Neutral Citation Number: [2012] EWHC 2996 (Admin)

Case No: CO/7426/2012

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/10/2012

Before :

THE HON. MR JUSTICE FOSKETT

- -

Between :

The Queen (on the application of 'J')	**Claimant**
- and –	
The Chief Constable of Devon and Cornwall	**Defendant**

- -
- -

Stephen Broach (instructed by **Royal College of Nursing Legal Services**) for the **Claimant**
Stephen Morley (instructed by **Devon & Cornwall Constabulary Legal Services Department**) for the **Defendant**

Hearing date: 18 October 2012

- -

Approved Judgment

Judgment Approved by the court for handing down.

MR JUSTICE FOSKETT:

Introduction

1. This case arises out of the decision of the Defendant not to remove certain contested information from the 'other relevant information' section of the Claimant's Enhanced Criminal Records Certificates ('ECRCs').

2. The leading case in this area is *R (on the application of L) (FC) (Appellant) v Commissioner of Police of the Metropolis* [2010] 1 AC 410, a decision of the Supreme Court given in October 2009. Lord Hope of Craighead described an ECRC in this way at paragraph 1 of his judgment:

> "The [relevant statutory provision] provides for enhanced criminal record checks to be carried out in various specified circumstances, such as where people are applying to work with children or vulnerable adults, for various gaming and lotteries licences, for registration for child minding and day care or to act as foster parents or carers. The check is enhanced in the sense that it will involve a check with local police records as well as the centralised computer records held by the Criminal Records Bureau. As well as information about minor convictions and cautions, it will reveal allegations held on local police records about the applicant's criminal or other behaviour which have not been tested at trial or led to a conviction. If the information satisfies the tests that [the relevant statutory provision] lays down, it must be given to the Secretary of State and the Secretary of State for his part must include it in the ECRC."

3. The relevant statutory provision for the purposes of the present case is section 113B of the Police Act 1997, inserted by section 163(2) of the Serious Organised Crime and Police Act 2005. It does not differ in any material respect from its predecessor, section 115 of the 1997 Act, to which the judgments in *L* related. (The section has been amended again with effect from 10 September 2012.) The relevant and operative subsections of section 113B for the purposes of this case are subsections (3) and (4) which read as follows:

> (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 shall 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.

4. It is the inclusion from December 2011 onwards in the 'other relevant information' section of the ECRCs of certain information relating to the Claimant based upon the tests set out in subsection (4) that lies at the heart of this case. Prior to December 2011 the ECRCs relating to the Claimant had contained no information in that section other than that to which I will refer in paragraph 8 below.

5. Permission to apply for judicial review was granted by Collins J on 31 August 2012 and the hearing has been expedited because of the effect that the inclusion of the relevant information is having on the Claimant's employment prospects.

6. These proceedings were issued on 11 July and on 17 July His Honour Judge Anthony Thornton QC gave certain directions which included the making of an anonymity order so far as the Claimant is concerned. I directed the continuation of that order at the outset of the hearing before me. I propose to deal with all individuals who figure in this case anonymously for reasons that will become apparent.

Background

7. The Claimant is a registered nurse from Zimbabwe and is now in her mid-30s. She qualified as a nurse in 1999 having commenced her training in 1996. She arrived in the UK in 2004. Since then she has been employed in various nursing roles in nursing homes and through care agencies. She has experience in nursing mentally ill patients, those with learning difficulties and terminally ill patients. Since her arrival in the UK she has completed a BSc degree in Health Studies and has obtained a Certificate in Dementia Awareness.

8. For completeness it should be noted that the earlier ECRCs did contain details of a caution administered to the Claimant in 2005 for "child cruelty" contrary to section 1 of the Children Act 1933. The inclusion of that matter in the ECRC is not challenged and it is not that matter that gives rise to the present proceedings. Some evidence was filed in these proceedings concerning the background to that matter, but it is important to note nothing came of it beyond the caution and, whilst it sounds serious in the way in which the offence is described, the actual circumstances were not as serious as might at first sight be thought. All I need to say for present purposes is that the allegation was <u>not</u> of any physical violence or cruelty to her son, either by her or by her husband who was also questioned about what happened; it involved leaving him on his own on one occasion for longer than was acceptable. At all events, the Claimant has disclosed this caution to the Nursing and Midwifery Council ('NMC'), but the Council has not sought to take it any further and the caution has, she says, never impeded her in obtaining employment even though it was referred to in about six ECRCs prior to those the subject of complaint in these proceedings.

9. That situation changed in December 2011 when she applied for two nursing positions and the ECRCs, both issued on 8 December 2011, contained information about allegations made against her in February 2007 and June 2011 by a 'Mrs R' and a 'Mrs T' respectively. A further ECRC issued on 6 January 2012 concerning another application she made for a nursing position contained the same information.

10. The information concerning these allegations was set out in the following terms:

> "Devon & Cornwall Constabulary holds the following information concerning [J] … that in the opinion of the Chief Officer might be relevant to this application and ought to be disclosed under Part V of the Police Act 1997.
>
> In February 2007 a complaint was made to police alleging that [J] had assaulted a female elderly lady who was a resident at the residential home which employed [J]. Police visited the elderly lady who did not wish to make an official complaint, but stated that she felt that [J] was too severe and heavy handed, although she apologised to the lady when she pointed out that her actions hurt her. No police action was taken and the residential home reported to police that they were to arrange some manual handling training for [J].
>
> In June 2011 police received a complaint that [J] had allegedly mistreated a resident at [a home for the blind]. It was alleged the resident lady had asked [J] for assistance in sitting up to which [J] is alleged to have grabbed the lady by the head and pulled her up. Police wished to interview the lady, but due to her being very ill and subsequently dying this was not possible. Two other residents also made a complaint about mistreatment from [J], but due to their dementia they were not considered reliable witnesses. [J] was interviewed by police regarding these incidents which she categorically denied. Police were advised that [J] subsequently left this employment."

11. The Claimant had been given no prior warning of the intention to add this information to the certificates and had been afforded no opportunity to make representations about the proposal to include such information.

12. On 24 January 2012 the Royal College of Nursing (the 'RCN') sent an urgent Pre-Action Protocol Letter on her behalf to the Defendant, the substance of which was in the following terms:

> "While the information disclosed in the ECRC may be factually accurate in the narrowest sense, in that such complaints may have been made against the Claimant, the Claimant has always argued that it is obviously disproportionate to disclose this information. The disclosure is partial and does not give an accurate picture of the allegations or the surrounding circumstances in the following important respects:

> Allegation 1
>
> [*the first allegation as set out above was quoted here*]
>
> The patient in question asked the Claimant to adjust her pillow one evening. In so doing the Claimant inadvertently hurt the patient and immediately apologised. It was a male nurse who took over from the Claimant in the morning who reported the incident to the police, not the patient herself. The Claimant understands that the patient had mentioned the incident to the male nurse in passing but had not formally complained. The patient and her relatives remained happy for the Claimant to nurse the patient and after a short suspension to investigate the matter the Claimant was asked to return to work by her employer, with the only action taken being the provision of further manual handling training. The Claimant was not interviewed by the police, was not subject to any disciplinary procedures and was not referred to her professional regulator, the Nursing and Midwifery Council (NMC).
>
> Allegation 2
>
> [*the second allegation as set out above was quoted here*]
>
> In relation to the two other residents who allegedly complained about mistreatment, the Claimant's understanding is that these residents did not make a complaint but as part of an investigation into the above incident they were asked leading questions by the care home manager and, as the disclosure notes, their statements were unreliable and hence of little if any probative value as evidence. Having been subject to a false allegation, the Claimant co-operated with the police whilst the investigations were completed. She left the care home on 1st August 2011 after giving notice and when the above issues had been resolved with the Claimant being advised that no further action would be taken. The reason why the Claimant left this employment was that she needed a job with day shift patterns to fit in with her son's schooling. She also considered that relations with the care home had broken down after these allegations. The Claimant was not referred to the NMC in relation to these incidents."

13. The letter asserted that there was insufficient reliable evidence to justify the decision to disclose information about both of the incidents, a decision which was suggested to have been disproportionate. It was also contended that the decision was unlawful since the Claimant had not been given an opportunity to challenge the disclosure decision before it was taken.

14. After some further correspondence, on 17 February 2012 the Defendant agreed to review his decision and a substantive response was eventually received dated 13 April 2012 in which it was said that it was "proportionate to disclose an amended text

which gives details of the 2007 and 2011 incidents but which also includes [J's] version of events." A proposed amended text for any future ECRC was included in that letter which was in the following terms:

> "In February 2007 a referral from [a named residential home] was made to Police. It described that [J], a RGN employed at the Home, had allegedly assaulted a female resident (88 yrs). The resident had subsequently told another nurse who took over from [J] about the incident leading to the referral to the police.
>
> Police spoke with the resident who did not wish to make an official complaint, but stated that she felt that [J] was too severe and heavy handed, although [J] apologised to the lady at the time when she pointed out that her actions hurt her.
>
> No Police action was taken and the residential home later informed Police that [J] was provided with refresher training in manual handling.
>
> [J] subsequently provided an account of the incident describing that on the evening in question whilst tending the resident she had been asked to adjust her pillow. Whilst doing this [J] inadvertently hurt the patient. [J] states that the resident and her relatives remained happy for [her] to nurse the patient and that after a short investigative suspension [J] was asked to return to work by her employer.
>
> [J] detailed that the only action taken by that employer was the provision of further manual handling training. [J] detailed that the matter was not referred to the [Nursing] and Midwifery Council (NMC).
>
> In June 2011 a referral from the [named the home for the blind], was made to Police. It described that [J], a Nurse employed at the Home had allegedly mistreated a resident there.
>
> It was subsequently described to police officers that during the evening of [dated given] [J] tended a female resident (60 years) who had a terminal tumour and required medication. The following day the resident enquired with other staff whether [J] on duty. When it was confirmed that [J] was on duty the resident began to cry. The resident then alleged that she had during the above interaction asked [J] for assistance in sitting up. She alleged that [J] had stated that she could do it herself. The resident described that [J] then grabbed the lady by her head and pulled her up.

> The investigators, due to the female resident's deteriorating medical condition, were unable to interview her regarding the allegation. She subsequently passed away.
>
> [J] subsequently provided an account describing that the resident in question had a brain tumour and needed more than one person to move her. [J] described that whilst visiting her room she found her lying on her side. [J] stated the resident insisted that she help her sit up threatening that if she did not, she would not take her medications. [J] stated that she made an attempt to help her sit up by taking hold of her around the shoulders but was unsuccessful. She denied taking hold of her by the head. [J] stated that she then became aware that the resident was on an electronically adjustable bed.
>
> Using the [bed's] remote [control] she then sat the resident up, gave her the medication and left her room.
>
> In view of the fact that the allegation by the resident was uncorroborated and the account given by [J], Police investigators concluded that no further Police action would be taken.
>
> No referrals to the [Nursing] and Midwifery Council (NMC) or Independent Safeguarding Authority (ISA) were made."

15. On 18 April the RCN responded arguing that it was disproportionate for the Defendant to disclose any of the information concerning the two incidents since, it was suggested, the 2007 allegation "put at its highest, involved an error … in which she inadvertently hurt her patient … that was addressed through low level training." It was contended that it was not proportionate for the police to disclose this information to all future potential employers. In relation to the 2011 allegation, it was suggested that it appeared "to have been entirely fabricated by an unwell patient". The RCN rejected any invitation to negotiate over the words that might appear in the disclosure.

16. On 24 April 2012 the Claimant received a letter from the Criminal Records Bureau informing her that the police had decided not to amend her ECRCs.

17. The battle lines were thus drawn at that stage and it is the decision in that letter that is the principal target of this application.

The decision-making process

18. A Detective Superintendent with delegated authority from the Chief Constable to make ECRC disclosure decisions generally was the officer who made the final decisions in the Claimant's case. In his witness statement he has confirmed that he applied in the Claimant's case the approach and guidance set out in the Quality Assurance Framework produced by the Association of Chief Police Officers and the Criminal Records Bureau. The Detective Superintendent had been at that rank for

about 7 years at the time he made the relevant decisions and undoubtedly was (and remains) a senior and respected officer.

19. Mr Stephen Broach, who appears for the Claimant, has submitted that the guidance to which I have referred was deficient in some respects and that, as a result, the Detective Superintendent was misled into making the decisions he did.

20. In the present case on 12 September 2011 a CRB Disclosure Officer completed a report which set out the background along the lines of the two allegations as they first appeared (in other words, without the Claimant's version of events) and contained the following recommendation:

> "Had the Applicant not come to notice in 2011 I would not be recommending disclosing the 2007 incident, but she has now come to notice twice for her unprofessional behaviour towards the elderly.
>
> The nature of the alleged information, unprofessional behaviour whilst caring for the elderly, is such that in my opinion, the Chief Officer of Police, would be satisfied that the information is relevant to the role (sector) and has reached a threshold that indicates the individual, could pose a significant risk to the vulnerable.
>
> I have concluded that the information is such that a reasonable potential employer would regard the information as material to any employment decision where the protection of the vulnerable is a consideration.
>
> Lastly and importantly, I have given proper consideration as to whether disclosure of the circumstances of this incident in the context of the role sought, outweighs intrusion on the Applicant's private life. I have concluded that the need for disclosure does outweigh such intrusion.
>
> Therefore I regard disclosure as necessary, reasonable and proportionate and I believe that it ought to take place."

21. That report and recommendation was considered by the Disclosure Unit Manager who reviewed and agreed with it and then by the Detective Superintendent on 26 September 2011 whose own conclusion was as follows:

> [J] is applying to work as a Nurse for AA24 Group. This is a position that will involve the applicant being in regular contact with Children and Vulnerable Adults. I understand the facts are as described by the [disclosure officer].
>
> The information accurately reflects the data held by Devon & Cornwall Constabulary and provides a balanced account.

> I take the view that if [J] has a propensity for inappropriate and physically rough treatment of the very elderly this could put them at risk when in contact with [J] as nurse.
>
> In my opinion this information is not so without substance that it is unlikely to be true. I do not consider that concerns laid out are remote, fanciful or speculative, (thus making disclosure disproportionate), but rather that they might be relevant and ought to be included in the CRB disclosure certificate as there may be a risk posed to the vulnerable group. I believe the nature of the information and its degree of relevance to the post applied for are such that disclosure is reasonable and proportionate and necessary in accordance with Sec 113B Police Act 1997.
>
> I believe that the infringement of the human rights of [J] under Article 8 ECHR is outweighed by the potential risk posed to the vulnerable group as, whilst there is likely to be interference with her 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 harm to vulnerable individuals.
>
> For all of the reasons I have given here, the Registered Body is entitled to take this information into account when considering [J] for employment. I conclude that a reasonable person properly directing him/herself would have made such a decision."

22. That represented the initial decision-making process that led to the three ECRCs to which I referred in paragraph 9 above.

23. Following the letter from the RCN of 24 January (paragraph 12 above) challenging the decision, the standard practice, as described by the Detective Superintendent, was for the initial decision to be reviewed by a CRB disclosure officer who had not been involved in the initial decision-making process. A disclosure officer not previously involved reviewed the initial decision, taking into account the representations made by the Claimant and the RCN, as well as the police held information. In a lengthy and detailed report that officer recommended that there were "compelling and cogent reasons to recant the disclosure". The reasons he gave were as follows:

> - That in respect to the first 2007 incident taken at its highest it demonstrates poor manual handling which was addressed proportionally through further training.
>
> - That in respect to the second incident, the more serious of the two, there is no supporting evidence.
>
> - That the allegations allegedly made by the other two residents are not particularised and in the disclosure were regarded as unreliable.

- That these allegations subject of the Disclosure have never been proved to any standard.

- That if it is proportionate to disclose this information, it would be proportionate to disclose any information in relation to complaints of what might be relevant to an applicant's work with vulnerable persons.

- That the Supreme Court in overturning R (L) v Commissioner of Police of the Metropolis [2009] UKSC 3 sought to prevent such blanket or sweeping approaches.

- That whilst the 2011 incident with consideration of risk could be regarded as relevant to the role sought disclosure of what might be regarded as unreliable information was highly prejudicial in its impact on [J's] private life and capacity to obtain nursing employment.

- Therefore the disclosure in the light of this review regarded as disproportionate.

24. The Detective Superintendent considered this report, which he described as "well crafted … with compelling rationale", but said that he still considered that disclosure was required. His reasoning was as follows:

> "In essence we are talking about information that came to police highlighting where the specialist caring profession had grounds to consider that the applicant's standards were such as justify immediate suspension.
>
> On the first incident and following suspension, the profession recognised a failing and introduced corrective measures (training and advice) which facilitated a return to work.
>
> I am aware that the applicant left that employment in due course but there is nothing that leads me to believe her departure was under anything other than amicable.
>
> Some 3 years later the applicant is employed elsewhere and is once again the subject of allegations which led to her suspension. Those circumstances are not so far removed from those of the first allegation as to make me believe they do not indicate a potential propensity and as such they corroborate one another. Standing alone, it is right and proper that the benefit of the doubt is given to the applicant. But concerns are aggregated. And indeed that aggregation includes more than one occurrence with more than one alleged victim in the second account.

> We are not care professionals and we are at a disadvantage when it comes to assessing the true harm posed by the applicant. Similarly, we are unfamiliar with a care home environment and would perhaps find it difficult to assess the validity of allegations made by those with dementia or mental instability when terminally ill.
>
> As such I conclude that my concerns are sufficiently heightened as to believe that the information we hold might be relevant to the registered body that would be in a far stronger and informed position to assess suitability.
>
> Proportionality is a separate question. I think the threat posed by the applicant to an individual on a single occasion average individual is minimal. I do not think she threatens life or serious physical harm.
>
> However I do believe that her presence within residential care homes where the most vulnerable are wholly dependent upon the care they receive has not been welcomed by more than one resident to the extent where I believe she may be making their lives miserable. As such I think that if she inflicts physical harm and if she is consistently unpleasant and uncaring to the residents then the impact of that behaviour, to the most vulnerable, must be very significant – at least to the extent whereby the registered body can undertake a further review before employing her.
>
> Finally, should the applicant be applying for employment in a role where there are lower levels of dependency on her and she is not in such a position as to provide unsupervised one-to-one care on the most vulnerable, then I suspect I would not be making the disclosure."

25. He subsequently approved the amended form of disclosure put forward in the letter from the Defendant dated 13 April 2012 (see paragraph 14 above).

26. Following receipt of the RCN's letter of 18 April 2012 (see paragraph 15 above) he re-considered and reviewed once again his decision to continue to disclose this information. According to his witness statement the position he took was as follows:

> "40. With respect to the question of relevance, I considered whether the information might be relevant to the registered bodies. Whilst I am unfamiliar with the residential care home environment and not an expert on residential care standards or the supervision and development of care workers, I concluded that the respective registered bodies, were those which were best placed to make an assessment about whether the Claimant posed a threat to the vulnerable and as such the information might be of relevance to them.

42. With respect to the question as to whether the information ought to be disclosed, I was aware of the lead case on the topic, R (L) v Commissioner of Police of the Metropolis [2009]. I was aware that according to this case, disclosure will affect the rights of an individual under Article 8 of the ECHR and that this interference must be justified. I was also aware of the important principle in this case that priority should not be afforded to the protection of the vulnerable.

43. I was further aware that whether the information ought to be disclosed involved a balancing exercise between, on the one hand, the pressing social need that children and vulnerable adults are protected from harm, and on the other hand, the Claimant's right to respect for her private life. In determining this question, I then took into account the following factors:

(a) The gravity of the information involved: I took into account the fact that none of the police held information indicated there to be a threat to life or serious physical harm. Indeed, following the first allegation, the residential home put in place measures to deal with poor communication and poor manual handling techniques and those in charge were presumably satisfied that those measures militated against the risk. However, once in receipt of information relating to the second incident, (including the allegations from the 2 dementia sufferers), I took the view that there *might* be a propensity for poor handling and care of vulnerable residents and my concern was that the alleged harm the Claimant inflicted on such residents resulting in two independent allegations may not be the result of an inadequate technique but rather uncaring attitude and behaviour. I believe that in the context of the residential home environment and in the context of particular vulnerabilities, the risk of rough treatment of residents remains. In the event that this risk is realised, then the harm would be physical but significantly could also manifest itself by creating a miserable and uncaring environment in the homes of lone, vulnerable (sometimes terminally ill), elderly residents.

(b) How reliable is the information? Whilst I have taken into account and considered the points made by the Claimant about the two allegations, my view remained that two entirely separate but similar allegations had been made against the Claimant. As [outlined in the letter of 13 April 2012] I considered it relevant to the reliability of the information concerning "Allegation two" that the patient Mrs T cried when told that the Claimant was on duty that evening. Further, I noted that when "Allegation two" was made, two residential dementia sufferers complained of mistreatment by the Claimant. I understand that there is a risk in attaching significant weight to the testimony of those suffering with

dementia, and as such I decided that it would not be proportionate to include their accounts within the Claimant's ECRC. That said, I did take the view that their complaints were relevant in all the circumstances, although I gave limited weight to these two complaints in determining the overall reliability of the information. Taking all of the above into account, I came to the conclusion that it was more likely than not that "Allegation 1" and "Allegation 2" had occurred in the manner alleged by the two respective residents rather than in the manner alleged by the Claimant. As a result of the Claimant's representations, the wording of the disclosure has also been altered to reflect the Claimant's version of events in order that a balanced picture of both versions of events can be presented. The material facts that now feature within the disclosure appear to be agreed.

(c) Role applied for: I took the view that if employed as a nurse within a residential care home or other Health Trust establishment, the Claimant was likely to be in regular contact with children or the elderly and vulnerable. I could have no certainty that such contact would not involve regular one-to-one unsupervised access and therefore I believed that the information held was relevant to the roles subject to the applications. Following the issuing of Judicial Proceedings, I have caused contact to be made with [the institutions to which the Claimant applied] and confirmed it to be the case that the Claimant, if successful in her applications for employment, would have been able to move from role to role within the respective trusts without there being a requirement for her to provide a fresh certificate. As such it must be assumed that there is more than a possibility that she might have had future access to the vulnerable, elderly and terminally ill ….

(d) What period of time has elapsed since the events occurred? Had the 2007 allegation been a "one off" then it is likely that I would have considered it as being too distant in time to be disclosed. Had the Claimant remained in the field of residential care work and not come to police attention for 4 years then that "clear period" would have weighed heavily in favour of non-disclosure. However that was not the case and a second, recent allegation brought the 2007 event to the fore. Having established the two events complained of are similar in nature, I concluded that the 2007 allegation is not remote or distant, indicating that a propensity for poor caring standards might exist.

(e) Impact of disclosure on the Applicant: As I have indicated already I am aware that disclosure of this information would affect the Article 8 ECHR rights of the Claimant to the extent whereby she may not be able to obtain employment in

> her chosen field. I did not, therefore, take the decision to disclose lightly and did not allow my duty to protect the vulnerable to take precedence over my duty to respect the Claimant's Article 8 ECHR rights. In making my decision, I weighed the adverse impact of disclosure on the Claimant against the likelihood of her causing harm to the most vulnerable. In my judgement the balance in this case falls in favour of disclosure.
>
> 44. Having taken into account all of the above factors, I concluded that the potential threat posed by the Claimant meant that the potential interference with the Claimant's Article 8 rights was both necessary and proportionate. Since these judicial review proceedings were issued I have again taken the opportunity to review all of the material in this case and my view remains that on the facts of this case the disclosure ought to be made."

27. That, therefore, reflects the evidence concerning the decision-making process that is challenged in these proceedings. When granting permission, Collins J expressed the view that the Defendant should be applying the proposed amended disclosure (which it was not doing at that time). Given this observation the Defendant agreed that the amended disclosure would be applied and, accordingly, this is the text that is said on the Claimant's behalf to constitute a disproportionate interference with her Article 8 rights. In essence, as indicated previously, her case is that there should be no reference to either of the incidents.

28. Before turning to the law, I should observe that reference was made in the disclosure to two other allegations arising in about June 2011 that the Claimant had mistreated certain patients. This has been highlighted in the Defendant's response to this case. One, Mrs. P, told the police that the Claimant had hit her in the chest on one occasion and that she had been terrified; the other, Mr. B, told them that she was too forceful in making him take his medication and on one occasion had forcibly put water into his mouth causing him to choke. The Claimant denies both allegations, though in relation to Mr B, she recalls recording in her diary that she had spilt some water on his pyjamas and thinks that this may have been the incident that led him to complain. However, both these patients were suffering from dementia and it could not be said that either was a reliable witness. I will return to this later (see paragraphs 61-65).

29. Mr Broach makes a number of criticisms of the decision-making processes and, of course, of the ultimate decision. I will turn to those after reviewing the applicable law.

The law

30. There is little, if any, dispute about the law to be applied. Much is, of course, derived from *L* (see paragraph 2 above).

31. Lord Hope of Craighead said this at paragraph 42:

> "So 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 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."

32. He also said that "[it] should no longer be assumed that the presumption is for disclosure unless there is a good reason for not doing so", thus overruling the approach in *R (X) v Chief Constable of the West Midlands Police* [2005] 1 WLR 65. Lord Hope said that, once the potential relevance of the information has been established, the next question is whether it "ought" to be disclosed:

> "The question whether the information might be relevant is not, however, the end of the matter. An opinion must also be formed as to whether it "ought" to be included in the certificate. It is here … that attention must be given to the impact that disclosure may have on the private lives of the applicant and of any third party who is referred to in the information. For the reasons I have already given … I consider that the decisions which the chief officer of police is required to take by section 115(7) of the 1997 Act will fall within the scope of article 8(1) in every case. So in every case he must consider whether there is likely to be an interference with the applicant's private life, and if so whether that interference can be justified."

33. It is clear that the Supreme Court appreciated the significance of an ECRC to an application for employment by someone about whom something adverse is recorded. Lord Neuberger said this at paragraph 69:

> "Even where the ECRC records a conviction (or caution) for a relatively minor, or questionably relevant, offence, a prospective employer may well feel it safer, particularly in the present culture, which, at least in its historical context, can be said to be unusually risk-averse and judgmental, to reject the applicant. The same point applies to an ECRC which only contained material falling within section 115(6)(a)(ii) and (7), even where the "chief officer's opinion" that the material should be included, while rational, was not one which many chief officers would have shared. (Having said that, there will no doubt be cases where the employer will conclude that the information in the adverse ECRC is irrelevant or has been satisfactorily explained or disposed of by the applicant, but such cases would, I suspect, be comparatively rare.)"

34. At paragraph 75 he said this:

> "Part V of the 1997 Act has the unexceptionable aim of protecting vulnerable people (for present purposes children, but also, in certain circumstances, vulnerable adults), from being harmed by those working with them. It does so by requiring

> relevant information available to the police, about an applicant for a post involving responsibility for such vulnerable people, to be vouchsafed in an ECRC to the prospective employer. It is then for that employer to decide whether the information is relevant, and, if so, whether it justifies refusing to employ the applicant. As already mentioned, however, it seems to me realistic to assume that, in the majority of cases, it is likely that an adverse ECRC, i.e. one falling within section 115(6)(a), will represent something close to a killer blow to the hopes of a person who aspires to any post which falls within the scope of the section. Further, the vouchsafing of the information in an adverse ECRC will of itself normally (and where, as here, it is pursuant to section 115(6)(a)(ii), almost inevitably) impact on the applicant's private life."

35. When dealing with the factors that may need to be considered in striking the balance between the competing interests in such a case, Lord Neuberger said this at paragraph 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 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."

36. I will return to the necessary balancing exercise in due course, but before doing so I should refer briefly to the weight that I should attach, in performing that exercise, to the views of the decision-maker – in this case, the Detective Superintendent to whom I have referred. Ultimately, the decision is that of the court (see, e.g., *Belfast City Council v Miss Behavin' Ltd* [2007] UKHL 19, *R (SB) v Governors of Denbigh High School* [2007] 1 AC 100 and *R (Quila) v Secretary of State for the Home Department* [2012] 1 AC 621), but the question arises as to the extent to which the views of the decision-maker should influence the balancing exercise.

37. The primary guidance on an issue such as this is acknowledged to be found in *Huang v Secretary of State for the Home Department* [2007] 2 AC 167 which dealt with the decision-making role or function of appellate immigration authorities when deciding appeals, on Convention grounds, against the refusal by the Secretary of State of

applications for leave to enter or remain in the UK. There Lord Bingham of Cornhill, giving the unanimous view of the House of Lords, said this at paragraph 16:

> "The [appellate authority] will wish to consider and weigh all that tells in favour of the refusal of leave which is challenged, with particular reference to justification under article 8(2). There will, in almost any case, be certain general considerations to bear in mind: the general administrative desirability of applying known rules if a system of immigration control is to be workable, predictable, consistent and fair as between one applicant and another; the damage to good administration and effective control if a system is perceived by applicants internationally to be unduly porous, unpredictable or perfunctory; the need to discourage non-nationals admitted to the country temporarily from believing that they can commit serious crimes and yet be allowed to remain; the need to discourage fraud, deception and deliberate breaches of the law; and so on. In some cases much more particular reasons will be relied on to justify refusal, as [in one case] where attention was paid to the Secretary of State's judgment that deportation was a valuable deterrent to actual or prospective drug traffickers, or … [in an article 10 case] in which note was taken of the Home Secretary's judgment that the applicant posed a threat to community relations between Muslims and Jews and a potential threat to public order for that reason. 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. That is how any rational judicial decision-maker is likely to proceed …."

38. This area (together with the approach to proportionality) has been helpfully reviewed by the Divisional Court (Hooper LJ and Singh J) recently in *R (BBC) v Secretary of State for Justice* [2012] EWHC 13 (Admin) where the following was the view of the court:

> "51. The principle of proportionality was explained by the House of Lords in Huang v Secretary of State for the Home Department [2007] 2 AC 167, at para. 19, in a single opinion of the appellate committee which was given by Lord Bingham of Cornhill. Although that was a case about article 8 (the right to respect for private and family life), the structure of that article is similar to article 10 and the principles which Lord Bingham set out were derived from comparative law relating to human rights generally. After drawing on well-known authority … Lord Bingham summarised the requirements of proportionality as follows (we adapt the language slightly to make it pertinent to cases such as the present):

> (i) the objective is sufficiently important to justify limiting a fundamental right;
>
> (ii) the means used to achieve that objective are rationally connected to it;
>
> (iii) the means used to impair the right or freedom are no more than is necessary to accomplish that objective; and
>
> (iv) there is maintained a fair balance between the rights of individuals or groups and the interests of the community.
>
> 52. Also in Huang Lord Bingham gave important guidance as to the relevance of the judgment of the Secretary of State when a court is called upon to adjudicate on the question of proportionality. [*Part of the quotation from paragraph 16 is set out at this point*.]
>
> 53. As has been observed in the past, the concept of "deference" is inapt in this context since it has "overtones of servility": e.g. the ProLife Alliance case, at para. 75 (Lord Hoffmann). More often used are phrases such as the "margin of appreciation" or the "discretionary area of judgment". The former should not be used in the domestic context as it is a concept of international law, more appropriate in the Strasbourg Court: R v Director of Public Prosecutions, ex parte Kebilene [2000] 2 AC 326, at 380 (Lord Hope of Craighead). We have found helpful the concept of "appropriate weight" to which Lord Bingham referred in Huang. As the passage from which we have quoted makes clear, how much weight should be given to the judgment of a person such as the Secretary of State will vary according to the subject matter and the extent of their expertise and access to specialist sources of knowledge and advice. As we understand it, this is what is meant by "institutional competence", about which there was some debate at the hearing before us. The passage we have quoted from Huang also makes it clear that, at the end of the day, the assessment of proportionality under the HRA is a judicial task, once all the material has been taken into account and appropriate weight given to the views of others, including those of the decision-maker. As Lord Bingham observed in his opinion in A v Secretary of State for the Home Department [2005] 2 AC 68, at para. 42, the HRA "gives the courts a very specific, wholly democratic mandate" to adjudicate on human rights issues."

39. It follows that in my approach to the balancing exercise I must give "appropriate weight" to the Detective Superintendent's view and, to some extent, the views of the other disclosure officers. Mr Morley very fairly conceded that the Detective Superintendent had no expertise in or experience of care homes and what takes place in them. This might be seen as slightly at odds with the way he expressed himself in

sub-paragraph (a) of paragraph 43 of his witness statement, but at all events I must approach this factor on the basis that he had no direct experience of what happens in care homes. He does, of course, have plenty of experience of criminal assaults.

40. I will return to this after I have dealt with the criticism made by Mr Broach of the failure to afford the Claimant an opportunity to make representations before the disclosure was made.

Lack of opportunity to make representations

41. It is, of course, easy to be wise with hindsight, but I am clearly of the view, notwithstanding Mr Morley's argument to the contrary, that the decision to give the disclosure in its initial form (see paragraph 10) should have been seen as a borderline decision, or at least one that was not clear cut, and should have prompted the Defendant to give the Claimant an opportunity to make representations before disclosure was given. The reason for putting the circumstances of this case into that category is that a conscious decision had been taken previously that the matters that arose in 2007 did not demand disclosure. I have not seen any note of the decision-making process, but Mr Morley confirmed that I could proceed on the basis that the view had been taken that these matters did not merit disclosure. The CRB Disclosure Officer who prepared the initial report (see paragraph 20 above) said that, but for the 2011 matters, she would not have recommended disclosing the 2007 matters. The Detective Superintendent presumably saw that opinion and did not disagree with it: indeed he placed his own gloss on the issue in sub-paragraph (d) of paragraph 43 of his witness statement quoted in paragraph 26 above to which I will refer further at paragraph 54 below. He does not indicate in his statement that he made those earlier decisions although he was in post during that period. At all events, it seems quite clear that the view had been formed by those who did make the decisions prior to 2011 that the 2007 material did not require disclosure.

42. Since part of my task is to review the 2007 material to see if it was right in due course to disclose it, I should say that I agree with that earlier assessment. I will give my reasons for saying so in due course (see paragraphs 54-58 below).

43. However, as I have indicated, the Detective Superintendent agreed with the view of the CRB Disclosure Officer that the emergence of the 2011 allegations permitted the re-emergence of the 2007 material as a potential candidate for disclosure. Whilst there is nothing irrational or inappropriate about that thought process, it does seem to me to be plain that, when a positive decision about non-disclosure of certain material has been in place for over 4 years, if that decision is to be reviewed in the light of new evidence, particularly if that evidence itself has some debatable features about it (see paragraphs 59-69 below) and is disputed, any subsequent decision to disclose that material will almost invariably be one about which there must be some doubt or which should be seen as borderline.

44. The guidelines to which I have referred do draw attention to the possible need to offer the opportunity to make representations. One sentence in the guidelines says this: "If in doubt, consider offering representations – always record your reasoning for offering/not offering representations." No record was made of the reasons for not offering representations when the Detective Superintendent made his initial decision on 26 September 2011. This either means that he thought the position was entirely

clear cut or that he overlooked the need to consider offering representations or, perhaps, to record his decision in that respect. Whatever the reason, I have to characterise the failure to afford the opportunity to make representations as a significant error. To be fair to him, he did not have available to him at the time some updated guidance about offering representations (which was updated on 7 November 2011 in the light of *R(B) v Derbyshire Constabulary* – see paragraph 49 below) which, arguably, has shifted the balance more in favour of offering the opportunity for representations.

45. It is, of course, right to say that the Claimant achieved the right to make representations later once the RCN had taken up her case. However, it was too late then to influence the initial disclosure which, arguably, had an impact on the 3 applications for employment she made in December 2011 and January 2012.

46. If, in due course, I am of the view that the disclosure, either in that initial form or in the amended form, is and was appropriate, the failure to give the opportunity to make representations will effectively be irrelevant. But it is, in my view, important that decision-makers are reminded in any guidance that they do need to be very confident that, when something in the past is thought later to be made relevant and disclosable by virtue of some new evidence that has emerged, the decision to disclose truly is clear cut before proceeding without affording the opportunity for representations to be made. Whilst it would offend the proposition that all cases are fact specific (see paragraph 47 below) to say that in all cases of that nature the opportunity to make representations should be given before the disclosure of all that material is made, it must be in very few such cases that such an opportunity should not be given: there may be very good reasons, not immediately apparent to the decision-maker, for taking a different view.

47. That view seems to me to be consistent with the approach of the Supreme Court in *L* and there is no need to look further for guidance. Indeed in the more recent case of *R (C) v Chief Constable of Greater Manchester Police* [2011] EWCA Civ 175 Toulson LJ, at paragraph 11, said that "it would be unwise to gloss, or add to, what was said by Lord Hope and Lord Neuberger in *L*" and that "[the] question ultimately is a fact specific question." In the context of the facts in that case he said this:

> "12. In this case the allegations were of abuse said to have occurred more than 15 years earlier. At one stage the allegation had been withdrawn and then renewed some years later. They were denied by C. When those factors are taken into account, in conjunction with the nature of the employment which he was seeking, it does seem to me, looking at the matter overall, that fairness required that he should be given an opportunity to make representations. If one asks the question, rhetorically, "Was it obvious that nothing that he could have said could rationally or sensibly have influenced the mind of the Chief Constable?", I am not persuaded that the answer is an obvious "yes". That is very far from saying what the right answer should have been. I emphasise that this is a view formed on the particular facts of this case, applying the general guidance laid down in L. I would also emphasise that giving an opportunity to the prospective employee to make representations does not

> necessarily mean arranging for any form of oral hearing. Representations can be made in a much simpler form than that.
>
> 13. When considering how such disputes are handled, it is also right to bear in mind the pre-action protocol for judicial review applications. There may be cases in which the Chief Constable, in good faith, does not think it necessary to afford an opportunity to make representations, but the prospective employee is aggrieved by the lack of opportunity given to him of doing so. In such circumstances one would expect the pre-action letter to set out the representations which the person would have wished to make, and, unless the Chief Constable considers that they do not merit any consideration at all, one would expect that the Chief Constable at that stage to give consideration to them. All this is part of the modern process for dealing with public law complaints in a way which is just and does not involve unnecessary expense. In other words, I would hope that courts are not going to be burdened with judicial review applications based on a failure of an opportunity to make representations, without the complainant first setting out the concerns and relevant considerations in correspondence and the Chief Constable considering the correspondence."

48. That, of course, is precisely what happened in this case once the RCN took it up on the Claimant's behalf. However, the view was taken (shared by Lord Neuberger MR and Wilson LJ) that the opportunity to make representations should have been given.

49. That case was reviewed by a Divisional Court consisting of Munby LJ and Beatson J in *R (B) v Chief Constable of Derbyshire Constabulary* [2011] EWHC 2362 (Admin) where Munby LJ said this at paragraph 60:

> "I do not propose to add to the jurisprudence. All I would say is that typically, where a chief officer is considering the issue of an ECRC, it is likely to be appropriate for him to afford the applicant an opportunity to make representations, unless, for example, the facts are clear and not in dispute, and that typically this will appropriately be done by sending the applicant a draft of the proposed certificate and inviting his comments. Usually, the draft certificate will itself set out the gist or substance of the allegations on which it is based. If for some reason it does not, then they should be set out in the accompanying letter."

50. Munby LJ went on to say that "[there] may (though I suspect only in those probably comparatively infrequent cases where the facts are both clear and known not to be in dispute) be occasions when, as in *L*, there is no need to give the applicant an opportunity to make representations."

51. The guidance had apparently not been altered in the light of *C*, but it was in the light of *B*.

52. At all events, in my judgment, a conscientious application of the approach of the court to this issue as reflected in the cases to which I have referred should have resulted in the Claimant being given an opportunity to comment on the proposed disclosure before it was given for the first time. I will return to the consequences, if any, of this in due course (see paragraph 75).

Was the disclosure proportionate?

53. I will review each allegation (or set of allegations) separately before looking at their cumulative effect.

The 2007 allegations

54. So far as the first allegations are concerned, I have already alluded to the fact that it was the Defendant's view until 2011 that the 2007 incidents need not be disclosed. The Detective Superintendent has said this was because by 2011 the earlier incidents were 4 years old and thus "too distant in time to be disclosed". The period since the first incident would undoubtedly have been a factor to be considered in 2011, though it would have been a factor that would have diminished in weight the earlier in the 4-year period the incident was being considered as a candidate for disclosure. As I have said, at no time in the period from February 2007 onwards had it been considered by the Defendant as appropriate for disclosure. This means that the earlier decisions relating to disclosure must have been made on grounds other than the period of time since the events.

55. In my view, Mr Broach is right to say that, after appropriate investigation and consultation, the upshot was that Mrs R and her family accepted that the incident resulted from a poor manual handling technique, did not want to pursue a complaint and were happy for the Claimant to continue to nurse Mrs R.

56. Although Mr Morley pressed me with the contemporary records showing that Mrs R had described herself as being treated "like a rag doll", the bottom line of the whole affair is that it was treated by everyone at the time as a poor handling issue rather than one of a deliberate assault. Indeed the word "assault" does not appear in any of the contemporaneous documentation, although it was used in the disclosure given in 2011 in the sense of the disclosure record saying that the Claimant "allegedly assaulted" Mrs R. Looking at the material as a whole, including the record of the police inquiries, it does not appear that Mrs R ever said that the Claimant deliberately assaulted her. There is a clear record that her view was that the Claimant did not intend to hurt her and all that she needed was some advice because she was too rough. This was the position that the 88-year-old Mrs R took. There is no suggestion of dementia in her case and her family were obviously content that matters should be left on the basis that the Claimant should be given (as she was in due course) some further training in handling techniques. The matter was obviously resolved on this basis. It was acknowledged at the time that there had been no other complaints about the Claimant and none apparently emerged thereafter. It is also plain that the Claimant was extremely upset when she was told what Mrs R had said initially and denied any kind of wrongdoing, though she accepted that Mrs R had complained that she had hurt her when holding one of her arms and that she (the Claimant) had apologised (as Mrs R confirmed to the police).

57. Looking at those circumstances, it seems to me that the only risk that was identified so far as the Claimant was concerned was that on occasions her manual handling technique could be too rough for some patients. I emphasise the word 'some' because, as I have said, there was no evidence that anyone else had ever complained. This incident (including the two other matters raised by Mrs R) was never truly dealt with as a case of assault or rough treatment as a result of the Claimant having lost her temper.

58. Standing alone, whilst it would be possible (just) to say that the incident might be relevant to an application for further employment as a nurse in a field that involved handling elderly patients, it is impossible to say that it would have ever been proportionate for the police to disclose it is part of an enhanced certificate, a view that must have been formed or confirmed on several occasions prior to 2011. Whether the incident might have been referred to in a reference sought by the Claimant, or in a report back to the agency through which the Claimant was supplied, would be a matter for the care home's administration. But I cannot see it as being a matter for disclosure by the police. Applying the general approach to the issue of proportionality set out in *L* by Lord Neuberger (see paragraph 35 above), looking at the material about the incident as a whole, I do not consider that it possessed such intrinsic gravity that demanded disclosure in an ECRC bearing in mind the weight, on the other side of the scale, of the Claimant's Article 8 rights.

The 2011 allegations

59. I will turn now to the 2011 allegations. These must be referred to in the plural because there were 3 complainants (see paragraph 28 above).

60. The allegation made by Mrs T is summarised in the disclosure made (see paragraph 10 above) and the Claimant's response to it is also summarised in the proposed amended text (see paragraph 14 above). Very sadly, Mrs T had an aggressive tumour from which she died within about 14 days of the incident about which she complained. Indeed within about a week of saying what she said she was noted to be "slipping in and out of consciousness", that she was "unaware of her surroundings" and that she "was unable to provide nursing staff with answers that make sense". Inevitably, given the Claimant's strong denial of any wrongdoing, unless there was substantial support from other sources (e.g., an eyewitness or very compelling evidence of similar episodes from other credible patients), no adverse conclusion could fairly be formed. The highest it could be put was that some suspicion was aroused that the Claimant was, on occasions, somewhat heavy-handed. However, the police were clearly right to say that, so far as Mrs T was concerned, there was no further action that could be taken.

61. The other lady who made a complaint (and it is not clear in what circumstances she came to make the complaint) was an elderly lady with dementia and who was visually impaired in the sense that she could only make out shapes. She apparently alleged to the staff that the Claimant came into her room at night on one occasion and woke her up by "hitting her on the chest". That was not quite how she put it when she was interviewed by the police – she simply said that she "felt something hard and heavy on her chest as she woke", her main complaint being that the Claimant did not identify herself when she came into the room. Against that background, it is entirely

understandable that the police should take the view that she was not a reliable historian.

62. The male patient who complained about the Claimant in 2011 was an elderly man (with dementia) who had either a military or a naval background and was referred to by his former rank. It was necessary for him to have certain medication each day which he found difficulty in taking because of his Parkinsonian disabilities. It is not difficult to envisage the daily scenario when he had to take his medication. Whilst, of course, it was something that had to be handled professionally and with due sensitivity, there must have been moments when it was necessary for there to be a bit more proactive action on the part of a nurse than on others simply for his own good. It is tolerably easy to see how an allegation of being too forceful could be made by him in respect of a nurse who was doing her best but was, it seems, not too popular with a number of the residents.

63. On that last issue it is clear from the documents generated at the time that the Claimant had herself sensed that she was not very well accepted by some residents in the home and indeed she had complained to the matron about a resident who had made racist comments about her. In addition to that there is, of course, always the risk of an element of "ganging up" in this kind of situation or one person's opinion feeding that of another. All this needs to be put into the balance when assessing the gravity of what was alleged and the reliability of the sources supporting the allegations: cf. Lord Neuberger's approach set out in paragraph 35 above.

64. As a general observation, it does not require much imagination to believe that being accused of rough handling is a daily occupational hazard for a nurse dealing with very elderly patients, particularly those who have certain physical frailties and diminishing mental faculties. If a nurse (perhaps as is the case with the Claimant) has an apparently rather severe demeanour, it is not difficult to see how even a relatively minor mishandling incident could be perceived by such a patient to have been a piece of deliberate castigation or retaliation for the difficulties the patient was presenting. Doubtless that kind of factor would need to be borne in mind in evaluating the veracity of an allegation of assault.

65. The police who were called to investigate formed the view that the two other patients were not going to be "credible witnesses" given their dementia and the confused way in which they spoke to the police. So far as the male patient is concerned, if a record kept by the Claimant was accurate, the incident when he accused her of choking him took place on 1 May 2011 and thus a good number of weeks before the complaint was made to the matron. The police recorded that neither patient wished to make a statement. The view was taken that no criminal offences had been committed and it was resolved to take no further action.

66. For completeness, I should say that when reviewing the documents for the purposes of preparing this judgment, I noted that the manager of the care home is recorded as having referred the complaints about the Claimant to the CQC, which I take to be the Care Quality Commission which has responsibility *inter alia* for ensuring the maintenance of standards in care homes. To that extent, the concerns of the kind that arose were referred to the body with appropriate responsibility.

67. It is, of course, right to say, as Mr Morley said in his Skeleton Argument, that the disclosure made did not involve reference to either of the accounts of the two patients other than Mrs T, but (a) generalised reference was made to them and (b) my attention has been drawn to them in a way that invites me to take them on board as part of my evaluation of where the balance lies so far as disclosure is concerned.

68. The Detective Superintendent has not indicated whether, in his view, if the principal 2011 allegation (that of Mrs T) had been the only allegation for consideration, he would have regarded disclosure as appropriate. I cannot, therefore, put into the balance his view on that issue. But since I must give consideration to that issue, my view is that it would not have warranted disclosure. Nothing adverse was established against the Claimant, there were doubts about the reliability of the information to hand, there was no evidence of widespread complaints about the Claimant and the allegation (including the allegations by the other two patients) were strongly disputed by her. Again, applying the approach suggested by Lord Neuberger, the balance, in my view, would be decidedly against disclosure if the 2011 allegation (or indeed allegations) stood alone.

69. That, of course, brings me to the question of whether, taken together, these two sets of allegations gain a weight that tilts the balance in favour of disclosure.

Cumulative effect?

70. I should consider first of all the way in which the decision-maker expressed himself at the time.

71. The CRB Disclosure Officer concluded, having reviewed both the 2007 and 2011 allegations, that she had "no reason to doubt the veracity of the information" and continued by saying that the Claimant "has been shown to behave in an unprofessional manner on two occasions by more than two people." The Detective Superintendent's conclusion was along similar lines. He said this in the document recording his decision at the time:

> "I take the view that if [J] has a propensity for inappropriate and physically rough treatment of the very elderly this could put them at risk when in contact with [her] as [a] nurse.
>
> In my opinion this information is not so without substance that it is unlikely to be true. I do not consider that concerns laid out are remote, fanciful or speculative, (thus making disclosure disproportionate), but rather that they might be relevant and ought to be included in the CRB disclosure certificate as there may be a risk posed to the vulnerable group. I believe the nature of the information and its degree of relevance to the post applied for are such that disclosure is reasonable and proportionate and necessary…."

72. I am anxious not to subject those words to a fine textual analysis because that is not the appropriate approach, but I do have some difficulty with the essential reasoning of both the CRB Disclosure Officer and that of the Detective Superintendent. I do not consider it can be said that there was "no reason to doubt the veracity of the

information" if, included in the information, were the allegations made by the two patients whose accounts were not considered reliable by the police. Furthermore, so far as Mrs R is concerned, her essential position was that the Claimant needed some further guidance on handling techniques and, of course, Mrs T had died before a final statement could be obtained; but the circumstances in which the allegations were made were as I have set out above. It means that the conclusion that the Claimant "has been shown to behave in an unprofessional way on two occasions" cannot really be sustained.

73. For my part, whilst as I have said previously, it was quite correct to review the 2007 matter in the light of the 2011 allegations, it is very difficult to see how the latter allegations, which were unproved and unsubstantiated in the sense of establishing any wrongdoing on the Claimant's part, could give credence to the allegation made in 2007 which, if made initially, was never sustained or pursued. Indeed it was effectively withdrawn.

74. I can well understand the concerns that were felt by the officers, but those concerns can only arise on the basis of a suspicion of occasional heavy-handedness and that, it seems to me, is not a sufficiently weighty factor to outweigh the Claimant's Article 8 rights in the circumstances of this case. I come to that conclusion giving such weight as I can to the views of the Detective Superintendent. Essentially, however, on the question of the evaluation of what occurred, or may have occurred, in the two care homes, he was in no better position by way of expertise than is the court.

75. I would have reached that conclusion without reference to two other significant factors to which I will now turn briefly. However, those two factors add considerable weight to that conclusion. The first is that, as Mr Broach argued, there have been two isolated occasions when complaints have been made over a period of seven years working as a nurse in the UK. The Claimant must have handled very many elderly and infirm patients many times on a daily basis throughout that period and yet complaints have arisen from a handful of people on two occasions separated by over four years. Second, and related to that fact, it would be surprising if other nurses and the administrators in the care homes in which the Claimant worked would not have gained a sense that she was consistently heavy-handed if that indeed was the case. There is no evidence that such a sense had been gained in any of the institutions in which she had worked and this does lend credence to the proposition that, whatever it was that generated the specific complaints, it was not an intrinsic propensity to be heavy-handed. I do not believe that this consideration was weighed sufficiently, or at all, by the Detective Superintendent. It is, of course, one of the factors that might have been drawn to his attention and might have affected his view if representations had been invited at the outset.

76. Doing the best I can, therefore, to weigh the various factors, and giving such weight as I can to the views of the Detective Superintendent, I do not consider that the risks generated by the possibility of occasional heavy-handedness (the suspicion of which has been raised by the allegations) outweighs the Claimant's right to respect for private life under Article 8. I have, of course, considered whether the text that includes her account as well as the précis of the allegations is a satisfactory means of meeting her legitimate concerns about her Article 8 rights, but it seems to me that the recitation of those allegations will of itself cause her irredeemable harm in seeking

further employment. Obviously, she may face the possibility that these matters will be referred to in confidential references, but that is a different matter.

77. I have approached this issue purely on the basis of balancing the considerations in the manner ordained in *L*. Mr Morley did invite me to approach the issue in the way that, as I understood him, he suggested that Munby LJ approached it in *B*. When reflecting on the circumstances in that case (which involved an untried allegation that a consultant psychiatrist, when under the influence of alcohol, brandished a Samurai sword at a 16-year old boy and whose house was then later found to contain a number of firearms), Munby LJ said this:

> "One can perhaps test the matter in this way. Suppose that none of this information had been included in the Certificate, and suppose that the claimant had then appeared for work under the influence of alcohol and brandishing a sword or a gun in front of one of his patients. Would not both the patient and the Trust have been justifiably angered – to use no stronger word – if they had then discovered what the police had been aware of but had chosen not to reveal? The answer is obvious."

78. I do not think for one moment that Munby LJ was suggesting that the test is always one of the "what would people think if" variety. If that was the test, everything would always be disclosed out of pure caution and, in effect, self-defence on the part of the decision-maker. That is not the kind of approach dictated by *L*. All he was seeking to demonstrate, in the circumstances of that case, was how obvious it was that the disclosure was required. Unlike this case, it was a strong case on its own facts, as was the case of *R (W) v. Chief Constable of Warwickshire* [2012] EWHC 406 (Admin), to which I was also referred, where there were four incidents of violent behaviour on the part of a teacher over a relatively short period of time which were justifiably thought likely to be true.

Conclusion

79. For those reasons, I consider that the Claimant is entitled to a declaration that the disclosure given breached her Article 8 rights and that the further decisions taken up to and including the decision reflected in the letter of 24 April 2012 (see paragraph 16 above) should be quashed.

80. My conclusion in this respect means that I do not have to consider directly the issue raised by Mr Broach, namely, whether an officer other than the Detective Superintendent should have considered the matter after the representations contained in a letter from the RCN were put forward. All I would say in relation to that is that I am sure that resource issues would come into play, but irrespective of that, it is to be anticipated that every conscientious decision-maker will or should approach the new information with an open mind and decide afresh where the balance lies if the information is still considered relevant to the employment application. I did not detect in the Detective Superintendent's final reasoning any reluctance on his part to do just that.

81. As agreed at the conclusion of the hearing, any matters of just satisfaction, if pursued, can be raised with me in written submissions.