Case No: CO 6081 /2009

Neutral Citation Number: [2010] EWHC 1601 (Admin)
IN THE HIGH COURT OF JUSTICE
ADMINISTRATIVE COURT

Sitting at:
Manchester Civil Justice Centre
1 Bridge Street West
Manchester
M3 3FX

Date: Monday, 24th May 2010

Before:

MR JUSTICE LANGSTAFF

- -

Between:

C

Claimant

- and -

CHIEF CONSTABLE OF GREATER MANCHESTER

First Defendant

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Second Defendant

- -

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Ms Abigail Hudson appeared on behalf of the **Claimant**.

Ms Anne Studd appeared on behalf of the **Defendant**.

- -

Judgment

(As Approved)

MR JUSTICE LANGSTAFF:

1. By this application for judicial review the claimant seeks declarations and a quashing order in respect of the decision made by the second defendant under a scheme set up by the first defendant to reveal the information about him to a prospective employer, an almost inevitable consequence of which in the claimant's case was that he would not obtain employment or continued employment with that employer.

2. The claimant, C, had sought a job as a welding lecturer teaching the skills of welding to those in further education in a local community further education college which will remain nameless. The college, so I am told, deals with those over the age of 16.

3. There are essentially three challenges to the disclosure: first, that the disclosure itself in any form of the information which was provided was unlawful; secondly, that a decision should have been made to seek the views of C before making any such disclosure as was made; and thirdly, that in any event the terms in which the disclosures were made were unfairly prejudicial to the claimant.

4. Before turning to the facts which give rise to these challenges, I shall set out the statutory regime by reference to which the challenge is sustained.

5. It arises under Part V of the Police Act 1997 as amended by the Serious and Organised Crime Act 2005 and then by the Safeguarding of Vulnerable Groups Act of 2006. In its current form the statutory numbering differs from that which was considered by the Supreme Court in the case of R (L) (FC) v Commissioner of Police of the Metropolis [2009] UKSC 3. However, the relevant statutory provisions are not materially different from those considered by their Lordships. Part V provides for a scheme by which in outline those employers who have a proper reason to ask it may obtain certificates of varying sorts relating to information that an applicant for a post may be undesirable. Thus section 112 provides for a criminal conviction certificate to be issued, section 113A that a criminal records certificate must be issued where the application is countersigned by a registered person. There are descriptions in subordinate legislation as to who it is that would be a registered person.

6. Section 113B is the section with which this case is concerned. It provides as follows, under the heading "Enhanced Criminal Record Certificates":

> "113B Enhanced criminal record certificates
>
> (1) The Secretary of State must issue an enhanced criminal record certificate to any individual who -
>
> (a) makes an application …
>
> (2) The application must -

(a) be countersigned by a registered person, and
(b) be accompanied by a statement by the registered person that the certificate is required for a prescribed purpose.

(3) An enhanced criminal record certificate is a certificate which -

(a) gives the prescribed details of every relevant matter relating to the applicant which is recorded in central records and any information provided in accordance with subsection (4), or
(b) states that there is no such matter or information.

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

(a) might be relevant for the purpose described in the statement under subsection (2), and
(b) ought to be included in the certificate.

…

(6) The Secretary of State must send to the registered person who countersigned the application -

(a) a copy of the enhanced criminal record certificate…"

` The remaining subsections have not featured in the argument nor the case before me.

7. The requirement in 113B(4)(a) and (b) has been central. It requires on the face of it that two matters be considered by the chief officer: first, whether any information might be relevant for the purpose for which the statement is to be provided; and second whether it ought to be included in the certificate. The first issue, that of relevance, has been described in words to which I shall come as providing a low hurdle. However, the requirement that the chief officer considers what ***ought to be included*** in the certificate is on authority and from principle said to involve the issue of proportionality, that is, setting a balance between the importance and desirability of providing the information on the one hand against, on the other, the degree of interference with and the likely consequences of such interference in the private life of the person to whom the information relates.

8. Before turning to what, importantly, their Lordships said in L, I make these observations. First, the decision is expressly that of the chief officer. In practice, as this case demonstrates, he will delegate that authority and responsibility to others of senior rank within his force, but it is their decision exercising his name which is central. Secondly, context is plainly relevant here as it is generally throughout the law. Disclosures may be sought in many different circumstances. They may be sought for a variety of reasons. There is no question that one piece of information, if disclosed once in one set of circumstances, may necessarily be disclosed proportionately in other circumstances. It all depends upon the particular facts.

9. It follows in my view that the questions to be asked and answered both in respect of relevance and proportionality under section 113B(4) and in particular those asked of proportionality cannot and do not sit easily inside tick boxes or in any matrix which provides effectively for tick boxes. That is not to say that such a matrix may not be a very useful guide to a decision maker, but it can never substitute for the exercise of a careful judgment taking into account the relevant facts, particularly in the knowledge that any decision in this area has the potential to have serious consequences, on the one hand. for those in respect of whom it is sought to prevent their being any real risk, and secondly on the other to avoid there being a serious damage done to the interests of the person in respect of whom the information may be provided.

10. The need to respect private and family life derives from Article 8 of the European Convention on Fundamental Human Rights and Freedoms. Its provisions are well known. It is a qualified right, qualified necessarily by the need of the state to protect those who might otherwise be exposed to criminal activity and to meet what might be summarised as pressing social needs. Whereas in this case I was taken in the early part of her submissions by Ms Hudson to those cases determined at common law prior to the enactment and coming into force of the 1997 Police Act (in particular the cases of R v Chief Constable of North Wales, ex p AB [1998] 3 FCR 371, R v Chief Constable of North Wales Police, ex p Thorpe [1996] QB 396 and R v Local Authority and Police Authority in the Midlands ex p LM [2000] 1 FLR 612) in which it was held that there should be a presumption against disclosure in the absence of there being a pressing need, I consider that little help can be gained from those cases because it seems to me, as recognised in L, that the statute itself recognises a pressing need for disclosure in certain circumstances which it then defines by the mechanism I have outlined above.

11. Thirdly, in the light of that I observe that there is no presumption to be made against disclosure but nor is there a presumption to be made in favour of disclosure. That there had been such a presumption thought to emerge from the wording of the 1997 Police Act was the principle underlying the decision in the case of R (X) v Chief Constable of the West Midlands Police [2004] EWCA Civ 1068 [2005], 1 WLR 65, but it was specifically that approach which was rejected by a majority of the Supreme Court in L with the dissent only of Lord Scott.

12. Fourthly, I observe that the balance required by proportionality necessitates a close attention by the decision maker to detail. It is plainly important, as it seems to me, that the decision maker is to be careful in weighing the risk on the one hand of non-disclosure against the risks of disclosure.

13. Relevant, fifthly, in striking that balance is the force of the accusations. It is relevant to the decision that allegations which may be true, and are assessed as relevant if potentially true, are less compelling than others in similar circumstances might be where and to the extent that the allegations are weak even if not unbelievable. Weaker allegations must carry less weight in the balancing process than ones with stronger reason to believe them.

14. That is because in my view, sixthly, it is risk which the statute seeks to guard against, indicated by such a past history of a potential employee as may indicate that he is unsuitable for the job he proposes. Risk here is a combination of the likelihood of acts being committed by him which harm the interests of others and the severity of that harm, should it occur. It may be overanalysis to go further and suggest that "likelihood" is itself an evaluation of the evidence that any particular reprehensible behaviour had occurred in the past in particular circumstances, against the similarity of the circumstances in which the person concerned was likely to find himself in the future and the controls that there might be in that environment which would argue against a reoccurrence, but it is certainly my view that the analysis requires an appreciation, whether stated or not, of the extent of risk.

15. With those observations I turn to the central authority in this case, that of L. The facts of L are not significant to the discussion which follows, and may be briefly stated. L sought a job as a playground assistant in a school where youngsters attended. There was evidence that she had been unable to control her own young son, to the extent that the social services had been involved and at one stage her son's name was to be placed on the child protection register under the category of neglect. The disclosure of that information was held unanimously by their Lordships to be both appropriate and proportionate when a position as casual midday assistant was being considered, involving as it did relationships with children of the age at which her son had been at the relevant time. But the test which the court applied and the observations made in the judgments are of critical importance to the decision this court has to make here. The decision under consideration in that case had been made by the Chief Officer following the terms of a matrix set out in guidance based firmly upon the decision in X. X had decided that there should be a presumption in favour of disclosure of any material which might be relevant and it would only be in exceptional circumstances that the phrase 'ought to be disclosed' would fall for consideration so as to render such information not in fact the subject of disclosure.

16. Lord Hope who gave the leading speech observed in paragraph 42 that the issue was essentially one of proportionality. He expressed it thus:

> "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 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."

17. At paragraph 4 he gave it as his opinion that the effect of the approach taken in X had been to tilt the balance against the applicant too far. That was shown by the way the rating table had been constructed. What was needed was to give the statutory words 'ought to be included' their full weight so that proper consideration was given to the applicant's right for respect for her private life. See also paragraph 45, ending in the words:

> "It should no longer be assumed that the presumption is for disclosure unless there is a good reason for not doing so."

And paragraph 46 in which he said this:

> "46. In cases of doubt, especially where it is unclear whether the position for which the applicant is applying really does require the disclosure of sensitive information, where there is room for doubt as to whether an allegation of a sensitive kind could be substantiated or where the information may indicate a state of affairs that is out of date or no longer true, chief constables should offer the applicant an opportunity of making representations before the information is released. In *R (X) v Chief Constable of the West Midlands Police* Lord Woolf CJ rejected Wall J's suggestion that this should be done on the ground that this would impose too heavy an obligation on the Chief Constable [2005] 1 WLR 65, para 37. Here too I think, with respect, that he got the balance wrong. But it will not be necessary for this procedure to be undertaken in every case. It should only be resorted to where there is room for doubt as to whether there should be disclosure of information that is considered to be relevant. The risks in such cases of causing disproportionate harm to the applicant outweigh the inconvenience to the chief constable."

18. Lord Brown and Lord Saville agreed, the former saying at paragraph 63 that there could be no doubt of the impact which an enhanced criminal records certificate containing any adverse information was likely to have on the person's prospects of obtaining the desired employment. It seemed therefore to him imperative in every case to ensure that the public interest in safeguarding children really did justify the relevant disclosure. He thought that the balance had to be restruck from that which was shown in X, such that

it was properly to be achieved in the first place by the Chief Officer of Police giving no less weight to the section 115(7)(b) requirement than to the section 115(7)(a) requirement. (Here I pause. I have already noted that the section numbering was different. Section 115(7)(b) to their Lordships in L reads as does section 113B(4)(b) to me here; 115(7)(a) was to them as is section 113B(4)(a)). He was to consider the relevance of the material, rather than applying a presumption that any material that might be relevant ought to be disclosed. Second, in any borderline case before issuing the certificate the Chief Officer should give the prospective employee an opportunity to state why the information which the officer proposed disclosing ought not in fact to be disclosed.

19. Lord Neuberger noted at paragraph 69 that even where an ECRC recorded a conviction or caution for a relatively minor or questionably relevant offence, a prospective employer might well feel it safer, particularly in the present culture, to reject the applicant. He observed that the present culture "at least in its historical context, can be said to be unusually risk-averse and judgmental".

20. So far as the balance to be struck under section 115(7)(b) was concerned (that is now section 113B(4)(b)), he drew particular attention to the fact that the material which would be contained in an enhanced record might frequently extend to allegations of matters which were disputed by the applicant or even to mere suspicions or hints of matters disputed by an applicant (see paragraph 77), that the threshold for inclusion of such matters in a certificate was subjective and "very low", and that would have led him to conclude that the regime would not have been compatible with the Convention had it not been for the presence of what is now section113B(4)(b).

21. At paragraph 81 he said:

> " 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 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 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. "

22. Here the proposed disclosure in the ECRC was in respect of prospective employment as a lecturer. The employer seeking the information was "Protocol National", which I understand stands for Protocol National Database. In effect, unless a lecturer is registered with the Protocol National Database, he has no possibility in practical terms of obtaining employment as a lecturer in any college.

23. The police record of convictions, cautions, reprimands and final warnings shows that none were recorded against the applicant. There was no information against the applicant under section 142 of the Education Act 2002, there was no information recorded against him deriving from the Protection of Children Act and there was no information against him when it came to protection of vulnerable adults.

24. The concerns over disclosure have related therefore purely to that which is contained in a box at the bottom of the page headed "Other relevant information disclosed at the Chief Police Officer's discretion".

25. From the Greater Manchester Police this is said:

> "On 16/3/06 a 27 year old female attended at Radcliffe Police Station in a distressed state reporting an allegation of historic sexual abuse. She stated that between the ages of 5 and 15 years she had been subject to acts of indecency by her step father, [C], [and it gives his date of birth]. She alleged from the age of 5 years that he would tuck her in bed and read a story, at this time he began to touch her vaginal area. She alleged the assaults continued over many years and increased to a point where he began to force her to perform oral sex on him. She had initially reported the matter to the police in 1994 but was coerced into retracting the allegations by her mother. As a result no police investigation was conducted in 1994.
> A police investigation confirmed that the allegation had been made and the mother confirmed that whilst she had no reason to disbelieve her daughter at the time she had persuaded her to withdraw the allegations.
> On 11/05/06 [C] was arrested and denied the allegations when interviewed. The full circumstances were reviewed by the Crown Prosecution Service who concluded that whilst there was no reason to disbelieve the female's account there was insufficient evidence to provide a

> realistic prospect of conviction. No further police action was taken in this instance"

Reasons for making the disclosure

26. The decision to disclose in the terms I have set out was made initially before September 2008. C became aware that the disclosure had been made and attempted to tell the Criminal Records Bureau that the disclosure was inaccurate and thereafter pursued complaints until, finally, in March 2009 the defendant maintained the position that the material should be disclosed. The reasons for making the original disclosure are set out in a witness statement which, being provided late though it was, I nonetheless permitted to be put before me for the purposes of this hearing.

27. David Barry Frost, who makes the statement, did not make the decision. The decision was made by the Occupation Checks Disclosure Unit manager. That is the position Mr Frost now occupies, but at the time of the decision in this case it was Superintendent John Sargeson. The system was for an assessment to be made under what is plainly the same guidance and the same matrix as fell for consideration in L. The officer sets it out. It shows that a civilian employee whose job it was to make a risk assessment had referred the decision upward, being unsure as to whether there should or should not be a disclosure. That is despite the regime being as it had been described in L at the time. Mr Frost tells me that Superintendent Sargeson, from whom there is no statement, concluded that the disclosure was in relation to allegations of sexual abuse in paragraph 9 of the statement, that that was relevant to the post applied for as a lecturer "as there is a risk that the applicant would abuse children in his care". Mr Frost says:

> "In coming to this decision I have taken into account that the applicant has not been charged with the offences alleged. However, the text is additive, relevant and should be considered prior to the applicant taking the post applied for. There is no evidence to suggest the allegations are false, other than the applicant's denials. The fact that the allegations have been made twice and the circumstance of the first being retracted add weight to them.
>
> 11. I believe this disclosure to be factually correct, proportionate and that the wording is fair. Having considered the human rights of the applicant and the potential risk identified, I believe the disclosure is necessary. I authorise disclosure as approved information."

28. As to this, it is plain from what is not said in paragraph 9 that there was no obvious detailed consideration of the extent to which, as a welding lecturer in a further education college, the claimant would come into contact with children in respect with whom there was some risk of abuse. The precise

nature of the job and the contact with risk groups which it might afford does not appear to be spelt out. It is plainly relevant, in that very different considerations may apply, for instance, to someone seeking a job as a teaching assistant in a primary school compared to someone whose primary focus is teaching those who have already been through and completed their formal secondary education, are above school leaving age, and are engaged in an essentially vocational course, in an environment populated by other young adults and children over 16.

29. As to paragraph 10, where he says there is no evidence to suggest the allegations are false other than the applicant's denials, adding something about the circumstances of the first being retracted adding weight, this is difficult to understand without the further information which the papers have disclosed. They show (see page 129) that the complainant, the stepdaughter of C, had made the allegations that she had been abused both to social services and to the police in 1994 and had told each subsequently that she had made up the allegations as a means of seeking attention. To say there was "no evidence to suggest the allegations are false" is to ignore that objectively viewed there was such evidence: that is, that she herself had said so. She had, however, subsequently retracted that confession, that she had lied, as being untrue. What then fell to be asked, with the detailed anxious curiosity that one might expect of a decision maker in the circumstances, was, first, why the allegations were made and withdrawn in the first place when they were, and secondly, why they should be resurrected now. There is no evidence before me as to any answer to the latter question. As to the first, there is material to show that the complainant said that she had been persuaded to retract by her mother, the ground for persuasion being that her mother feared that she would lose access to her children if the complaint were pursued. The mother was phoned by police at the time of repeating the allegations in 2006. She confirmed that she had persuaded her daughter to retract the allegations. What remains difficult, however, is the basis for concluding that the circumstances of the first complaint being retracted adds weight to the allegations, since it involves no separate allegation itself against the claimant, and it is difficult to see why complaints which are made and recognised as untrue at the time, should have added weight if restored rather than a question mark and need for explanation hanging over them.

30. Ms Studd in argument accepted that there would be a forensic hurdle, at least in presenting the evidence before a court, given that the focus would naturally be upon the question why the allegation was withdrawn in 1994 if true, but she maintained that it was open to the police officer nonetheless to accept that the allegations might indeed be true (and, as will become apparent later in this decision, I accept that the allegations might well be true).

31. In all of what Mr Frost says there is no detailed consideration of the issue of proportionality. In the case of X at first instance Wall J observed that it was not enough in his view for a decision maker simply to say that he had carried out a balancing exercise. This observation is obiter. It is obiter in a decision which was reversed by the Court of Appeal - though the principles underlying it were accepted by the Supreme Court to the extent to which I have already

referred though no further: so it is of some though possibly tenuous persuasive value. Nonetheless, I tend to agree that where a decision has to be carefully justified whichever way it goes, it would not normally be sufficient for a decision maker to simply say that he had believed disclosure to be proportionate.

32. The use of the word "proportionate" does, however, show that the decision maker had in mind the need to have some form of balance, and Ms Studd has pointed out with force, and I accept, that whatever the shortcomings may be of the guidance, it did draw attention to the impact of Article 8 in this general area.

33. Against this background, then, I turn to consider the challenges, the arguments and my conclusions. Should there have been disclosure in principle? In my view the decision in fact made by Superintendent Sargeson as reported by David Barry Frost cannot stand as a lawful decision. I have a number of reasons for this. First, it is implicit that he took centrally into account guidance which was flawed. The guidance itself was at parts ambiguous, quite apart from the effects of the matrix and the condemnation to the approach generally given in the L decision: see for instance paragraph 18 of the Guidance, in which the wording is that:

> "The decision must be taken strictly on the basis of relevancy, because that is the only requirement laid down by the 1997 Act - and it would be advisable to note in the record that the test of relevancy was the test applied."

34. That is a reflection, it seems, of the view in X that it would only be in exceptional circumstances that the 'ought to be disclosed' consideration would play a part. It was certainly entirely and properly in line with X, that is, properly in line as the law was then understood. But it seems to me that that guidance was the reason why Mr Frost expressed Superintendent Sargeson's decision as he did, and I have to infer that the Superintendent had significant regard to the guidance, which he had no reason to think at the time was at all misleading.

35. Secondly, in my view Mr Frost took an uncritical approach to the question of whether the complainant had admitted lying. I simply cannot accept that the fact that an allegation had been repeated could legitimately be said to add weight to the allegation. At best it would leave the allegation to be of equal weight and be properly explained away, but how it could add to the allegation is very difficult to see. The real point here is however not the way in which the reasoning is described, but the absence of any critical approach to the explanation given at the time, and whether an explanation that the mother have thought that she would lose access to her children if her husband, unknown to her, had engaged in sexual abuse with one of them, on the one hand, was actually credible and secondly, some explanation as to why it was that the allegations should have resurfaced when they did.

36. Thirdly, there is no apparent consideration by him of the question of risk. It is stated as relevant that there was a risk that the applicant would abuse children in his care. More than this seems to me to be required to make a decision as to disclosure where the post applied for deals with over-sixteens in a college environment when the abuse complained of was that said to have been committed in the home environment on a girl between five and 15. Ms Studd notes, in a submission which I will come back to, that in a college, of course, people may have access to youngsters which they do not have in other surroundings, but that demands an appreciation of the extent to which work in a further education college is any different from living a normal life in society in which there is not infrequent exposure to people of all ages: and once again brings one back to the age group to whom there is particular exposure. Put shortly, I would have expected more of the decision maker than is revealed by the reasons.

37. Ms Hudson, having submitted as I have described and as I have thought sound, added that the terms of disclosure and the absence of any prior involvement of the claimant before the allegations were sent to the Protocol National Database add weight to the argument that the decision was itself flawed in the first place. She argued that the word 'coerced' appears in the proposed disclosure. There is no material to show where this word comes from. Ms Studd says she cannot assist. It simply cannot be said that whether it comes from the complainant, or her mother, or is, as Ms Hudson was wont to call it in argument, a police construct. She complains that the terms of disclosure show no counterbalance other than the simple fact of denial and are drafted in such a way that a reader would naturally conclude that the allegations were seen as having truth and the denial little weight. She complains that more details should have been given of those denials. In this she is hampered by the fact, in my view, that her client has filed no evidence about what it was that he said to the police which ought to have been reflected in the disclosure statement. Yet he was interviewed. The transcripts of that interview have not been made available to the claimant nor to counsel acting for the police, and therefore I have not had sight of them in this case. But as the interviewee, he, C, must have known what he had to say and if there had been something of particular relevance which he said, then I might have been told in a witness statement. I asked for background information as to what the position of the marriage between him and the complainant's mother was and was given material which I would expect would have been investigated during the course of such interviews, but I have very great hesitation in basing any conclusion upon it since it is simply not the subject of evidence, and thus discount it.

38. However, Miss Hudson complains that no inquiry was made by the police. She asks me to pay regard to two statements made since the decision as to disclosure by siblings of the complainant, which are highly supportive of the claimant, as being material which, had the police made proper inquiries, they would have discovered in 2006. I have placed no weight upon these either because I do not know what might have been said by Ms Studd had she had proper notice of this point through the applicant's skeleton argument and the grounds in the N461 . No notice was given that this point would be taken. So

I simply refer to it in order to say that I shall ignore it, as I indicated when it emerged in argument in reply.

39. Finally, however, there is no reference to material which was undoubtedly in the possession of the police at the time, which is that the complainant herself had fallen foul of the police to the extent of having convictions. Ms Studd told me that those convictions were for theft, assault and driving whilst disqualified. The potential relevance might be whether in any of those cases she gave evidence and was disbelieved on oath. As to two of the cases, the information available to Ms Studd and therefore to me is that the police records simply do not show.

40. Ms Studd argued that the process of decision making was not a blanket decision making process. Attention was drawn to Article 8 by the material before the decision maker. There was a clear appreciation of the likely consequence of disclosure in that it must have been appreciated that to disclose would be to deprive the claimant of the chance of employment. She argued that the officer could indeed conclude the allegations were more credible because they had been repeated, given the difficulty that there must be to any woman who has been subject to sexual interference repeating allegations which she had withdrawn in the circumstances in which she did so whilst young, and that to repeat them later therefore indicated they must be true; that the police officers could not say that the claimant was lying, they had no objective material on which to base that; and that, given that, the decision to disclose was the only one to which under the available guidance (or for that matter the guidance as now understood with the assistance of L) could have been made. This was not a borderline case in which it might be appropriate to hear what the claimant had to say against disclosure in advance of it, because this was a man against whom there was an unresolved allegation of persistent sexual abuse who proposed to go to work with children,

Conclusions

41. As I have indicated, the basis upon which the decision was made by Superintendent Sargeson was such that the decision itself cannot stand as a decision. I need not repeat what I have already said.

42. It follows that of the second and the third challenges made to me, the challenge made in respect of the failure to give the claimant a chance to influence the defendant need not be considered further. It is inevitably predicated upon there being what might well be a proper disclosure subject only to some small alteration in its terms.

43. I should add for the sake of completeness that Ms Studd tells me that following discussions since original disclosure, it had been decided that the word ‘coerced’ should be replaced by the word ‘persuaded’, and so it is plain that the decision maker has had regard to what has been said so far as that is concerned. It follows also that the detailed complaint as to the wording falls since the decision to make disclosure as it seems to me is flawed.

44. Deciding that the decision making process was flawed does not, however, resolve this case because I have next to consider whether in any event the decision though flawed was in any event plainly and unarguably right, before turning to determine what relief if any I should give.

The proportionate decision

45. Here I invited counsel to consider whether the decision which the court has to take is one which reviews the decision of the officer of police, as the legislation suggests, or whether it is one which the court can and should take for itself in any event. As to that, Ms Hudson wished me to be in a position to make a decision for the court, but the nature of her submissions left me in some doubt as to whether she was actually proposing a review test or not. Ms Studd was clear that if the claimant had wished, he might have brought an action under the Human Rights Act without seeking judicial review, that the decision is one given by the legislation to the officer and that therefore the court should not make the decision itself but merely ask whether the decision maker's decision was within the range of responses reasonably open to him.

46. As it seems to me I do not need to resolve this particular debate in the event because I have come to a firm conclusion. First, given that the decision is flawed, can I conclude that it is plainly and unarguably right? I cannot. My reasons are these. I begin by accepting that the allegation is one which is possibly true. I take it that the police disclosure in using the expression 'no reason to disbelieve the account' means that there was no objective evidence to do so apart, that is, from the denial by the claimant, and as I have indicated, apart from the claimant's own earlier behaviour which might but not inevitably would lead to that conclusion.

47. Potentially, therefore, what is said might be true. If so, might it be relevant? Here both parties were agreed that it might be, and in my view are correct to be so. However the relevance is low or very low depending on which formulation one adopts. It is relevant because the proposed job involves working with those who are under the age of 18 and therefore children. The disclosure was sought also in respect of working with vulnerable adults, but there is no obvious connection between the circumstances of the offence and any particular risk to vulnerable adults, and in the course of her submissions, at one stage before Ms Studd took me to the document which showed that disclosure had been so sought, she observed that she thought that that particular risk was not really relevant in this case, and I think in that throwaway moment rightly drew the balance so far as that was concerned.

48. In assessing the weight of relevance here what is important first, adopting the words used by Lord Neuberger in paragraph 81 of L, is to have regard to the relevance of material to the particular job application. The job application was for the post of a lecturer in welding in a further education college. The allegations concerned a young female, at one stage very young, at home and in private. There is no evidence that there has been any repeat activity or any suspicion of repeat activity with any other female of any age. The claimant is a man of good character. There is nothing on the social services file against him. The allegations by the complainant are untried and untested, that is

inevitable, but the objective way of viewing it is that they were allegations as to which the Crown Prosecution Service thought there was no sufficient evidence even to place the defendant on trial or to pursue the investigation further. That the investigation did not proceed far, so it seems, may be demonstrated by the absence of material which there might have been from the family, though as I have said I can and will take no particular notice of the material purporting to come from siblings in my papers.

49. The fact that the allegations were withdrawn and then reinstated, and the additional fact, as it appears, that a claim was made by the daughter that she had had at one stage a letter written by the claimant in which he appears to have accepted some blame for what had happened, which she says she showed to her mother, yet which simply has not surfaced as one would have expected it to had this indeed been the case, tend to cast some doubt on the allegations.

50. There are, therefore as it seems to me, significant question marks over the quality of the evidence. It may be capable of belief but the question marks need reflection when drawing the balance which has per L to be drawn.

51. Given all that material, I cannot see that a decision which would inevitably have the consequence that C would not secure any work at all in his chosen profession would be proportional to a risk which, evaluated as I suggest it should be, though existing, would be low. It follows that I cannot say that the decision is plainly and obviously right.

52. I then have to ask what the consequence should be so far as this court is concerned. It seems to me so obvious in this case that a decision to release this information in any form, whether supported by the discussions with the claimant in advance or not, would simply not be proportionate, that I should so declare and I propose to do so.

53. I would actually like to add this, however. In view of the criticisms which have been made in the course of argument by Ms Hudson, the evidence which has been given to me by the police, although it demonstrates the flaws to which I have referred, shows that some degree of care was taken and does not in my view show that those who made the decision acted at all in bad faith. The decision was made in the light of the law as it was understood to be at the time. It was taken with regard to the procedures which were understood to be the correct and proper procedures. That the conclusion ultimately was as it was seems, as I have indicated, to place too high an emphasis upon the fact that any allegation of sexual interference with a youngster is necessarily grave and serious, and implies that a disclosure in any such case should, whatever the consequences to a claimant, be revealed. It does not strike the proper balance with the interests of the subject of that disclosure.

54. It follows that the claim on the basis which I have outlined must succeed.

MS HUDSON: My Lord, I think the only remaining matter is the issue of costs and I simply ask that they be assessed and paid by the respondent.

MR JUSTICE LANGSTAFF: Ms Studd?

MS STUDD: I (inaudible) as to costs but I do ask for permission to appeal. As far as I am aware, and I could be wrong because it might not have been reported, but as far as I am aware this is the first full hearing of a challenge since L. In my submission my Lord has struck the balance too far away and put too much responsibility on police officers to make a decision as to whether a person is going to be employed, and removed that decision from the employer, who obviously has to make that final ... give that final consideration. It is a very difficult issue. My Lord will be aware from the decision in L of the numbers of applications like this which come in. Very often the most difficult ones concern domestic sexual abuse because by their nature they are often people who make complaints and then repeal them. They are often complainants who have ... who could in some sense be seen to be unreliable for one reason or another. They are very often people who have, since the abuse occurred, if it did, been involved with criminal courts because of the effect that sexual abuse can have, and they are the types of case that cause the police the most difficulty, and in my submission my Lord has come down saying that this is effectively a decision that the Chief Officer must make and, where there is doubt about the reliability of the complainant, and where it is a one off allegation within a domestic context, then that will be a case where disclosure should not be made, and, my Lord, I cannot put it anymore succinctly than this, but that is incorrect, because that must put the burden too heavily upon the Chief Officer of Police in these very difficult decisions.

MR JUSTICE LANGSTAFF: Thank you for that. Shall we deal with the costs first? You don't oppose costs?

MS STUDD: I don't oppose costs.

MR JUSTICE LANGSTAFF: And are you supported legally or not?

MS HUDSON: I am subjected to a representation order, yes.

MR JUSTICE LANGSTAFF: So you want an order that there be legal aid assessment, or whatever the phrase is?

MS HUDSON: Indeed, to be assessed for the purposes of the Legal Services Commission.

MR JUSTICE LANGSTAFF: Very well, thank you. So be it so far as that is concerned. So far as leave to appeal is concerned, Ms Studd, I appreciate the difficulty of the decisions which have to be made by the police. It is a difficult area, and that is why structures are in place to deal with them as there are here. What I was struggling in this *extempore* judgment to say at the end - and omitted to repeat in the last paragraph - was that every case turns upon its own facts. If this had been a case in which the employment circumstances had been different, then I might well have taken another view, and this should not be seen as anything other than a decision upon its own particular facts and what is proportionate in the light of those particular facts. That being my approach, as it has been throughout, I do not think there is any issue of general principle which applies. You may be right in saying this is the first case since

L that has considered the principles forensically, but I am not satisfied that that is sufficient reason for saying that for some other substantial reason the appeal should be heard. The consequence is that if you want leave to appeal you have to go to the Court of Appeal and ask for it, but presumably you would like an expedited transcript?

MS STUDD: Yes, please.

MR JUSTICE LANGSTAFF: And I shall do my best to correct any infelicities in the transcript when it returns.

MS HUDSON: My Lord the reference for AB is ...

MR JUSTICE LANGSTAFF: Thank you.

MS HUDSON: ... is [1996] QB 396.

MR JUSTICE LANGSTAFF: 396. Thank you very much. I will just repeat that in case the transcriber can go back and put it into the transcript for me: [1996] QB 396. Thank you both.