Neutral Citation Number: [2013] EWHC 424 (Admin)

Case No: CO/13787/2012

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date:08/03/2013

Before:

THE HONOURABLE MRS JUSTICE LANG DBE

- -

Between:

THE QUEEN **on the application of A**	**Claimant**
- and -	
THE CHIEF CONSTABLE OF KENT CONSTABULARY	**Defendant**

- -
- -

Stephen Broach (instructed by **Royal College of Nursing**) for the **Claimant**
Dijen Basu (instructed by **Kent Police Legal Services Department**) for the **Defendant**

Hearing dates: 15 February 2013

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Judgment

MRS JUSTICE LANG:

1. The Claimant applies for judicial review, and makes a claim under the Human Rights Act 1998, in respect of the Defendant's decision to disclose allegations of neglect and ill-treatment of care home residents in an Enhanced Criminal Records Certificate ("ECRC") dated 12th October 2012. Permission was granted by David Elvin QC, Deputy High Court Judge, on 16th January 2013, and an order for expedition was made. Stadlen J ordered on 20th December 2012 that pursuant to CPR Rule 39.2, no person shall identify the Claimant, and she shall be called A in these proceedings. That order remains in force.

2. On 3rd August 2012, the Defendant received a request from the Criminal Records Bureau (the "CRB") for an enhanced check to be made in respect of the Claimant concerning her proposed employment by Nightingales 24 7 as a registered nurse.

3. By virtue of s.113B(4) Police Act 1997, the Defendant was required to provide any information which:

    a) he reasonably believed to be relevant for the purpose described in the statement, and

b) in his opinion, ought to be included in the certificate.

4. On 12th October 2012, the Defendant's entry in the ECRC was in the following terms:

> "**Other relevant information disclosed at the Chief Police Officer(s) discretion**
>
> Kent Police holds the following information which we believe to be relevant to the application of [A] (date of birth 03/12/1961).
>
> The information relates to the alleged mistreatment of several elderly and vulnerable adults resident in the care home in which [A] worked as a Registered General Nurse. Kent Police believes this information to be relevant to an employer's risk and suitability assessment when considering [A]'s application for the position of Registered Nurse involving regular contact with children and vulnerable adults because, if [A] were to mistreat individuals in her care, this could occur in a similar environment when working as a Registered Nurse with children and/or vulnerable adults.
>
> The information held by police is that:
>
> Between 15/09/2010 and 04/04/2011, [A] allegedly pinched the cheek of the first injured party, an 85-year-old female resident of the care home, in order to force her mouth open, and then pour tea into her mouth.
>
> On 29/03/2011, [A] allegedly dismissed an allegation made by the second injured party, an 81-year-old female resident of the care home, who asked why [A] had hit her.
>
> On 01/04/2011, [A] allegedly failed to attend to the third injured party, another 81-year-old female resident of the care home, who was thought to have suffered a fit.
>
> On 01/04/2011, [A] allegedly put a flannel into the mouth of a fourth injured party, a 76-year-old female resident of the care home.
>
> On 24/05/2011 [A] was interviewed by police and denied all the allegations.
>
> On 18/06/2012 [A] appeared at Maidstone Crown Court to answer four separate charges of ill-treat/neglect care of person who lacks capacity of donee of lasting power of attorney, and was found not guilty of all charges, no evidence being offered, and the case was dismissed.
>
> After careful consideration, Kent Police believes that this information ought to be disclosed because the alleged incidents

> occurred less than two years ago and the injured parties were all vulnerable adults in a care home environment. There is concern that children and vulnerable adults under the care of [A] may be subjected to mistreatment. It is therefore concluded that the impact of [A]'s right to privacy is outweighed by the potential risk posed to children and vulnerable adults and disclosure of this information is necessary, justified and proportionate to safeguard the vulnerable group.
>
> On 12/09/2012 a letter was sent to [A] giving her the opportunity to make representations about the above information. On 02/10/2012 a letter was received from the Royal College of Nursing, on behalf of [A]. They referred to the fact that [A] was acquitted at court and the prosecution offered no evidence against [A] following careful consideration of the evidence and issues in the case, including a statement that had recently been received which they considered would significantly undermine the reliability of two of the main prosecution witnesses. The Royal College of Nursing added that [A] has an exemplary record and a stated commitment to the care and welfare of patients."

The Facts

5. The Claimant is an experienced registered nurse who qualified in Nigeria and held senior nursing positions. On relocating to the UK in 2006, she worked in various nursing homes in the UK, as a nurse registered with the Nursing and Midwifery Council.

6. In September 2010 she was employed by Southern Cross Healthcare as a staff nurse on night duties at C Nursing Home. It was a 32 bed care home, with nursing, for patients over 65 years of age suffering with dementia and physical ailments. They were all vulnerable and needed high levels of care. Some of them displayed challenging behaviour.

7. Allegations were made against the Claimant by health care assistants (identified by initials) who worked with the Claimant. Some allegations were made to their employer, Southern Cross, who referred the matter to the police. Further allegations were made to the police. In summary, the allegations were:

   a) CH alleged that, between 15th September 2010 and 4th April 2011, the Claimant forced a patient to drink by pinching her cheeks together and pouring tea into her mouth, which then flowed down the patient's cheeks and neck. The Claimant denied this allegation.

   b) MB alleged that, on 1st March 2011, a patient asked the Claimant "Why did you hit me?" and the Claimant's response was to laugh and say "I'm going to beat you in a minute". The patient told the health care assistant that she did not like the Claimant. MB said she had previously seen the Claimant grab this patient by the top of her arms and push her into her bedroom. The Claimant denied these allegations. The patient denied that she had been hit, although she was found not to have capacity to give evidence on this matter.

c) SL alleged that, on 1st April 2011, when a patient was observed having a minor fit, the Claimant was asleep on duty and could not be woken. The Claimant subsequently altered the patient's notes, to remove the reference to a fit, saying that the patient was twitching. The Claimant denied these allegations. The patient had a chronic condition which caused her eye lid to twitch; she had been seen by the GP recently and given medication for this. Sometimes this developed into a fit. SL, who is not a qualified nurse, had wrongly recorded a fit, and the Claimant explained her mistake to her.

d) SL alleged that, on 1st April 2011, the Claimant pushed a soapy dirty flannel into a patient's mouth for a couple of seconds, when a patient was yelling during a bed wash, and told her to shut up, and then laughed. When challenged by SL, the Claimant told SL to shut up. The Claimant denied these allegations.

e) SL, MB, CH and RH alleged that the Claimant regularly slept for hours on shift leaving them to work alone. The Claimant denied this allegation, stating that she was far too busy with nursing duties during the night to sleep for long periods. She explained that the staffing rota was one nurse per floor, but because of staff shortages, she frequently had to carry out nursing duties, such as medication rounds and attending to patients, on two floors. This was why the health care assistants could not always find her on their floor.

8. The Claimant said that the allegations were made maliciously because the health care assistants resented the way in which she managed them, for example, telling them off for failing to use gloves and aprons to ensure hygiene and avoid cross-infection; incorrect manual handling techniques; slack working, such as over-long smoking breaks.

9. The patients concerned did not have mental capacity to give evidence or attend court. When interviewed, they either could not speak at all, or did not give a reliable account.

10. On the basis of these allegations, the Claimant was suspended and following an investigation and a disciplinary hearing, she was dismissed on 14th April 2011. Southern Cross referred the case to the police and the Independent Safeguarding Authority.

11. On 24th May 2011 the Claimant was interviewed by police and denied all the allegations in detail. She also said that the health care assistants who had made the allegations had a grudge against her because the Claimant had rebuked them for unprofessional working practices and they considered that she was too strict.

12. The Claimant appealed against her dismissal under her employer's internal appeal procedure. Mrs Broom, a Manager, was appointed to conduct an investigation. She considered the material obtained in the initial investigation; conducted interviews with MB, SL, and a bank nurse, JT, on duty at the same time as them, and the Claimant. She examined the care home records. She concluded in her report:

> "Both carers have made serious allegations about this nurse, and have sustained these both in writing and at interview. However, apart from their word, there is no other evidence to support the allegations.

> There is scanty evidence to support [A]'s evidence, but what there is does support her. On the 1st April, the occasion that the resident fitted and the carer she was unable to wake [A], [A] has made an entry in the residents file precisely during the period the carer said she was asleep. When [MB] complained that [A] spent two hours upstairs, she was the only nurse on duty, and had nursing duties to perform on both floors, which obviously meant that she was absent on occasions from both floors. The bank HCA [JT] was on duty on all of the occasions when the allegations were to have taken place, and she denied ever seeing [A] sleep, or of not participating in care delivery, but did mention that her demeanour to the residents was not polite or respectful.
>
> Whilst this evidence does not completely disprove the allegations made against her, it does cast some doubt on the accuracy of all the allegations. Hence, there is no evidence to support any of the allegations made about [A] and she should be reinstated."

13. On 1st June 2011, Mrs Broom wrote to the Claimant stating that "a further more detailed investigation failed to discover any supporting evidence to any of the allegations". The Claimant was fully reinstated. However, when the Claimant returned to work, she was upset at the way she was treated and handed in her resignation.

14. The allegations were referred to the Independent Safeguarding Authority ("ISA"), as required. On 14th June 2011, the ISA wrote to the Claimant in the following terms:

> "We have now concluded our enquiries and have carefully considered all the information available to us. On the basis of this information we have decided that it is not appropriate to include you in the Children's Barred List or the Adults' Barred List."

15. Kent Police referred the allegations to the Nursing and Midwifery Council ("NMC"), the Claimant's professional regulatory body. An interim conditions of practice order was made for a period of 18 months from 8th February 2012. External solicitors were instructed to conduct an investigation and they advised the NMC that there was insufficient evidence to establish a case against the Claimant and no real prospect of a finding of impairment of fitness to practise.

16. On 16th May 2012, Mrs Broom, the Manager who investigated the allegations on behalf of Southern Cross Healthcare in 2011, was interviewed by the police, and gave a full account of what the health care assistants and the Claimant had told her in interview, her analysis of the records, and the outcome of her investigation. In addition to the points made in her report, Mrs Broom said that the health care assistants said that they did not like the Claimant and found her difficult to work with. MB made a racist remark about her. In relation to the patient who allegedly had a fit, Mrs Broom found that the Night Check Book had two entries made by SL, at 3.25 am and 4.25 am, saying that the patient was fine, which was not consistent with SL's entry in the patient records at 4 am saying that she had a fit. She considered that the Claimant's account was genuine. Mrs Broom also concluded that the original

investigation and disciplinary hearing had not been properly conducted and the Claimant had not been given the opportunity to defend herself against the allegations.

17. On 12th June 2012, the Crown Prosecution Service ("CPS") notified the Claimant that the prosecution would not offer any evidence against her. Its letter stated:

> "The reason for this course of action is that after careful consideration of the evidence and issues in this case, including a very recently received statement which would significantly undermine the reliability of two of the main prosecution witnesses, the only proper course of action now, applying the Code for Crown Prosecutors, is to offer no evidence."

18. On 18th June 2012, the prosecution offered no evidence and the Claimant was acquitted.

19. In its decision letter dated 12th December 2012, the NMC's Investigating Committee Panel notified the Claimant that it had decided that there was no case to answer. It said:

> "The panel considered the report prepared by the external firm of lawyers instructed in this matter, supported by statements and exhibits from the two witnesses interviewed. The report advises that there is insufficient evidence to establish that there is a case for the registrant to answer on the facts. The report further advises that there is no real prospect of a finding of impairment of current fitness to practise."

20. On 3rd August 2012, the Defendant received a request from the Criminal Records Bureau for an enhanced check to be made in respect of the Claimant concerning her proposed employment by a nursing agency.

21. The Defendant's vetting unit considered the information held in its records relating to the Claimant and applied its standard procedures, under which the allegations were carefully assessed and considered by several officers. The Claimant was given the opportunity to make representations on the proposed disclosure, which she did by letter from the Royal College of Nursing dated 28th September 2012.

22. On four earlier occasions the Defendant has made disclosures in relation to the same allegations, in response to requests arising out of the Claimant's applications for jobs. On one of these occasions, the Claimant referred to one of the health care assistants being instructed to spy on her by one of the managers. It appears from SL's statement to the police that a manager asked SL to write a statement about the Claimant next time she was at work.

23. Apart from these allegations, the Claimant has not been the subject of any other complaints or disciplinary proceedings, cautions or criminal convictions.

Grounds for judicial review

24. The Claimant's primary ground was that the decision to disclose was an unlawful interference with the Claimant's right to respect for her private life under Article 8(1) European Convention on Human Rights ("ECHR"). The disclosure was

disproportionate and so the Defendant had failed to establish that the disclosure was justified under Article 8(2).

25. The Claimant also submitted that it was apparent from the evidence that Ms Bottomley, the Head of Central Vetting Unit, in Kent Police who made the decision to disclose, failed to apply the correct legal tests in assessing credibility and proportionality.

26. The Defendant submitted that the disclosure was proportionate and justified under Article 8(2) and that Ms Bottomley had applied the correct legal test under s.114B(4). He also submitted that Article 3 rights were engaged, and they took precedence over the Claimant's rights under Article 8.

Article 8

27. Article 8 provides:

> "(1) Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> (2) There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

28. In *R(L) v Commissioner of Police of the Metropolis* [2010] 1 AC 410, Lord Hope (with whom the majority agreed) held that a decision to disclose matters on an ECRC, made by a Chief Officer of Police under the Police Act 1997, would in most cases fall within the scope of Article 8(1) because:

a) the decision would entail the release of information about the applicant which had been collected and stored in police records;

b) the decision would adversely affect the applicant's ability to obtain work in her chosen field and thereby to earn a living and to establish and maintain relationships with others; and

c) the consequent exclusion from employment would damage the applicant's good name and reputation.

29. In *L*, the Supreme Court held that a chief officer of police, when deciding whether material "ought" to be disclosed under section 113B(4), had to consider whether such an interference with the applicant's private life under Article 8(1) could be justified under Article 8(2), to ensure that the provision was compatible with the ECHR (at [40]).

30. In *L*, Lord Hope concluded that the previous approach to disclosure adopted by the Court of Appeal in *R (X) v Chief Constable of the West Midlands Police* [2005] 1 WLR 65, tilted the balance too far against the applicant, "encouraging the idea that priority must be given to the social need to protect the vulnerable as against the right to respect for the private life of the applicant" (at [44]).

31. In *X*, Lord Woolf had explained the duty to disclose in the following terms, at [37]:

> "This was obviously required by Parliament because it was important (for the protection of children and vulnerable adults) that the information should be disclosed even if it only might be true. If it might be true, the person who was proposing to employ the claimant should be entitled to take it into account before the decision was made as to whether or not to employ the claimant."

32. In *L*, Lord Hope expressly rejected Lord Woolf's approach in *X*, saying, at [45]:

> "The correct approach, as in other cases where competing Convention rights are in issue, is that neither consideration has precedence over the other: *Campbell v MGN Ltd* [2004] 2 AC 457, para 12, per Lord Nicholls of Birkenhead. The rating table in MP9 should be restructured so that the precedence that is given to the risk that failure to disclose would cause to the vulnerable group is removed. It should indicate that careful consideration is required in all cases where the disruption to the private life of anyone is judged to be as great, or more so, as the risk of non-disclosure to the vulnerable group.... It should no longer be assumed that the presumption is for disclosure unless there is a good reason for not doing so."

33. The guidance given by the Supreme Court in *L* has since been applied in a number of other cases including: *R (B) v Chief Constable of Derbyshire Constabulary* [2011] EWHC 2362 (Admin); *R (W) v Chief Constable of Warwickshire Police* [2012] EWHC 406 (Admin); *R(J) v Chief Constable of Devon & Cornwall Police* [2012] EWHC 2996 (Admin).

Article 3

34. In this case, the Defendant submitted that Lord Hope's guidance as to the correct approach (*L* at [45]) could not apply to a case such as this one when Article 3 rights were in play. Lord Hope was referring to the balancing of two qualified Convention rights, where neither had precedence over the other. However, the absolute right under Article 3 had to take precedence over the qualified right in Article 8. Mr Basu submitted that the incident in which the Claimant was alleged to have stuffed a flannel into the patient's mouth for a couple of seconds was (if proved) "inhuman or degrading treatment" within the meaning of Article 3 (he conceded that none of the other allegations met the Article 3 threshold). He went on to submit that the material had to be disclosed to give effect to the positive duty on the State to take steps to safeguard individuals against Article 3 ill treatment (citing *OOO v Commissioner of Police for the Metropolis* [2011] EWHC 1246 (QB), per Wyn Williams J. at [143]). This absolute duty under Article 3 had to take precedence over the qualified rights of the Claimant under Article 8.

35. In my judgment, this submission was misconceived. The legitimate aim of protecting the rights and freedoms of others under Article 8(2) includes protection for all rights, including those under Article 3. It is not limited to the Article 8 rights of others, even though that may have been the position on the facts in *L*. Plainly, when considering necessity and proportionality under Article 8(2), the gravity of the risk to others is a critical consideration, as indicated by Lord Neuberger in *L*. at [81]. The more grave

the risk, the greater the likelihood that the interference with an Article 8(1) right will be justified. But the risk of a breach of Article 3 does not avoid the legal requirement to justify the interference under Article 8(2) in each case. To adopt that approach would be to emasculate the protection of Convention rights upheld by the Supreme Court in *L*.

36. Moreover, Article 3 does not impose a positive duty on the Defendant to disclose the material under s.113B(4). Under Article 3, the positive duty on the UK is to take measures to ensure that individuals within its jurisdiction are not subjected to Article 3 ill-treatment. The State must prohibit such treatment under the criminal law and ensure that the prohibition is effective (*A v UK* (1998) 27 EHRR 611). Beyond the criminal law, the State has a discretion how to give effect to the positive duty. In the UK, the regulatory bodies with supervisory responsibility for the professions and for care home establishments are the means by which the UK discharges its Convention obligations. Generally, it is not obliged to make disclosure under section 113B(4) Police Act 1997 in order to comply with its Article 3 duties under the Convention.

37. In relation to specific cases, public authorities are under a positive obligation to take those steps that could reasonably be expected of them to avoid a real and immediate risk of ill-treatment contrary to Article 3 of which they know or ought to have knowledge: *Osman v UK* [2009] 29 EHRR 245; *Z v UK* (2002) 34 EHRR 3. This is a narrow class of case where there is a real and immediate risk of harm. The present case does not come near that class of case, on the facts. In such cases, it is to be hoped that the police would take positive steps to protect the person at risk, not merely disclose the risk in an ECRC, which opportunity would only arise if the applicant happened to apply for a job which required an ECRC. If disclosure in an ECRC was in contemplation, the Article 8 rights of the applicant would still have to be considered, though no doubt they would be outweighed by the gravity of the risk in the balancing exercise.

The role of the court in human rights claims

38. As the Court is itself a public authority for the purposes of the Human Rights Act 1998 ('HRA 1998'), it is subject to the duty in section 6 not to act incompatibly with Convention rights. It must also ensure that other public authorities, such as the Defendant, do not act incompatibly with Convention rights. This is an essential part of the way in which the ECHR is enforced in domestic law. Lord Bingham said in *Huang v Secretary of State for the Home Department* [2007] 1 AC 167, at [8]:

> "In the Human Rights Act 1998 Parliament not only enabled but required the Convention rights set out in Schedule 1 to the Act … to be given effect as a matter of domestic law in this country. It did so (section 2) by requiring courts or tribunals determining a question which had arisen in connection with a Convention right to take into account of any relevant Strasbourg jurisprudence, by requiring legislation, where possible, to be read compatibly with Convention rights (section 3) and, most importantly, by declaring it unlawful (section 6) for a public authority to act in a way incompatible with a Convention right. Thus immigration officers, the appellate immigration authority and the courts, as public authorities (section 6(3), act unlawfully if they do not (save in specified circumstances) act compatibly with a person's Convention right

> … The object is to ensure that public authorities should act to avert or rectify any violation of a Convention right, with the result that such results would be effectively protected at home, thus (it was hoped) obviating or reducing the need for recourse to Strasbourg."

39. In *R (SB) v Denbigh High School* [2007] 1 AC 100, Lord Bingham explained the role of the court in these terms, at [30]:

> "30. Secondly, it is clear that the court's approach to an issue of proportionality under the Convention must go beyond that traditionally adopted to judicial review in a domestic setting. The inadequacy of that approach was exposed in *Smith and Grady v United Kingdom* (1999) 29 EHRR 493, para 138, and the new approach required under the 1998 Act was described by Lord Steyn in *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532, paras 25-28, in terms which have never to my knowledge been questioned. There is no shift to a merits review, but the intensity of review is greater than was previously appropriate, and greater even that then heightened scrutiny test adopted by the Court of Appeal in *R v Ministry of Defence, Ex p. Smith* [1996] QB 517, 554. The domestic court must now make a value judgment, an evaluation, by reference to the circumstances prevailing at the relevant time: *Wilson v First County Trust Ltd (No. 2)* [2004] 1 AC 816, paras 62-67. Proportionality must be judged objectively, by the court: R (Williamson) v Secretary of State for Education [2005] 2 AC 246, para 51."

40. The meaning of the phrase "[t]here is no shift to a merits review", in the extract from Lord Bingham's judgment in *Denbigh High School*, was subsequently clarified by Lord Bingham in *Huang*, at [13]:

> "13. In the course of his justly-celebrated and much-quoted opinion in *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532, paras 26-28, Lord Steyn pointed out that neither the traditional approach to judicial review formulated in *Associated Provincial Picture Houses Ltd v Wednesbury Corpn.* [1948] 1 KB 223 nor the heightened scrutiny approach adopted in *R v Ministry of Defence, Ex p Smith* [1996] QB 517 had provided adequate protection of Convention rights, as held by the Strasbourg court in *Smith and Grady v United Kingdom* (1999) 29 EHRR 493. Having referred to a material difference between the Wednesbury and Smith approach on the one hand and the proportionality approach applicable where Convention rights are at stake on the other, he said, at para 28: "This does not mean that there has been a shift to merits review." This statement has, it seems, given rise to some misunderstanding. The policy attached in Daly was held to be ultra vires the Prison Act 1952 (para 21) and also a breach of article 8. With both those conclusions Lord Steyn agreed: para 24. They depended on questions of

> pure legal principle, on which the House ruled. *Ex p Smith* was different. It raised a rationality challenge to the recruitment policy adopted by the Ministry of Defence which both the Divisional Court and the Court of Appeal felt themselves bound to dismiss. The point which, as we understand, Lord Steyn wished to make was that, although the Convention calls for a more exacting standard of review, it remains the case that the judge is not the primary decision-maker. It is not for him to decide what the recruitment policy for the armed forces should be. In proceedings under the Human Rights Act 1998, of course, the court would have to scrutinise the policy and any justification advanced for it to see whether there was sufficient justification for the discriminatory treatment."

41. In *Belfast City Council v Miss Behavin' Ltd* [2007] 1 WLR 1420, Baroness Hale confirmed, at [31], that:

> "The role of the court in human rights adjudication is quite different from the role of the court in an ordinary judicial review of administrative action. In human rights adjudication, the court is concerned with whether the human rights of the claimant have in fact been infringed, not with whether the administrative decision-maker properly took them into account."

42. In order to carry out this role effectively, the court has to consider the facts as they are found at the time of its adjudication, and not limit itself to the facts in existence at the time of the original decision. In *Huang* Lord Bingham explained that the "first task" of the immigration tribunal was "to establish the relevant facts" which "may have changed since the original decision was made". Outside the immigration context, the House of Lords has confirmed in *Manchester City Council v Pinnock* [2011] 2 AC 10, that the European law requires the domestic court to make its own assessment of the facts at the hearing before it. Lord Neuberger said at [45] and [73]:

> "45. From these cases, it is clear that the following propositions are now well established in the jurisprudence of the European court:
>
> (a) Any person at risk of being dispossessed of his home at the suit of a local authority should in principle have the right to raise the question of the proportionality of the measure, and to have it determined by an independent tribunal in the light of article 8, even if his right of occupation under domestic law has come to an end: *McCann v United Kingdom* 47 EHRR 913, para 50; Cosic v Croatia 52 EHRR 1098, para 22; *Zehentner v Austria* 52 EHRR 739, para 59; *Paulic v Croatia* given 22 October 2009, para 43; and Kay v United Kingdom [2011] HLR3, paras 73-74.
>
> (b) A judicial procedure which is limited to addressing the proportionality of the measure through the medium of traditional judicial review (i e, one which does not permit the court to make its own assessment of the facts in an

> appropriate case) is inadequate as it is not appropriate for resolving sensitive factual issues: *Connors v United Kingdom* 40 EHRR 189, para 92; *McCann v United Kingdom* 47 EHRR 913, para 53; Kay v United Kingdom [2011] HLR3, paras 72-73…
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> 73. In our judgment, once it is accepted that it is open to a demoted tenant to seek judicial review of a landlord's decision to bring and continue possession proceedings, then it inevitably follows that, as a generality, it is open to a tenant to challenge that decision on the ground that it would be disproportionate and therefore contrary to article 8. Further, as we saw at paras 31 to 43 above, the European court jurisprudence requires the court considering such a challenge to have the power to make its own assessment of any relevant facts which are in dispute. We have already pointed out, at para 28 above, that Lord Scott and Lord Mance, in particular, reached this conclusion in Doherty v Birmingham City Council [2009] AC 367, paras 68 and 138. The European court acknowledged this development in Kay v United Kingdom [2011] HLR 123, para 73. In these circumstances we are satisfied that, wherever possible, the traditional review powers of the court should be expanded so as to permit it to carry out that exercise.
>
> In summary: where it is required in order to give effect to an occupier's article 8 Convention rights, the court's powers of review can, in an appropriate case, extend to reconsidering for itself the facts found by a local authority, or indeed to considering facts which have arisen since the issue of proceedings, by hearing evidence and forming its own view." (emphasis added)

43. Although the relevant court in *Pinnock* was the County Court, I consider that the Administrative Court has to carry out a similar exercise as it is the sole court with power to review whether the Defendant's decision will result in a breach of the Claimant's human rights. In doing so, it has to consider the Claimant's human rights as at the date of the court hearing. If it confines its consideration to a date in the past, and ignores the current position, it might itself act in breach of the Claimant's rights, contrary to section 6(1) HRA 1998.

44. Mr Basu submitted that in a judicial review claim, the court is limited to reviewing the challenged decision on the basis of the material available to the decision-maker. In my judgment, in this case the Court is not merely conducting a judicial review. It is also determining a claim under the HRA 1998. By section 7(1) HRA 1998:

> "A person who claims that a public authority has acted … in a way which is made unlawful by section 6(1) may –
>
> (a) bring proceedings against the authority under this Act in the appropriate court or tribunal, or
>
> (b) rely on the Convention right or rights concerned in any legal proceedings"

45. In this case, the Claimant has applied under section 8(1) HRA 1998 for a remedy against the Defendant for acting in a way which is incompatible with her Convention right under Article 8(1), contrary to section 6(1) HRA 1998. The court has to rule on the merits of that claim. It is agreed that, on a conventional judicial review approach, I should only review the Defendant's decision and if I find it to be unlawful, leave it to the Defendant to re-make the decision. In contrast, under the HRA 1998, I am required to decide whether or not the Defendant was right or wrong in deciding that disclosure would not be in breach of the Claimant's Article 8 rights because disclosure was proportionate. If I state in my judgment that disclosure was not proportionate, the Defendant is, in effect, required to re-make its decision in accordance with my assessment of proportionality (absent a material change of circumstances).

46. The issue in this claim is whether disclosure was proportionate, in light of the potential unreliability of the allegations. Reliability is a factor to be taken into account when assessing proportionality (per Lord Neuberger in *L.* at [81]) and the parties have made competing submissions as to the reliability of the allegations. If I find that the Defendant's assessment of reliability was flawed, it would be wrong for me to conduct the proportionality exercise on the basis of the Defendant's assessment of reliability. In those circumstances, I cannot properly conduct the proportionality exercise myself without first assessing the reliability of the evidence.

47. In *Huang*, Lord Bingham, giving the judgment of the Committee, held that the Court should not defer to the decision-maker's judgment, but should instead accord 'appropriate weight" to it, saying at [16]:

> "The giving of weight to factors such as these is not, in our opinion, aptly described as deference: it is performance of the ordinary judicial task of weighing up the competing considerations on each side and according appropriate weight to the judgment of a person with responsibility for a given subject matter and access to special sources of knowledge and advice."

48. In *R (Aguilar Quila) v Secretary of State for the Home Department* [2012] 1 AC 621, Lord Wilson cited with approval Lord Bingham's formulation in *Huang* (at [46]) and Baroness Hale said at [63]:

> "where delicate and difficult judgment are involved ... this court will treat with appropriate respect the views taken by those whose primary responsibility is to make the judgments in question. But those views cannot be decisive. Ultimately, it is for the courts to decide whether or not the Convention rights have been breached: *R (SB) v Denbigh High School* [2007] 1 AC 100; *Belfast City Council v Miss Behavin' Ltd* [2007] 1 WLR 1420."

The Defendant's decision

49. The Defendant's decision was taken by Ms Gillian Bottomley, head of the Central Vetting Unit at Kent Police. It was the conclusion of a decision-making procedure using the template issued by the Home Office to ensure a consistent level of decision-making, and updated in the light of the "Statutory Disclosure Guidance" dated July

2012 and the Protection of Freedoms Act 2012. Initially each application is considered by a Disclosure Operator and a Disclosure Risk Assessor; then by a Disclosure Supervisor, and finally by Ms Bottomley who makes the final decision on behalf of the Defendant.

50. The Defendant was bound to have regard to the "Statutory Disclosure Guidance" in making its decision, by virtue of section 113B(4A) Police Act 1997.

51. The reasons recorded by Ms Bottomley for her decision were as follows:

> "**Principle 2 – Information must only be provided if it is reasonably believed to be relevant for the prescribed purpose**.
>
> Given that [A] is applying for the post of Registered Nurse involving regular contact with children/vulnerable adults and this information relates to alleged mistreatment of several elderly and vulnerable adults resident in a care home, I reasonably believe the information to be relevant as there may be a risk posed to the vulnerable group, and it ought to be included in the CRB disclosure certificate. In my view the information is of sufficient gravity to justify its inclusion. [A] appeared in Maidstone Crown Court on 18/06/2012 to answer four separate charges of Ill-treat/Neglect Care of Person Who Lacks Capacity of Donee of Lasting Power of Attorney. [A] was found not guilty of all charges as no evidence was offered and the case was dismissed. If [A] were to neglect or mistreat individuals in her care, this could put vulnerable individuals at risk with whom [A] comes into contact in the capacity of a Registered Nurse. The nature of the information and its degree of relevance to the post applied for are such that disclosure is reasonable and proportionate. The alleged incidents occurred in 2010 and 2011 and are sufficiently current to be considered relevant. In my opinion this information is not so without substance that it is unlikely to be true and thus make disclosure disproportionate because, whilst a statement was received that undermined the evidence of two main prosecution witnesses, there were others who had raised concerns about [A], including allegations that she would sleep whilst on night shift. I have acquired a copy of the statement referred to by the CPS as undermining the evidence of two main prosecution witnesses and I have taken this into account when making my decision. Despite this, I am concerned by the allegations made against [A] not only by the two main witnesses but by others who also worked with [A]. The information accurately reflects the data held by Kent Police and provides a balanced account, having included reference to the fact that the CPS decided to offer no evidence after carefully considering the evidence and issues in the case, including the statement that had been received, which they felt would significantly undermine the reliability of two of the main prosecution witnesses.

> **Principle 3 – Information should only be provided if the opinion is that it ought to be included.**
>
> Having formed a reasonable belief that the information is relevant, I have considered the impact of disclosure on the private life of [A] having regard for her right to respect for her private and family life under Article 8 of the European Convention on Human Rights. I believe that the infringement of [A]'s human rights is outweighed by the potential risk posed to the vulnerable group as, whilst release of this information will result in interference to [A]'s private life, and disclosure may impact upon her employment prospects within this field, I believe that interference can be justified when considered against the risk that she may cause vulnerable individuals harm through neglect/mistreatment. The nature of the information and its degree of relevance to the post applied for are such that disclosure is reasonable and proportionate. In this instance, disclosure is not outweighed or undermined by an adverse impact on the prevention or detection of crime."

52. The "principles" to which she referred are those set out in the "Statutory Disclosure Guidance". It advises, in paragraph 13, that the Chief Officer, in deciding whether he reasonably believes the material to be relevant, must consider a number of factors. The key factor in this case was credibility/reliability. The Guidance states:

> "18. Information should be sufficiently credible
>
> This will always be a matter of judgment, but the starting point will be to consider whether the information is from a credible source. Chief Officers should consider whether there are any specific circumstances that lead them to consider that information is unlikely to be true or whether the information is so without substance that it is unlikely to be true. In particular, allegations should not be included without taking reasonable steps to ascertain whether they are more likely than not to be true."

53. The Guidance advises, in paragraph 19, that "having formed what they regard as a reasonable belief that the information is relevant, the chief officer must then consider whether it ought to be included in the certificate". This provision has to be read and given effect to a way which is compatible with the applicant's right to respect for private and family life under Article 8. The Guidance goes on to say, at paragraph 22:

> "22. If there is a legitimate aim pursued, the next step is to consider whether the disclosure of the information is necessary to pursue that aim including consideration of whether there are any other realistic and practical options to pursue that aim. If disclosure is considered necessary to pursue that aim then the question becomes one of proportionality. <u>In practice this will involve weighing factors underpinning relevancy, such as seriousness, currency and credibility against any potential interference with privacy</u>. All decisions must be proportionate. This means that the decision is no more than necessary to

> achieve the legitimate aim and that it strikes a fair balance between the rights of the applicant and the rights of those the disclosure is intended to protect." (Emphasis added).

54. In her witness statement resisting this claim, Ms Bottomley said:

> "17. In making the final decision whether to disclose information to the CRB/DBS for the purposes of an ECRC, I am very conscious of the need to make careful, proportionate and consistent decisions in providing information from police records for inclusion in the certificates. The primary purpose of enhanced checks is to protect children and vulnerable adults and their human rights by helping employers and voluntary organisations to make recruitment decisions in the light of sufficient information about candidates. It is only if they know of any important and relevant concerns that they can take steps to reduce the risks that they may pose to children and vulnerable adults to an acceptable level in discussion with the candidate. I am well aware that a decision to disclose information impacts on the human right to respect for privacy of the subject but I have to balance that against the human rights of vulnerable people which are no less important. A candidate for a job caring for children and/or vulnerable adults could be the subject of a false allegation and therefore completely innocent, but the children and vulnerable adults are completely innocent. In reaching these conclusions, I was aware of the fact that the Independent Safeguarding Authority had not barred the Claimant and that the Nursing and Midwifery Council ("NMC") had not considered that the Claimant had a disciplinary case to answer. The ISA deals, of course, with placing people on barred lists and the NMC decide on the fitness to practice of nurses and midwives and limit or prevent a nurse from practising. Neither body would have had access to the same amount of information relating to the Claimant as was held on Kent Police databases."

55. The Claimant made a number of valid criticisms of Ms Bottomley's decision-making.

56. Ms Bottomley considered the credibility of the allegations when deciding, under principle 2, whether the material was "relevant", concluding:

> "In my opinion this information is not so without substance that it is unlikely to be true and thus make disclosure disproportionate because, whilst a statement was received that undermined the evidence of two main prosecution witnesses, there were others who had raised concerns about [A], including allegations that she would sleep whilst on night shift."

57. In my view, she should at this stage have considered all the questions in paragraph 18 of the Guidance, namely:

    a) is the information from a credible source?

b) are there any specific circumstances which lead the decision maker to consider that the information is unlikely to be true?

c) is the information so without substance that it is unlikely to be true?

d) if minded to disclose, have all reasonable steps been taken to ascertain whether the allegations are more likely than not to be true?

58. By only applying the test at (c) above, she applied too low a threshold when considering the issue of credibility. There were specific circumstances – the evidence of resentment on the part of the health care assistants towards the Claimant and possible racism – which might mean that the allegations were untrue. Further reasonable steps could have been taken to ascertain the truth of the allegations. Mr Basu submitted that the Defendant had no resources to enable it to carry out further investigation. However, in this case Ms Bottomley did not even read all the relevant material. She did not read the Claimant's police interview. In her witness statement, she frankly admitted that she might not have read the statements of the two main health care assistants, SL and MB. She read the police statement of Mrs Broom, but not, it appears, the documents arising from Mrs Broom's investigation. In paragraph 15 of her witness statement, Ms Bottomley said that "Mrs Broom re-instated the Claimant to her job on the basis that the disciplinary process had not been followed correctly". Ms Bottomley appears to have overlooked Mrs Broom's conclusion in her investigation report that the care home records and the evidence of a bank nurse, Ms Tah, cast doubt on the accuracy of the allegations against the Claimant.

59. I also consider that Ms Bottomley's evaluation of the evidence was inadequate. In reaching her conclusions on credibility, she made no reference to the Claimant's defence; the evidence of hostility on the part of the health care assistants towards the Claimant; Mrs Broom's findings that the records supported the Claimant's account; and the contradictory evidence of JT, the bank nurse.

60. The Claimant rightly criticised Ms Bottomley's failure, in her formal reasons, to consider the "credibility" of the allegations when carrying out the balancing exercise under Article 8(2). She did not mention the credibility or reliability of the allegations at this stage. Lord Neuberger in *L* identified as a relevant factor "the reliability of the information upon which it is based", at [81]. The Guidance, at paragraph 22, advises Chief Officers that they must weigh factors underpinning relevancy, such as credibility, against any potential interference with privacy.

61. Ms Bottomley did not, and indeed could not, conduct the proportionality exercise properly at this stage because she was not considering whether the means employed were proportionate to the legitimate aim pursued or whether a fair balance had been struck between the interests of the community and the protection of the individual's rights. The Claimant was entitled to have the potential unreliability of the allegations taken into account at the second stage when proportionality fell to be considered under Article 8(2).

62. In so far as she did consider the proportionality of disclosure, it appears from her witness statement that she gave primacy to the risks to vulnerable adults ahead of the risk of unfairness to a falsely accused employee. She said, in paragraph 17:

> "A candidate for a job caring for children and/or vulnerable adults could be the subject of a false allegation and therefore

> completely innocent, but the children and vulnerable adults are completely innocent."

In my view, her approach reflects the view of the Court of Appeal in *X* that priority must be given to the social need to protect the vulnerable, as against the right to respect for the private life of the applicant, even if the allegations against the applicant only might be true. However, this approach was rejected by the Supreme Court in *L* because it was incompatible with Convention rights.

63. Ms Bottomley stated at paragraph 17 of her statement that, in reaching her decision, she was "aware of the fact that the Independent Safeguarding Authority had not barred the Claimant and the .... [NMC] had not considered that the Claimant had a disciplinary case to answer". This could not be true, since the NMC decision that the Claimant had no case to answer was made in December 2012 whereas Ms Bottomley's decision was made in October 2012. Although Mr Basu tried to argue that this sentence merely meant that Ms Bottomley knew that the NMC had not yet decided that she had a case to answer, his own skeleton argument made this interpretation untenable. Mr Basu's skeleton said, at paragraph 26, "Here the decision maker, Gillian Bottomley, was aware of the decisions of the NMC and ISA in relation to the Claimant but neither body had had access to the same amount of information ... neither decision followed a hearing of any sort .... Their decisions were merely a factor to which she was entitled … to attach little or no weight in the circumstances." These submissions are plainly made on the basis that the NMC decision in the Claimant's favour had already been made at the time Ms Bottomley made her decision, and they seek to explain why she was entitled to give it little weight.

64. In my view, the likely explanation for Ms Bottomley's misstatement was carelessness, not any intention to mislead. However, her misstatement of the position in respect of the NMC decision, betrays a cavalier attitude towards the decisions of other bodies, causing me to doubt whether she had appropriate regard to them.

65. Ms Bottomley was not bound by the decisions of the other bodies who had considered the allegations against the Claimant since they were deciding different questions to the one she had to decide, and they had made no formal findings of fact (see *R (Bradley & ors) v Secretary of State for Work and Pensions* [2009] QB 114).

66. However, in my judgment, it was highly relevant to the assessment of reliability and credibility that the CPS had decided that there was insufficient evidence to prosecute; the ISA had decided not to take even preliminary steps towards barring the Claimant and that Southern Cross had decided that the allegations could not be relied upon. Each of these bodies had expertise and experience which Ms Bottomley did not have.

67. For all these reasons, I consider that the Defendant applied the wrong legal tests and adopted a decision-making procedure which was flawed. I conclude, therefore, that the decision to disclose the allegations against the Claimant in the ECRC dated 12th October 2012 was unlawful and should be quashed.

The Court's assessment under Article 8

68. In deciding whether or not the Defendant's disclosure is in breach of Article 8, I need to consider what is the appropriate weight to give to the views of the Defendant, as expressed through Ms Bottomley. As Ms Bottomley is head of the Central Vetting Unit of Kent Police, it is reasonable to assume that she has expertise in disclosure

decisions regarding material commonly held by police forces. I was told nothing about her experience or background. It has not been suggested that she has any expertise in care homes or nursing. I assume that she is a civilian rather than a serving police officer since there is no mention of her rank, and so she does not have particular expertise in the investigation and detection of crime.

69. Mr Basu submitted that the appropriate weight to give to the judgment of Ms Bottomley was very high because she had access to the material concerning the investigation into the Claimant, in particular the reports prepared for the CPS by DC Preece. That investigation was conducted by DC Preece, who has expertise in the investigation and detection of crime.

70. Whilst plainly DC Preece's reports were important material, I consider that her conclusions were open to question. DC Preece concluded that there was a case to answer for the purpose of criminal proceedings. Her decision was subsequently overridden by the CPS, Crown counsel and Maidstone Crown Court, when the prosecution offered no evidence and the Claimant was acquitted. The reason for the revised decision was the evidence of Mrs Broom, the manager who investigated the allegations for the purposes of the appeal, and found that they were not reliable.

71. I consider that the quality of DC Preece's investigation was undermined by her failure to interview Mrs Broom or await the outcome of the Claimant's appeal. The Claimant appealed on 20th April 2011; Mrs Broom conducted her investigatory interviews on 27th May 2011 and sent her decision letter to the Claimant on 1st June 2011. DC Preece commenced her investigation on 7th April 2011. The computer records show that DC Preece spoke to Mrs Broom on 26th May 2011 about the appeal and Mrs Broom informed her of the outcome on 1st June 2011. DC Preece recorded "Mrs Broom said she did not feel there was enough evidence against [the Claimant] …. Mrs Broom believed [the Claimant] rather than the two witnesses." DC Preece went ahead and sent her initial report to the CPS on 27th May 2011 (the same day as Mrs Broom's interviews), and sent further reports on 14th July and 10th August 2011. None of these reports mention the successful appeal or Mrs Broom's investigation and the conclusions she reached.

72. DC Preece relied upon the initial investigation and dismissal by Southern Cross in her report, indicating that she believed it to be relevant. When she interviewed the Claimant on 24th May 2011, she referred extensively to the reports from the initial investigation by Southern Cross. The investigation and outcome on appeal was equally relevant and in my view, DC Preece could and should have included the appeal within her investigation, interviewed Mrs Broom, and considered Mrs Broom's notes of her investigation. If she had done so, she might have produced a more balanced report and the decision to prosecute might not have been made.

73. In a note supplied at my request after the hearing, she explained that she did inform the CPS of the outcome of the appeal, probably at a meeting on 13th June 2011. At some point after the meeting on 24th August 2011, she was asked by the CPS to obtain a statement (she does not recall precisely when), but she had difficulty locating Mrs Broom, as Southern Cross closed down and Mrs Broom left. In the event, DC Preece did not interview Mrs Broom until a year later, on 16th May 2012.

74. In light of my concerns about the manner in which Ms Bottomley and DC Preece assessed the relevant material, I have concluded that I can only give limited weight to

the Defendant's views when considering whether there has been a breach of Article 8, as alleged by the Claimant.

75. Lord Bingham's analysis of Article 8 in *Huang* at [19] identifies the issues to be considered when deciding whether an interference with the rights protected under Article 8(1) is "necessary in a democratic society" for one or more of the legitimate aims set out in Article 8(2).

76. In the context of a decision under section 113B Police Act 1997, the legitimate aim pursued is "the protection of the rights and freedoms of others".

77. Disclosure will only be "necessary in a democratic society" where it is justified by a pressing social need, and proportionate to the legitimate aim pursued.

78. Proportionality involves two concepts. First, whether the means employed are proportionate to the legitimate aim pursued. Second, whether a fair balance has been struck between the interests of the community and the protection of the individual's rights.

79. In *L*, Lord Hope said at [42]:

> "...the issue is essentially one of proportionality. On the one hand there is a pressing social need that children and vulnerable adults should be protected against the risk of harm. On the other hand there is the applicant's right to respect for her private life. It is of the greatest importance that the balance between these two considerations is struck in the right place."

80. Lord Neuberger described the factors which typically would have to be taken into account, at [81]:

> "81. Having decided that information might be relevant under section 115(7)(a), 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 weight 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 her 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."

81. The impact of disclosure on the Claimant has been, and will continue to be, grave. Although she has an impressive record of employment as a senior nurse, the disclosure on the ECRC has prevented her from obtaining permanent full-time

employment in her profession. I have seen letters from health authorities stating that they would not employ her because of the disclosure on the ECRC. The only work she has been able to obtain is a limited amount of shift work through an agency, owing to the fact that the owner of the agency knows her personally. The reduction in her earnings has been very detrimental, affecting the Claimant's ability to maintain her home and family. Her professional reputation and good name has been damaged as a result of this disclosure, and as has no means of clearing her name, the damage will continue indefinitely.

82. The nature of the allegations of neglect and misconduct towards vulnerable elderly patients plainly give rise to concern. They are directly relevant to her future job applications for employment as a nurse. However, "the reliability of the information upon which they are based" (per Lord Neuberger in *L* at [81]) is highly questionable.

83. Mrs Broom, who has expertise in care home management through her work for Southern Cross, carried out an independent and thorough investigation, and concluded that the allegations against the Claimant were not substantiated. Her reasoning was convincing:

a) in relation to the patient who allegedly had a fit while the Claimant was sleeping, Mrs Broom found that the Night Check Book had two entries made by SL, at 3.25 am and 4.25 am, saying that the patient was fine, which was not consistent with SL's entry in the patient records at 4 am saying that she had a fit;

b) on the same occasion as (a) above, at the time the Claimant was alleged to have been sleeping, she made an entry in the records proving she was not asleep;

c) on another occasion, at the time the Claimant was alleged to have been neglecting her duties and sleeping/resting, the records showed that she was covering for an absent nurse on another floor;

d) a bank health care assistant (JT) was on duty on all of the occasions when the allegations were said to have taken place and said she had not witnessed the Claimant displaying any lack of care or sleeping on duty, but that her demeanour to residents was not polite or respectful.

84. The evidence disclosed overt hostility on the part of the health care assistants towards the Claimant, including racist remarks.

85. MB said she was "bullied" by the Claimant, and found her "intimidating". SL complained that the Claimant criticised staff practices which had been in place for a long time and that the Claimant was "bossing everyone around".

86. The Claimant said that, as a senior nursing officer in Lagos, she had learned to be meticulous and disciplined in the co-ordination of shifts and this approach made the carers angry. The Claimant was not a manager but she believed it was her role, as the nurse, to correct their unsafe or poor practices. She had had issues with SL and MB. They were slap-dash and unhygienic; did not wash their hands or change their gloves; did not always use gloves and aprons; spent too long on smoking breaks and using the internet. Their manual handling techniques were inappropriate, but when she corrected them, they became angry and abusive. She reported them to the manager on several occasions.

87. MB and SL thought she was "too strict" and called her "commander". MB complained about the Claimant's attitude and said it was "typical of an African" and used a racist term about her. SL and MB also complained that the Claimant was lazy and did not do her share of care work (as opposed to nursing work) during the night shift.

88. The evidence suggested that they found the Claimant to be a forceful personality, bordering on rude, and they resented her controlling management style and her imposition of standards and practices from Nigeria which they were unused to and disagreed with.

89. This evidence lent support to the Claimant's assertion that these allegations were motivated by resentment towards her, which potentially undermined their reliability.

90. The allegations have been considered by the CPS, the ISA, Southern Cross and the NMC who, after careful consideration of the evidence, concluded that these allegations were not a sufficient basis upon which to take action against the Claimant. Although each body was applying different criteria, it is highly significant that all these bodies have reached a similar conclusion. The ISA, the employer and the NMC have wide experience and expertise with care home nursing staff. In the case of the NMC, and the employer, their remits were wide, going beyond allegations of abuse and extending to unprofessional practice. The allegations, if accepted, would have merited action against the Claimant. Yet still their conclusions were that there was no case against the Claimant.

91. The position before me now is that the NMC has made its decision that there is no case to answer on the evidence, which in my view, is highly significant because of its expertise and experience in nursing, including the care of vulnerable adults.

92. Mr Basu questioned whether the NMC had sufficient evidence upon which to make a reliable judgment. As far as I can tell, they did. The NMC asked an independent firm of solicitors, Morgan Cole, to investigate the allegations and provide the NMC with a report. Although the Defendant formally referred the case to the NMC, it was unable to locate, at the time of the hearing, the referral letter or the correspondence with the NMC, which would have clarified what material was made available to the NMC by the police. After the hearing, but before judgment was handed down, these documents were found. It appears that Morgan Cole asked the Defendant for their file, citing the Memorandum of Understanding between the police and the NMC and the Court of Appeal decision in *Woolgar v Chief Constable of Sussex and UKCC*, 26th May 1999, which recognised the existence of a public interest entitling the police to disclose information to a regulatory body, in that case, the United Kingdom Central Council for Nursing, Midwifery and Health Visiting (UKCC), without the consent of the individual.

93. The Defendant sent to Morgan Cole the Crime Report (comprising about 60 pages); three witness statements by DC Preece and the Claimant's police interview. These documents had names redacted. The Defendant advised Morgan Cole that it held a further 12 witness statements which it would not disclose without the written consent of the witness or order of the court, but offered to write to the witnesses to seek disclosure. The Claimant gave her consent. As the NMC was not a party to these proceedings, I do not know what steps the investigators took to obtain further witness statements. It is apparent from the text of the NMC's decision letter that the NMC had a statement from Mrs Broom, but I am not sure whether that was the police statement

or another one. The NMC decision letter also stated that Morgan Cole interviewed two witnesses. It is reasonable to assume that the NMC must have been satisfied that the allegations had been adequately investigated, otherwise they would have postponed their decision and directed that further investigations be pursued.

94. It is unfortunate that at no stage has there been any oral hearing at which the allegations against the Claimant, and her defence, were tested. However, Mr Basu was adamant that a lack of resources meant that the Defendant could not embark upon any further investigation beyond that which had already been carried out. There is now no prospect of any other body holding an oral hearing to determine the truth of these allegations. Although this court could hear oral evidence from the Claimant, the parties in these proceedings were not in a position to call the health care assistants or Mrs Broom as witnesses.

95. My conclusion is that the Defendant has failed to establish that disclosure of these allegations against the Claimant is proportionate under Article 8(2). On the basis of the evidence before me, including the decisions of Southern Cross, the CPS, the ISA and the NMC, the allegations against the Claimant are not reliable. On the balance of probabilities, I consider that they are either exaggerated or false. When assessing proportionality under Article 8(2), and balancing the need to protect vulnerable patients from the risk of ill-treatment, against the harm caused to the Claimant by disclosure, the balance tips in favour of non-disclosure when it is more likely than not that the allegations are either exaggerated or false. A fair balance must be struck between the interests of the community and the protection of the individual's rights, and it is disproportionate for the Claimant's professional life to be blighted in this manner when the allegations have been repeatedly found to be unreliable.

96. Therefore my conclusion is that disclosure of these allegations by the Defendant in an Enhanced Criminal Records Certificate is in breach of Article 8 ECHR, and section 6(1) HRA 1998.