that it was for the police to decide what was to be disclosed and that it was not within the discretion of the CRB to influence that assessment. The recommendation was that he should take up the matter with the police.

13. Some months later the Claimant was again offered a job with the same recruitment agency conditional on receipt of a satisfactory ECRC and the Claimant engaged solicitors who wrote to the Defendant asking for the adverse entry on the ECRC be removed. Two months later the second ECRC, which is the subject of these proceedings, was issued. The decision about its content was taken by a senior officer deputed by the Chief Constable to deal with these matters. It was in the following terms:

> "Thames Valley Police hold information concerning [P] that in the opinion of the Chief Officer may be relevant to this application and ought to be disclosed under part V of the Police Act 1997.

> On [date given, though inaccurate] [P] was working as an agency worker at a residential community drugs stabilisation and structured treatment programme. The manager had received information that [P] had made inappropriate and sexual comments to service users and declined to continue him at the centre. The comments included [P] proposing to staff that he bring alcohol to a residents' barbecue, and comments about a sexual position, the use of Viagra and prostitutes."

14. The focus, therefore, of the information conveyed was upon comments he made about sexual matters. There are two initial observations I would make: first, although the senior officer's internally recorded rationale for considering the "revised text" as appropriate for disclosure says that "the revised text is clear as to the facts, outlines [P's] denials, and is not overstated", in fact there is no expression of the Claimant's express denials of these allegations in the text. Second, I am bound to say immediately that I do not really understand why there was any need to refer at all to his alleged suggestion "to staff" that alcohol be brought to a residents' barbecue. On the assumption that it was said (and if it was said, it was apparently said on the first occasion the Claimant went to the centre and thus some days before he was told not to return), it might well be an inappropriate and ill-conceived suggestion for a centre such as that involved, but I cannot see how something like this, said to staff not to the residents, could reasonably be included in an Enhanced Criminal Record Certificate.

15. At all events, the Claimant's solicitors took issue with this certificate and correspondence ensued over the next few months with the Defendant's Legal Department. The same senior officer reviewed her decision in April 2012, but did not find any reason to reach a different conclusion from that she had reached in October 2011 that the information in the second ECRC ought to be included. She noted that whilst the Claimant asserted the information was untrue, the incidents had been witnessed and formed the basis of the discontinuance of the Claimant's employment at the centre. She asked another senior officer to consider the matter afresh, but that officer confirmed his agreement with her conclusion that the disclosure was appropriate and proportionate.

16. A letter before claim was sent on his behalf in June 2012 which Miss Cicely Hayward for the Defendant says was "over two months" after the review decision. She reminds me that the judicial review proceedings were issued just before the 3-month period from the date of the review decision, the suggestion being that the Claimant did not act promptly. I do not know the reasons for the delay though I suspect there were funding issues to consider. Indeed I note that the CLS Funding Certificate was dated 13 July 2012. I do not think any case for rejecting this claim on the basis of undue delay has been established.

17. I must revert to what the alleged comments were, leaving aside the reference to the alcohol about which I have already expressed my view (see paragraph 14 above). The way these matters are described in the information ("a sexual position, the use of Viagra and prostitutes") is relatively anodyne and, taking those words as they appear in the information, do not, it might be thought, amount to a great deal in the scale of the kind of things that might be said of a sexual nature. However, they plainly suggest the use of a degree of vulgar language with which many people might feel uncomfortable. The more detailed allegation in relation to the "sexual position" is

that the Claimant asked A if she "takes it up the arse", her reply being "no that's one way" - or words to that effect. The use of Viagra is said to relate to his assertion that "Viagra is my thing" and that it makes "his stand up like a mop handle". The reference to prostitutes is said to relate to his suggestion that he had "fucked" many prostitutes.

18. It is fair to say that the comments thus recorded were only recorded in the information if more than one person said that he or she heard it. Service users A, I, B, K and C were spoken to by the manager and it appears that the senior officer only recorded the comment in the information if more than one person had spoken of hearing the comment. I should say immediately that given the nature of the residents (all of whom, the papers in the case suggest, were known to the police), that was an intrinsically fair thing to do although there is another dimension to which it will be necessary to refer in due course (see paragraph 25 below). It is also the case that the substance (and indeed most of the alleged actual words) of what is recorded in the information was put to the Claimant during the police interview, albeit as only as one question out of many put to him. He denied using those words. He did accept that he had spoken to some of the service users about his own, at one stage, troubled background, telling them that his mother was a prostitute, that he had been sexually abused by an uncle and that he had had 3 years' intensive counselling to put him on the right road. He said that he told them that prior to his counselling he had visited massage parlours and had sex with a lot of women "to try to get back at them", but that the counselling had revealed to him that he had a hatred of women. He said during the interview that in hindsight he might have divulged too much about his own life, but it was his style to be open if people asked him questions. He did tell the police that he had told the residents that he had changed as a result of the counselling. The motive for the observations he made was presumably to bring home to those currently undergoing a process designed to help with their issues that success can be achieved. As a motive, there could be nothing wrong with it.

19. What he told the police was mirrored by a statement he prepared (for his then recruitment agency) about the day in question. He did acknowledge in that statement that it may have been a mistake to share quite so much with the residents and that he should have known that it might "trigger off things in others". It is not clear to me when the police first had sight of that document, but I note that it was sent by the Defendant's Legal Department to the Claimant's solicitors under cover of a letter dated 24 November 2011.

20. However, it is <u>not</u> the additional material that he may have communicated to the police or the other things that he might have said to the residents at the centre that forms the focus of these proceedings: the issue is whether it was fair and proportionate to give the information reflected in the passage quoted in paragraph 13 above.

21. That question must, of course, be addressed by reference to the facts of this case, but the general approach has been considered extensively in a number of cases including *R (L) v Commissioner of Police of the Metropolis* [2010] AC 410, *R (B) v The Chief Constable of Derbyshire Constabulary* [2011] EWHC 2362 (Admin), *The Queen (on the application of 'J') v The Chief Constable of Devon and Cornwall* [2012] EWHC 2996 (Admin) (a decision of mine), *R (A) v Chief Constable of Kent Constabulary* [2013] EWHC 424 (Admin) and *Regina (L) v Chief Constable of Cumbria*

*Constabulary* [2014] 1 WLR 601. I do not think that extensive citation of the parameters within which my decision must be made is necessary.

22. There is little doubt that the ECRC in this case will amount to "a killer blow" (see *per* Lord Neuberger in *L*) to any prospects of the Claimant obtaining work in the caring community: the senior officer has acknowledged that "the practical impact of her decision would be that most employers would be "extremely reluctant" to employ a person with such information on their ECRC." (His ability to go back to cooking professionally is denied to him because of an injury to his hand, something, it seems, unknown to the senior officer.) That fact has to be weighed in the balance when determining any risks to which his working in the caring community might give rise, bearing in mind also, of course, the question of the reliability of the evidence supporting the information that might influence a potential employer in that area from engaging him. I will set out what Lord Neuberger in *L* said needs to be weighed up:

> "… the chief officer then has to decide under section 115(7)(b) whether it ought to be included, and, in making that decision, there will often be a number of different, sometimes competing, factors to weigh up. Examples of factors which could often be relevant are the gravity of the material involved, the reliability of the information on which it is based, whether the applicant has had a chance to rebut the information, the relevance of the material to the particular job application, the period that has elapsed since the relevant events occurred, and the impact on the applicant of including the material in the ECRC, both in terms of [their] prospects of obtaining the post in question and more generally. In many cases, other factors may also come into play, and in other cases, it may be unnecessary or inappropriate to consider one or more of the factors I have mentioned. Thus, the material may be so obviously reliable, relevant and grave as to be disclosable however detrimental the consequential effect on the applicant."

23. Ultimately, of course, it is for the court to decide whether the Claimant's convention rights have been disproportionately affected by the disclosure and, whilst attention is focused initially on the decision under challenge, that assessment must be made by reference to the circumstances at the time the case is before the court.

24. I will focus on some of the matters mentioned by Lord Neuberger. In the first place, what is the essential gravity of the allegations? The use of the words do not amount to criminal offences and no physical contact took place between the user of the words and any of those to whom they were allegedly addressed. Taken at their highest, the words are vulgar and explicit. However, they were not used to children and, looking at the matter realistically, it would be surprising if those at the residential centre had not heard or used words of a similar nature before. Indeed the manager's report records the use of words of a similar nature by a number of the residents in their conversations with him. The words alleged to have been addressed to A would clearly have been inappropriate for someone in a caring role but, in the light of the history of A given in the papers before the court, it is rather difficult to see her as a complete novice in these matters. I might add that the Protection of Vulnerable Adults ('POVA') team did not regard her as "vulnerable" for its purposes. It is, of course,

always difficult to be certain about these things, but I find it difficult to believe that any harm was done by the use of the words highlighted if the words were indeed used.

25. The expression "if the words were indeed used" introduces the next consideration: how reliable was the information that they were used and what opportunity did the Claimant have to rebut the allegations? A was undoubtedly regarded as a potentially unreliable historian of the alleged sexual assault. As I have already indicated, the senior officer only included in the information matters that could be corroborated by others. Whilst, as I have said previously, that was an entirely fair way of going about the decision-making process, that process did require also the need to bear in mind that all of the other residents were themselves known to the police and I have detected no critical analysis of the veracity of each of the others by the officer. None of the other service users was prepared to give a statement to the police and none was interviewed by the police. What is clear on a close reading of the manager's notes of the investigation he carried out is that of those who said they heard the comment made to A, B (who is male) and I (who is female) were both approached by A before they told the manager about the comment and K told the manager about a comment allegedly made by the Claimant during a conversation at which A, B and L were also present, none of whom had referred to that comment at all. Whilst the senior officer was entitled to take into account the manager's view that the Claimant had "used extremely inappropriate language to A and that the other service users' statements bear witness to this", a more considered view may well have been that there remained doubts about the reliability of the allegation, particularly as the allegation of the sexual assault was not corroborated by anyone else. At all events, doing the best I can to analyse the available material, there must be some residual doubts as to the reliability of the information upon which the content of the ECRC was based. I have already observed that the Claimant's express denials of the allegations were not recorded in the ECRC even though it appears that this was intended originally.

26. Moving to the issue of the opportunity to rebut the allegations, it does have to be observed that the senior officer gave the Claimant's solicitors no warning of her intention to include within the revised certificate these particular matters. His solicitors had been focusing on the removal of the reference to the sexual assault allegation (which was achieved), but had no intimation of the proposal to include in its place the material under review in these proceedings. I am told that the revised guidance requiring such matters to be referred to the person concerned was not in force at the time, but I have to say that fairness surely should have required that the Claimant's solicitors should have been told that this was the proposal. They would have been in the position to make a number of observations about the evidential foundation for the allegations (which, of course, they did in due course, but only in the context of the request to review the decision already made). Even when the review had taken place, it does not appear that the Claimant's denials were to be included in the information.

27. The position that the Claimant was seeking through the new recruitment agency was one that would have involved working with autistic children. I do not quite know to what extent that was known about by or factored into the decisions of the senior officer. In her internal note of her rationale for the disclosure she records this:

> "The behaviour described presents a risk to children and vulnerable adults whom [P] would come into contact with

> during the course of his employment. The information would be highly relevant to potential employers as they would be entrusting children and vulnerable adults into the care of [P]. I consider that the impact of disclosure on [P] is outweighed by the potential threat to a child or vulnerable adult. I believe the revised disclosure text is relevant, balanced and fair." (My emphasis.)

28. I have to say that, whatever view might be taken of the use of comments such as those alleged to have been used amongst adults who were probably used to such language, there are no obvious grounds for believing that any such words would be used by the Claimant amongst children. The additional comment is that A was not classified as "vulnerable" by POVA.

29. Putting together all these various factors - and, of course, giving such weight as I can to the experience of the senior officer in issues such as these - I am of the view that the inclusion of these matters (which, without diminishing them, are hardly at the most serious end of the relevant spectrum), the basis for which is disputed and is arguably unreliable, when judged by reference to the "killer blow" effect that they must have on the Claimant's future employment prospects, does represent a disproportionate interference with his Article 8 rights.

30. If there had been any lurking doubt about that view, assessed by reference to the material available at or about the time of the senior officer's decisions under challenge in these proceedings, I am considering the question 5 years after the material events. The Claimant will have had ample time to reflect on the consequences of engaging too readily at what appears to be their own level with others in respect of whom he is given a caring role. He indicated within days of the material events that he had in effect learned a lesson. I should be most surprised if the ensuing 5-year period has not reinforced the need for caution.

31. At all events, in my judgment, the ECRC should no longer refer to any of these matters and the Claimant's judicial review claim succeeds.

32. I am grateful to both Counsel for their helpful submissions.