Neutral Citation Number: [2006] EWHC 482 (Admin)

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19 March 2006

Before :

MR JUSTICE MUNBY

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Case No: CO/1734/2005

Between :

R (L)	**Claimant**
- and -	
COMMISSIONER OF POLICE OF THE METROPOLIS	**Defendant**

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Ms Charlotte Kilroy (instructed by John Ford Solicitors) for the Claimant
Ms Fiona Barton (instructed by the Legal Department) for the Defendant

Hearing dates: 13-14 February 2006

Case No: CO/6364/2004

Between :

R (G)	**Claimant**
- and -	
CHIEF CONSTABLE OF STAFFORDSHIRE POLICE	**Defendant**

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Ms Beverley Lang QC (instructed by the National Association of Head Teachers) for the Claimant

Mr Peter Oldham (instructed by Beachcroft Wansbroughs) for the Defendant

Hearing date: 17 February 2006

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Judgment Approved by the court
for handing down
(subject to editorial corrections)

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Mr Justice Munby :

1. These are applications for judicial review. Both raise questions as to the meaning and application of section 115 of the Police Act 1997. The two cases were heard separately but since they both raise essentially the same question of principle, and since the arguments in both cases traversed very much the same kind of ground, it is convenient to give a single judgment embracing both cases.

The legal framework

2. Under the heading "Enhanced criminal record certificates" section 115 of the Police Act 1997 provides, so far as material for present purposes, as follows:

> "(1) The Secretary of State shall issue an enhanced criminal record certificate to any individual who – (a) makes an application under this section in the prescribed manner and form countersigned by a registered person, …
>
> (2) An application under this section must be accompanied by a statement by the registered person that the certificate is required for the purposes of an exempted question asked – (a) in the course of considering the applicant's suitability for a position (whether paid or unpaid) within subsection (3) …
>
> (3) A position is within this subsection if it involves regularly caring for, training, supervising or being in sole charge of persons aged under 18."

3. Section 113(5) defines an "exempted question" as follows:

> ""exempted question" means a question in relation to which section 4(2)(a) or (b) of the Rehabilitation of Offenders Act 1974 (effect of rehabilitation) has been excluded by an order of the Secretary of State under section 4(4)."

4. Section 4(2) of the Rehabilitation of Offenders Act 1974 provides that:

> "Subject to the provisions of any order made under subsection (4) below, where a question seeking information with respect to a person's previous convictions, offences, conduct or circumstances is put to him or to any other person otherwise than in proceedings before a judicial authority –
>
> (a) the question shall be treated as not relating to spent convictions or to any circumstances ancillary to spent convictions, and the answer thereto may be framed accordingly; and
>
> (b) the person questioned shall not be subjected to any liability or otherwise prejudiced in law by reason of any failure to acknowledge or disclose a spent conviction or any

> circumstances ancillary to a spent conviction in his answer to the question."

It is common ground that the relevant order has been made by the Secretary of State under section 4(4) of the 1974 Act.

5. Section 115(6) of the Police Act 1997 provides that:

> "An enhanced criminal record certificate is a certificate which –
>
> (a) gives –
>
> (i) the prescribed details of every relevant matter relating to the applicant which is recorded in central records, and
>
> (ii) any information provided in accordance with subsection (7), or
>
> (b) states that there is no such matter or information."

6. Section 115(7) provides that:

> "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."

7. The authoritative decision on the meaning and effect of section 115(7) is that of the Court of Appeal in *R (X) v Chief Constable of the West Midlands Police* [2004] EWCA Civ 1968, [2005] 1 WLR 65. In the course of argument I was referred to the decisions in the two earlier cases of *R v Chief Constable of the North Wales Police ex p Thorpe* [1999] QB 397 and *R v Local Authority and Police Authority in the Midlands ex p LM* [2000] 1 FLR 612. I propose to say little about them because, as Lord Woolf CJ put it in *R (X) v Chief Constable of the West Midlands Police* [2004] EWCA Civ 1968, [2005] 1 WLR 65, at para [36], "to apply them … , except with the utmost of caution, can be misleading."

8. The general scheme of the legislation was described by Lord Woolf CJ in *R (X) v Chief Constable of the West Midlands Police* [2004] EWCA Civ 1968, [2005] 1 WLR 65, at para [18] as follows:

> " … it is useful to note the following significant aspects of the statutory scheme involving ECRCs.
>
> (i) The whole process of obtaining an ECRC is initiated by the person to whom the certificate will relate. The certificate

> is for his purposes to enable him to obtain employment which, at least in practical terms, will not be available to him unless he obtains a certificate.
>
> (ii) The certificate will only be seen by the applicant and his prospective employer.
>
> (iii) The applicant has the opportunity to persuade the Secretary of State to correct the certificate.
>
> (iv) The Chief Constable is under a duty to provide the information referred to in section 115(7). This is subject to the requirement that the information might be relevant and ought to be included in the certificate. What might be relevant and what ought to be included is a matter for the opinion of the Chief Constable.
>
> (v) The applicant is in a position to provide additional information if he wishes, whether in conflict with the certificate or not, to the prospective employer and it is the prospective employer who will make the decision as to whether he should or should not be employed."

9. The heart of the decision in *R (X) v Chief Constable of the West Midlands Police* [2004] EWCA Civ 1968, [2005] 1 WLR 65, is to be found in Lord Woolf CJ's judgment at paras [36]-[37]:

> "[36] ... Having regard to the language of section 115, the Chief Constable was under a duty to disclose if the information might be relevant, unless there was some good reason for not making such a disclosure.
>
> [37] This was obviously required by Parliament because it was important (for the protection of children and vulnerable adults) that the information should be disclosed even if it only might be true. If it might be true, the person who was proposing to employ the claimant should be entitled to take it into account before the decision was made as to whether or not to employ the claimant. This was the policy of the legislation in order to serve a pressing social need."

10. The claimants rely on Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. I am quite content to assume that the disclosure of information such as was disclosed in these two cases engages Article 8. As Dyson J said in *R v Local Authority and Police Authority in the Midlands ex p LM* [2000] 1 FLR 612 at pages 620 and 625:

> "The disclosure, if made, would obviously interfere with his right to a private life ... Disclosure of allegations of child sex abuse is on the face of it a substantial interference with a person's right to a private life: see *R v Chief Constable of North*

> *Wales Police ex p Thorpe* per Buxton J at 416B–C, approved by the Court of Appeal at 429B".

Moreover, it may well be, notwithstanding Mummery LJ's reservation of the point in *R (X) v Chief Constable of the West Midlands Police* [2004] EWCA Civ 1968, [2005] 1 WLR 65, at para [57], that Article 8 is also engaged inasmuch as disclosure in cases such as this can impact very damagingly on someone's employment prospects: see the later decision of the Strasbourg court in *Sidabras v Lithuania* (2004) 42 EHRR 104 at para [47]. I am prepared to assume as much, though without deciding the point.

11. But this does not necessarily take the claimants very far. In the first place, it is clear that section 115 itself is Convention compliant. As Lord Woolf CJ said in *R (X) v Chief Constable of the West Midlands Police* [2004] EWCA Civ 1968, [2005] 1 WLR 65, at para [20]:

> "It is helpful to note that while it is accepted by both parties that the information which is included in the ECRC might offend against article 8(1), it is not suggested that the legislation itself contravenes article 8. No doubt this is because disclosure of the information contained in the certificate would be "in accordance with the law" and "necessary in a democratic society", in the interests of public safety and for the prevention of crime and for the protection of the rights and freedoms of others. This country must, through its legislature, be entitled to enable information to be available to prospective employers, where the nature of the employment means that particular care should be taken to ensure that those who are working with the appropriate categories of persons can be relied on to do so, without those in their care coming to harm if they are under the age of 18 or vulnerable adults."

12. Moreover, the role that Article 8 will play in the individual case is limited. As Lord Woolf CJ said at para [41]:

> " ... how can the Chief Constable's decision to disclose be challenged under article 8? As already indicated, the Chief Constable starts off with the advantage that his statutory role is not in conflict with article 8, because the statute meets the requirements of article 8(2). It follows also, that as long as the Chief Constable was entitled to form the opinion that the information disclosed might be relevant, then absent any untoward circumstance which is not present here, it is difficult to see that there can be any reason why the information that "might be relevant", ought not to be included in the certificate. I accept that it is possible that there could be cases where the information should not be included in the certificate because it is disproportionate to do so; the information might be as to some trifling matter; it may be that the evidence made it so unlikely that the information was correct, that it again would be disproportionate to disclose it. These were not, in my judgment, the situations on the facts before the Chief Constable."

13. He added at para [45]:

> "The information which was disclosed, was information which a responsible employer in this field would want to know before making a decision as to whether to employ the claimant. The claimant is seeking to prevent that information being available. In my judgment, the making available of that information in accordance with the law, as occurred here, could not be contrary to article 8(2)."

14. He went on at paras [46]-[47] to explain why in that particular case the Court of Appeal was reversing the decision of the judge at first instance, Wall J:

> "[46] ... Wall J was not required, either on the grounds of fairness or because of article 8(2), to, in effect, form his own opinion as to what might be the relevance of the disclosed information.
>
> [47] The statute properly conferred the responsibility of forming an opinion on the Chief Constable and, having formed that opinion perfectly properly that certain information might be relevant, it is not for the courts to interfere."

15. So much for the legal framework. I turn to the facts.

The facts – L's case

16. The claimant, L, is the mother of a boy, X, who was born on 21 April 1989. He has a much older sister, Y. Unhappily the family has come to the attention of both the police and social services.

17. Because of concerns about X, the local authority arranged an initial Child Protection Conference which took place on 29 January 2002. The social worker reported concerns that X "may be exposed to drugs" and that L was not prepared to work with social services. She expressed the view that X "has no clear boundaries at home or at school" and reported that:

> "The general view of all the professionals is that [X] is at risk within his family because [L] has very little control of his behaviour and knowledge of his whereabouts for the large part of the day."

18. The Conference received detailed and particularised reports of the numerous occasions between August 1999 and December 2001 when X had been reported missing. It also received a detailed report from his school of his poor attendance and poor behaviour at school. The Conference was told that X was currently excluded from school for having assaulted his teacher. The teacher is quoted in the minutes of the Conference as reporting:

> "He goes off site regularly. His attendance is an ongoing issue. He has been involved in offending behaviour ie shoplifting ...

> [X] is constantly being linked with incidents around school. He is bullied and bullies other students."

The minutes also record him describing X "as out of control".

19. The police officer from the local Child Protection Team is recorded in the minutes as saying:

> "there has been a lot of involvement with [X] and his offending and being reported missing by [L]. It is felt that a lot of the issues stem from his sister [Y], around drugs and prostitution. [X] is a frequent visitor to his sister's home."

20. Recording L's contribution to the discussion the minutes include this:

> "[L] refuses to accept that [X's] behaviour is a concern. [L] targeted [the social worker] as the cause of all her problems … [L] said the root of the problem is the family being harassed by neighbours … [L] feels that she is not being listened to and everyone else is the cause of the problems and she is not to blame."

21. The decision of the Conference was that X's name should be placed on the Child Protection Register under the category of neglect. The minutes record fourteen specific recommendations, ten of them requiring action to be taken by the local authority. It is apparent that many of these were not implemented.

22. The first review Child Protection Conference took place on 26 April 2002. By then X had been living with his father for about three months – he had moved to live with him shortly before the Child Protection Conference on 29 January 2002. The Conference decided that X's name should remain on the Child Protection Register. It made seven specific recommendations, all requiring action on the part of the local authority. It is apparent that only one of these recommendations had been implemented by the date of the next meeting, some seven months later.

23. The second review Child Protection Conference took place on 22 November 2002. The picture remained bleak. L was reported as having no control over X. The position was summarised in the minutes:

> "Risks to [X] are still accumulating. [X's] impulsive behaviour is very dangerous and will get him into serious trouble. His emotional situation is also a huge problem".

The Conference decided that X's name should remain on the Child Protection Register. It made five specific recommendations, all requiring action on the part of the local authority. No dates were identified for implementation of these recommendations and it is not apparent whether any of them were in fact ever implemented.

24. By then X had been arrested, on 27 September 2002, for a robbery allegedly committed by him on 12 September 2002. Two days earlier, on 25 September 2002,

he had been assaulted by his father, seemingly provoked by X's behaviour in allowing unknown adults into their flat and running up a telephone bill of £490. X was charged on 2 October 2002. He was convicted and sentenced on 31 March 2003 to three years' detention in a Young Offender Institution. He was released exactly one year later on 28 February 2004.

25. In the meantime the third review Child Protection Conference had been due to take place on 10 April 2003. It was cancelled by the local authority for what were described as "internal departmental reasons." Because of X's conviction and detention no further Child Protection Conference was held and in June 2003 his name was removed from the Child Protection Register.

26. I appreciate that I am sitting in the Administrative Court, not in the Family Division, and that the local authority is not a party to the present proceedings, but I cannot forebear to comment on what would seem, on the face of it, to have been the almost complete futility, so far as X was concerned, of the entire series of Child Protection Conferences. Time after time specific recommendations were not implemented. One glaring failure on the part of the local authority was its failure to complete the Core Assessment required to comply with the second recommendation at the Conference on 29 January 2002. *Working Together to Safeguard Children* (guidance issued in 1999 by the Department of Health, the Home Office and the Department for Education and Employment) requires a Core Assessment to be completed in 35 working days. Here the Core Assessment called for on 29 January 2002 was still incomplete on 22 November 2002, well over 35 *weeks* later. The picture is deeply depressing. If the picture presented by the Child Protection Conference minutes is accurate, the local authority's failures would appear to be utterly lamentable.

27. From February to December 2004 L was employed by an agency which provides staff to schools. From March to July 2004 she worked as a midday assistant at a secondary school, her job involving supervising children in the lunchtime break both in the canteen and in the playground. Whilst on duty in the playground her responsibility was to ensure that the children did not go out of the school gate and that they behaved themselves properly. There were four other assistants in what was described as a big play area.

28. Because of the nature of L's job, the agency applied for an enhanced criminal record certificate in accordance with section 115 of the Police Act 1997. The position applied for by L was described as a "casual midday assistant." The certificate was issued on 16 December 2004. It recorded that L had no criminal convictions and that no information on her was recorded either on the list held under section 142 of the Education Act 2002 or on the Protection of Children Act list. But under the heading "Other relevant information disclosed at the Chief Police Officer(s) discretion" it set out the following as having been supplied by the Metropolitan Police Service:

> "[L], born [date], came to police notice in January 2002 when her son, age 13, was put on the Child Protection Register under the category of neglect. It was alleged that the applicant had failed to exercise the required degree of care and supervision in that her son was constantly engaged in activities including shoplifting, failing to attend school, going missing from home, assaulting a teacher at school and was excluded from school.

> Additionally, it was alleged that during this period the applicant had refused to co-operate with the social services. Her son was removed from the Child Protection Register in June 2003 – after he had been found guilty of robbery and receiving a custodial sentence."

29. Shortly afterwards, on 21 December 2004, L was informed by the agency that her services were no longer required.

30. L issued her application for judicial review on 21 March 2005, seeking to challenge what was described as the decision of the defendant, the Commissioner of the Metropolitan Police, to disclose information relating to her on the enhanced criminal record certificate. No acknowledgement of service was served within the prescribed period.

31. On 29 April 2005 I granted permission on the papers, observing that "the application raises an important point of potentially wide concern." An acknowledgement of service was subsequently filed on 3 June 2005. The matter came on for hearing before me on 13 February 2006. L was represented by Ms Charlotte Kilroy; the Commissioner by Ms Fiona Barton.

32. The evidence consisted of two short statements by L and two more substantial statements filed on behalf of the Commissioner: one by Detective Chief Inspector Stuart Gibson, the other by Chief Superintendent (previously Detective Superintendent) Graham Morris. The exhibits to DCI Gibson's statement included a print-out of the electronic record of the decision-making process taken from the Character Enquiry Centre Case Management System (CEC-CMS) and copies of the relevant data on the Crime Reporting System (CRIS), running to 168 pages, and the relevant police child protection records running to no fewer than 489 pages.

33. CS Morris supervises the Metropolitan Police Disclosure Service, which is part of CO4 at New Scotland Yard. His statement described how CO4 receives approximately 11,000 requests from the Criminal Records Bureau each week, of which approximately 50% result in a 'hit' producing some form of information. This information is then considered for disclosure. On average information is disclosed in only 20 to 25 cases each week. The disclosure unit consists of approximately 80 civilian case workers supervised by 10 civilian team leaders, each of whom has approximately 8 case workers in their team. In addition there are three Detective Sergeants, a Detective Inspector, a Detective Chief Inspector and, at the top, Detective Superintendent or, as he now is, Chief Superintendent Morris. An application is considered in turn by a case worker, by a team leader and then, if there is thought to be potentially disclosable material, by either a DS or a DI. If at that stage the recommendation is for disclosure the matter is next considered by the DCI and then by the CS.

34. In his statement CS Morris also described the decision-making process and the criteria by which decisions are made. The basic decision-making process is set out in flow-chart form in a booklet provided in both paper and electronic format to all case workers. There are five alternative flow charts, numbered MP2 to MP6. Where, as in the present case, both the name and the date of birth of the applicant are known, the relevant flow chart is MP2.

35. If the team leader forms the view that there is potentially disclosable information the application is then passed to a police officer, either a DS or a DI. If that officer is of the same view – ie, that the information is potentially disclosable – then the officer goes on to consider whether it should be disclosed. For this purpose the officer has regard to the criteria set out in two further flow charts: MP7 (Additional Information – Disclosure Rationale for Applications where only Applicant Information is being considered) and, where appropriate, MP8 (Additional Information – Disclosure Rationale for Applications where Third Party Information is being considered). Guidance on how to follow and apply the flow charts is contained in MP7A and MP8A. The officer will also have regard to the Human Rights Guidelines contained in MP9.

36. The two crucial stages in the decision-making process in this case were undertaken by DCI Gibson and CS (at that time DSupt) Morris. I think it is convenient to set out the CEC-CMS record in full. For ease of reference I have added paragraph numbers in square brackets.

37. On 30 November 2004 DCI Gibson wrote as follows to DSupt Morris:

> "[1] There is a mountain of information contained within the docket, a large proportion of which is rumour, conjecture, and uncorroborated allegations. The only information that I consider to be safe to disclose is that which surrounds the applicants son being subject of inclusion on the Child Protection Register under the category of neglect. Given that she has applied for a position involving regular contact with children, I consider this to be highly relevant; the applicant has consistently displayed a lack of ability to adequately care for and supervise her own child and the registered body should be made aware of her history when considering her employment application.
>
> [2] [L] born [date] came to Police notice on 29.1.02 when her son, then aged 13 years , was put on the Child Protection Register under the category of neglect. It was alleged that the applicant failed to exercise the required degree of care and supervision in that her son was constantly engaged in activities including shoplifting, failing to attend school, going missing from home, assaulting a teacher at school and was excluded from school. Additionally, during this period, it was alleged that the applicant refused to work or co-operate with the Social Services. Her son was removed from the Child Protection Register in June 2003 having been sentenced at Court to a custodial period for an offence of robbery."

38. On 2 December 2004 DSupt Morris wrote the following minute:

> "[3] I agree with DCI Gibson – the evidence is factual and relevant. In considering the disclosure we do identify her son by default and that does affect his rights. In this case the fact that the information is in the public domain and that the

applicant seeks a post with children, and their rights need to be considered does on balance justify disclosure.

[4] Information should be more than speculation, it should have some basis in fact. It should be more likely to be true than not and one would need to consider whether on the balance of probabilities test it was true. Age: HO Circular Para 28 "The older the information the less likely it is to be relevant" (2003).

[5] The incident has been admitted or is otherwise considered to be accurate and verifiable.

[6] The source can be relied upon.

[7] The investigation has concluded and there is evidence to support the allegation.

[8] 115(7) of the Police Act 1997 allows a Chief Officer of Police to disclose information that, in his opinion, might be relevant and ought to be brought to the attention of a registered body. Information might be relevant if a reasonable employer would find it material to a decision regarding employment, where the question of whether the applicant would pose a risk to the vulnerable was appropriate.

[9] The information relates to information that shows the applicant may be a risk to the physical, mental or moral welfare of the vulnerable.

[10] The incident was not connected with sex, drugs or violence but a lack of care.

[11] The incident is of concern and there is a specific reason to believe there is a risk to the vulnerable – lack of care.

[12] The HRA requires a balance to be struck between the right to private life and protecting the vulnerable from moral harm, mental or physical abuse. While individuals should not be at risk of being forever hounded, if a person chooses to seek this type of employment then they put themselves forward into public life and by that choice accept that information may be released. The impact of disclosure may result in his not being employed. While it would not be in society's interest to exclude an application from employment, social outlets, etc. as this may be a moderating factor on behaviour, the welfare of the vulnerable in respect of whom the risk may exist is of paramount importance, as it is their rights that legislation seeks to protect. The decision is one for police and there is no presumption against disclosure, the position is more in favour of disclosure unless there is a good reason for not doing so. (X v WM)

> [13] Disclosure would cause little disruption to the applicants private life as the information will be known to most people to whom disclosure is made.
>
> [14] A failure to disclose would result in the vulnerable being placed in some risk of harm through neglect.
>
> [15] If information is such that it passes all other tests then it should be disclosed irrespective of DPA implications.
>
> [16] Having considered these points and the information held I consider that disclosure is proportionate, in view of the nature of the information and the applicant's proposed role and necessary to protect vulnerable members of society."

39. The actual decision to make the disclosure was made on 3 December 2004.

The facts – G's case

40. G was head-teacher of a school providing year-long accommodation and education for young people aged between 16 and 19 with severe learning and other difficulties. Z, who was born on 12 March 1982, was a pupil at the school. As described by G in her evidence to me, Z had severe learning difficulties with associated autistic features and significant behavioural difficulties, significant receptive and expressive language and communication difficulties. He had no sense of danger and needed one to one support. On 28 January 2000 he was killed by a passing lorry and car when, unsupervised, he wandered out of the school premises and on to the main road. This was at least the fourth occasion when he had wandered out unsupervised: there had been earlier incidents on 19 November 1998, 21 September 1999 and 13 November 1999.

41. G was prosecuted for the 'gross negligence' manslaughter of Z. At her trial in the Crown Court Hughes J withdrew the case from the jury, having accepted a submission after the close of the Crown's case that there was no evidence on which the jury could properly convict.

42. In the course of his ruling, Hughes J directed himself by reference to *R v Adomako* [1995] 1 AC 171 that there were four ingredients of the offence which the Crown had to prove: (i) a duty of care; (ii) a breach of that duty; (iii) that the breach of duty was a substantial cause of Z's death; and (iv) gross negligence – in the sense of a gross disregard for human life.

43. Hughes J held that there was a prima facie case of breach of duty. Stressing that it was not for him to say whether G had in fact been negligent – that, of course, being a matter for the jury (or for the judge in any subsequent civil proceedings) – Hughes J said:

> "I am satisfied that there is a *prima facie* case for saying that she fell below the standard of a reasonable headmistress … there is a *prima facie* case that [G] fell below the standards reasonably to be expected of a headmistress in her position with

> the danger which clearly existed in this case ... there is a *prima facie* case she may well have done ... There is, as I hope I have made it clear, a *prima facie* case that in assessing that balance [scil, the balance between security on the one hand and restraint on the other] she got it wrong ... there is certainly a *prima facie* case that ... she failed to exercise reasonable care."

He also said that there was "evidence" of what he called "lack of care" by G.

44. Hughes J went on, however, to say that the Crown had failed to establish a prima facie case in relation to either causation or gross negligence. Essentially this was because the Fire Service had directed that there were to be no locks on the doors and there was much evidence that G was a dedicated and conscientious headmistress who took her responsibilities in relation to child protection very seriously:

> "that she was indifferent, showing disregard for life and safety, grossly negligent, the evidence does not begin to establish."

45. Because of Hughes J's ruling, G did not have to give evidence. In fairness to her I should point out that, according to her evidence to me, which I assume she would have laid before the jury at the Crown Court if her trial had proceeded that far, the senior member of staff who was in charge of Z on the fatal night had left him for some minutes without notifying any other member of staff; moreover, the school gates had been left open by a contractor, contrary to a notice at the gates.

46. G's acquittal was in November 2002. Subsequently G applied for a position requiring an application for an enhanced criminal record certificate in accordance with section 115 of the Police Act 1997. The certificate was issued on 10 March 2004. It described the position applied for by G as "supply teacher." The certificate recorded that G had no criminal convictions and that no information on her was recorded either by the Department for Education and Skills or by the Department of Health. But under the heading "Other relevant information" it set out the following as having been supplied by Staffordshire Police:

> "[G] is a woman of no convictions. However, we have access to intelligence information relating to [G] having been charged with manslaughter through negligence in January 2002. Whilst in the position of head teacher at a special needs school a pupil wandered off of the premises onto the main road with fatal consequences. The pupil was able to leave the premises due to inadequate security arrangements, which were [G's] responsibility. At Stafford Crown Court in November 2002, the judge presiding decided that there was no case to answer. We have obtained a copy of the judge's ruling and from that we have taken the following two quotes: "Nevertheless, I am satisfied that there is a prima facie case for saying that she fell below the standard of a reasonable headmistress", and "there is as I hope I have made clear, a prima facie case that in assessing that balance she got it wrong. Whether she did or not is not for me to say, but there is certainly a prima facie case that she did, that she failed to exercise reasonable care and that the

> consequence was a tragic one. But that she was indifferent, showing disregard for life and safety, grossly negligent, the evidence does not begin to establish." The judge made it clear that [G] did fall below the standard of a reasonable headmistress but the gross negligence required for manslaughter could never be established.
>
> My decision to disclose is based upon fact that it is reasonably believed that this information is relevant to the assessment of the person's suitability to work with children or vulnerable adults and that a reasonable potential employer of the applicant for a particular job or position might find the information to be material to his or her decision as to whether or not to employ that individual having regard to the question of whether that individual would pose a risk to children or vulnerable adults. I consider that the information is both credible and current.
>
> I think that it is appropriate to restate that it is for the employer and/or the professional body to decide whether the information herein is or is not relevant to the issue of the applicant's suitability for the position outlined in your correspondence."

47. The statement that "The judge made it clear that [G] did fall below the standard of a reasonable headmistress" was incorrect. Hughes J had said no such thing. The most he had said, as we have seen, was that "there is a *prima facie* case she may well have done" and that there was evidence of lack of care.

48. On 20 May 2004 G applied to the Criminal Records Bureau in accordance with section 117 of the Police Act 1997, inviting the Secretary of State to remove all the information supplied by the police from the certificate. This was refused, but on 12 September 2004 the Criminal Records Bureau wrote to G accepting that there had been a mistake, some of the information shown on the certificate being incorrect.

49. A new certificate was issued on 16 September 2004, setting out the following information:

> "[G] is a woman of no convictions. However, we have access to intelligence information relating to [G] having been charged with manslaughter through negligence in January 2002. Whilst in the position of head teacher at a special needs school a pupil wandered off of the premises and onto the main road with fatal consequences. Following a police investigation [G] was charged with the offence of manslaughter. She later appeared at court where, on the direction of the judge, she was found not guilty.
>
> My decision to disclose is based upon fact that it is reasonably believed that this information is relevant to the assessment of the person's suitability to work with children or vulnerable adults and that a reasonable potential employer of the applicant for a particular job or position might find the information to be

> material to his or her decision as to whether or not to employ that individual having regard to the question of whether that individual would pose a risk to children or vulnerable adults. I consider that the information is both credible and current.
>
> I think that it is appropriate to restate that it is for the employer and/or the professional body to decide whether the information herein is or is not relevant to the issue of the applicant's suitability for the position outlined in your correspondence."

50. G issued her application for judicial review on 14 December 2004, seeking to challenge both decisions of the defendant, the Chief Constable of Staffordshire Police, and the decision of the Criminal Records Bureau. On 10 February 2005 Mitting J stayed G's application for permission pending determination by the House of Lords of the petition for leave to appeal against the decision of the Court of Appeal in *R (X) v Chief Constable of the West Midlands Police* [2004] EWCA Civ 1968, [2005] 1 WLR 65. That petition having been dismissed, G's application for permission was considered by Bean J on 23 August 2005.

51. Bean J gave permission against the Chief Constable, but on one ground only, namely "the question of whether evidence of negligence by a teacher not amounting to a criminal offence may be relevant information for the purposes of section 115(7) of the Police Act 1997." Permission to apply for judicial review against the Criminal Records Bureau was refused. There has been no challenge to Bean J's order and the matter has accordingly proceeded only against the Chief Constable and only on that one ground. Before me it was made clear that the challenge now is only in relation to the second certificate.

52. The matter came on for hearing before me on 17 February 2006. G was represented by Ms Beverley Lang QC; the Chief Constable by Mr Peter Oldham. The evidence consisted of a statement by G and a statement by Assistant Chief Constable Adrian Lee, the officer who had taken the relevant decisions.

53. Unsurprisingly, the Staffordshire Police have far fewer section 115 applications than does the Metropolitan Police. And they are handled by a far smaller staff. Initially the application in this case was considered by Ms Marshall the Staffordshire Police's Criminal Records Bureau disclosure supervisor. But it was ACC Lee who took the final decisions in this case. He obtained a transcript of Hughes J's ruling. Having studied the transcript he decided to make the disclosure as set out in the first certificate.

54. I think I should set out his reasoning in full as he explained it in his witness statement:

> "In my opinion the records held by the Defendant showed that the claimant has been connected with, and to a material degree culpable for, the failure in supervision or management at [the school] which lead to the death of a vulnerable pupil. I know that [G's] behaviour was not criminal, but a review of the Judge's comments made it clear to me that he was not saying she was blameless. On the contrary, he states that, "there is certainly a prima facie case that she ... failed to exercise

reasonable care and that the consequence was a tragic one." He had, of course, addressed himself solely and properly to the question of criminal law before him.

On reviewing the record, I was sympathetic to the fact that [G] had evidently appreciated that the fire doors installed at the school created a risk that a pupil might be able to leave the premises undetected. I understood that she had indeed taken some steps to resolve the risk, albeit that she decided not to alter the fastenings of the doors in question. However, I also considered that this very risk which [G] had identified subsequently came to pass, with the most serious consequences. Whatever word one chooses to describe [G's] approach to that risk, whether it is "mistake," (as [G] contends), or error of judgement, or negligence, or some other word, it seemed to me, and it still does seem to me, that these facts might be relevant to an employer, at least where the employment in question involved the custody of children. Moral culpability did not seem to me to be the main issue. The main issue was that a child in her care had died from a risk of which she was aware and which she had, self evidently, not managed successfully.

However, I tried to be fair and balanced in the disclosure. In addition to quoting the words above ("there is certainly a prima facie case that she … failed to exercise reasonable care and that the consequence was a tragic one.") I went on, and also quoted the judge's comment that "that she was indifferent, showing disregard to life and safety, grossly negligent, the evidence does not begin to establish". I also made it clear that it was for the employer or professional body to decide whether the information disclosed actually was or was not relevant to the issue of her suitability for the post in question, my opinion being only that it might be.

Against disclosure, I considered that the fact that [G] had been acquitted, and so was entitled to be treated as wholly innocent of the charge that had been brought against her. I decided this did not outweigh the need to disclose the information, as the incident which had taken place under her stewardship had had very serious consequences, she was applying for a post which would once again put her in charge of children, and it was possible to make clear in the disclosure that she had been found not guilty. I felt that a professional employer would be able to make sensible and proper use of that information, rather than being prejudiced simply because [G] had been charged with a criminal offence.

Moreover, much of the information regarding the trial and the acquittal was already in the public domain and, therefore, I did not feel that disclosing it in her ECRC would affect the Claimant as much as if it had been confidential information

> known only to the Police. This was however a secondary consideration and I was aware that disclosure would have some effect."

55. He went on to explain his decision in relation to the second certificate:

> "I took the view, following further consultation with officers within the Defendant, that it was possible that any summary of the facts of the case, or any quotation from the judgement, ran the inevitable risk of being inadvertently partial or misleading. Whilst I believed, and believe, that I had tried to present the substance of the records held accurately and fairly, (and certainly I had quoted the judge accurately) on review I and those advising me felt that the complaint made by [G] that the disclosure inaccurately presented the detailed outcome of the case was at least arguable. I did not want even a risk that the disclosure might be inaccurate or misunderstood, and so I decided to remove a substantial part of the original disclosure.
>
> As part of the dispute I did reconsider whether to make the disclosure at all. However, I saw no reason to change my earlier decision, and decided to make the revised disclosure on the same grounds as set out above."

<u>The point of principle</u>

56. Insofar as there is any point of principle raised in either of these cases, it is the one identified by Bean J: Can evidence of neglect not amounting to a criminal offence (as in L's case) or evidence of negligence not amounting to a criminal offence (as in G's case) be relevant information within the meaning and for the purposes of section 115(7) of the Police Act 1997? In my judgment, the answer in each case is that it can.

57. Both cases raise the same generic issue: How does section 115(7) apply where there has been, or may have been, neglect of a child of a kind falling short of that which constitutes a criminal offence?

<u>The point of principle: contrasts between the criminal, civil and family law</u>

58. As is shown both by *R v Adomako* [1995] 1 AC 171 and, indeed, by G's albeit unsuccessful prosecution, reckless neglect of a child which results in the child's death can constitute 'gross negligence' manslaughter where there has been what Hughes J called a gross disregard for human life.

59. More generally, section 1(1) of the Children and Young Persons Act 1933 provides that:

> "If any person who has attained the age of sixteen years and has responsibility for any child or young person under that age, wilfully assaults, ill-treats, neglects, abandons, or exposes him, or causes or procures him to be assaulted, ill-treated, neglected, abandoned, or exposed, in a manner likely to cause him

> unnecessary suffering or injury to health (including injury to or loss of sight, or hearing, or limb, or organ of the body, and any mental derangement), that person shall be guilty of an offence".

60. As Ms Kilroy pointed out, there are two limiting features of this provision. In the first place, no offence is committed unless the carer has behaved wilfully, and where the allegation is of neglect – an omission to act rather than the commission of a positive act – no offence is committed unless the carer has been reckless: *R v Sheppard* [1981] AC 394 at pages 403, 404-405, 412, 418. Secondly, the statute focuses primarily on *physical* harm. As Lord Diplock observed in *R v Sheppard* [1981] AC 394 at page 404 (and Lord Keith of Kinkel said much the same thing at page 417):

> "To "neglect" a child is to omit to act, to fail to provide adequately for its needs; and, in the context of section 1 of the Children and Young Persons Act 1933, its physical needs rather than its spiritual, educational, moral or emotional needs. These are dealt with by other legislation."

61. But as Ms Kilroy also pointed out, both family law and the law relating to civil liability adopt less stringent tests. I need say nothing of civil liability save to observe that the test of liability in tort is negligence, not gross negligence. So far as family law is concerned, there are two significant differences from the criminal law.

62. In the first place, family law concerns itself with much more than merely physical neglect. As Ms Kilroy pointed out, the definition of "harm" to be found in section 31(9) of the Children Act 1989 embraces a wider class of case than is necessarily included in section 1 of the Children and Young Persons Act 1933. "Harm" is defined in section 31(9) as including not only "ill-treatment" but also "the impairment of health or development" – including not merely "physical" but also "intellectual, emotional, social or behavioural" development – and "ill-treatment" includes not only sexual abuse but also "forms of ill-treatment which are not physical." She made a similar point in relation to the definitions or descriptions of "neglect" which are to be found in paragraphs 2.7 and 2.15 of *Working Together to Safeguard Children*.

63. Secondly, family law assesses neglect by reference to an objective standard. Thus section 31(10) of the Children Act 1989 provides that "Where the question of whether harm suffered by a child is significant turns on the child's health or development, his health or development shall be compared with that which could reasonably be expected of a similar child". More importantly for present purposes, section 31(2)(b)(i) provides that the court may only make a care order or supervision order if it is satisfied that "the care given to the child, or likely to be given to him if the order were not made, [is] not … what it would be reasonable to expect a parent to give to him."

64. Another important difference between criminal law and family law is in matters of evidence and procedure. Family courts are not bound by the same strict rules of evidence as is the Crown Court – hearsay evidence is admissible – and they work to a different and lower standard of proof. Proceedings at a Child Protection Conference are even more informal.

65. Child Protection Conferences are described in paragraphs 5.52-5.70 of *Working Together to Safeguard Children*. Paragraph 5.52 defines the "aim of the conference" as being "to enable those professionals most involved with the child and family, and the family themselves, to assess all relevant information, and plan how to safeguard the child and promote his or her welfare."

66. Ms Kilroy referred me to well-known authorities containing judicial descriptions of the Child Protection Register system: *R v Norfolk County Council Social Services Department ex p M* [1989] QB 619, *R v Harrow London Borough Council ex p D* [1990] Fam 133 and *R v Hampshire County Council ex p H* [1999] 2 FLR 359. I need not go through them in any detail. It suffices to quote two brief extracts from the judgment of Butler-Sloss LJ (as she then was) in *R v Harrow London Borough Council ex p D* [1990] Fam 133. At page 138 she said this:

> "The case conference has a duty to make an assessment as to abuse and the abuser, if sufficient information is available. Of its nature, the mechanism of the case conference leading to the decision to place names on the register and the decision-making process, is unstructured and informal. It is accepted by Mr Scrivener that it is not a judicial process. It is part of a protection package for a child believed to have been the victim of abuse. Unlike other areas of judicial review, the considerations are not limited to the individual who may have been prejudiced and the tribunal or organisation being criticised. In this field, unusually, there is a third component of enormous importance – the welfare of the child which is the purpose of the entry in the register. In proceedings in which the child is the subject, his or her welfare is paramount.
>
> In balancing adequate protection for the child and fairness to an adult, the interest of an adult may have to be placed second to the needs of the child. All concerned in this difficult and delicate area should be allowed to perform their task without looking over their shoulder all the time for the possible intervention of the court."

She added at page 139:

> "The nature of the information recorded, the machinery by which it has been inserted and the limited purpose for which it is included must be recognised. Having said that, I do not consider such an entry is in any way a finding of fact, even less a finding of guilt, nor should it be seen as such."

67. *Working Together to Safeguard Children* recognises that a Child Protection Conference may have to consider a case where the child has been or may have been the victim of a crime. It advises in paragraph 5.8 that the local authority and the police should "consider jointly how to proceed in the best interests of the child". It goes on to recognise that "There will be less serious cases where, after discussion, it is agreed that the best interests of the child are served by social services led intervention rather than a full police investigation."

The point of principle: submissions

68. It was against this general background that both Ms Kilroy and Ms Lang sought to draw a distinction for the purposes of section 115(7) between conduct of the type that, if proved, would amount to a criminal offence and conduct that, even if proved, would not amount to a criminal offence – albeit that it might (as in the kind of situation exemplified by G's case) give rise to civil liability or (as in the kind of situation exemplified by L's case) lead to the convening by a local authority of a Child Protection Conference or the commencement by a local authority of care proceedings in accordance with Part IV of the Children Act 1989. In my judgment there is no such distinction.

69. There were in essence four strands to their arguments.

70. First, Ms Kilroy and Ms Lang referred to me to various phrases used in the Police Act 1997: the reference in the long title to the purpose of the Act being, inter alia, "to provide for the issue of certificates about criminal records"; the heading to Part V ("Certificates of Criminal Records, &c"); the headings to sections 112, 113 and 114 (respectively "Criminal conviction certificates", "Criminal record certificates" and "Criminal record certificates"); and most important of all the heading to section 115 itself ("Enhanced criminal record certificates"). All these, they suggested, showed that the Act was confined to records or certificates of *criminal* behaviour. A similar point was made by Ms Kilroy in reliance upon the fact that section 115(7) refers back, via section 115(2), to the provisions of section 4(2) of the Rehabilitation of Offenders Act 1974.

71. The short answer to all this was provided by Mr Oldham, who pointed out that section 115(6A) provides for the inclusion in certain circumstances in an enhanced criminal record certificate ("the enhanced criminal record certificate shall also state") of various matters, identified in sections 115(6A)(a)-(d), which are not on any view confined to criminal behaviour. I observe that the same point can also be made by reference to certain other subsections of section 115. But there is no need for me to go any further. The provisions of section 115(6A) would suffice, even if they stood alone, to make good Mr Oldham's point.

72. Secondly, Miss Lang placed some reliance upon the comments of Lord Woolf CJ in *R (X) v Chief Constable of the West Midlands Police* [2004] EWCA Civ 1968, [2005] 1 WLR 65, at para [2]:

> "An ECRC contains information, in addition to that which is recorded in central records, about the person to whom the certificate relates, provided by the Chief Constable. The additional information may concern *offences* of which the person to whom the ECRC relates is suspected of committing even though his responsibility has not been and cannot be proved (emphasis added)."

73. This passage, in my judgment, simply cannot bear the weight that Ms Lang would seek to give it. Lord Woolf CJ was not concerned at all in *R (X) v Chief Constable of the West Midlands Police* [2004] EWCA Civ 1968, [2005] 1 WLR 65, with the present point. He did not say that an ECRC is confined to information of the kind he

was referring to. All he said was that the additional information "may" concern suspected offences. So indeed it may, but there is nothing in what Lord Woolf CJ said to show that it may not equally concern other matters. On the contrary, his words in the passage immediately following that relied on by Ms Lang are framed in more general terms and point in a direction precisely the opposite of that contended for by Ms Lang:

> "The information must, however, be information which the Chief Constable is of the opinion might be relevant to a position which involves regularly caring for, training, supervising or being in sole charge of persons under 18 or vulnerable persons aged 18 or over. The ECRC is, therefore, a form of protection for the young and/or vulnerable: the additional information contained therein is required so as to avoid unsuitable individuals being employed for looking after such persons."

74. Thirdly, Ms Kilroy and Ms Lang referred me to a wide range of official sources: the Home Office Consultation Paper, *Disclosure of Criminal Records for Employment Vetting Purposes* (September 1993), the Home Office White Paper, *On the Record: The Government's Proposals for Access to Criminal Records for Employment and Related Purposes in England and Wales* (Cm 3308, June 1996), the speech of the Minister of State, Home Office, Baroness Blatch, introducing the second reading of the Bill in the House of Lords on 11 November 1996 (Hansard, HL Vol 575, cols 789-795), *Criminal Records Bureau: Police Service Manual of Guidance* (issued by the Criminal Records Bureau in February 2002), *Child Protection: Preventing Unsuitable people from Working with Children and Young Persons in the Education Service* (guidance issued by the Department for Education and Skills in May 2002, DfES/0278/2002), *Revised Arrangements for Police Checks* (issued by the Home Office in September 2003, Circular 047/2003), *Criminal Records Bureau: Local Checks by Police Forces for the Purpose of Enhanced Disclosures* (issued by the Home Office in February 2005, Circular 5/2005) and *Criminal Records Bureau: Code of Practice and Explanatory Guide for Registered Persons and other recipients of Disclosure Information* (published under section 122 of the Police Act 1997 in April 2005).

75. Their purpose in doing so was to demonstrate a general 'official' assumption that section 115(7) applies only to conduct that is in principle criminal: see, for example, paragraph 41 of the DfES guidance and paragraph 10 of the Home Office circular:

> "The key purpose of disclosure is not a general "character assessment" of the individual, but to consider the risk or likelihood of an offence being committed against the vulnerable."

In particular they relied upon paragraph 3.8.4 of the Criminal Records Bureau guidance which refers to the legislation as "frustrating the perpetrators of offences against the vulnerable." For the same reason they also referred me to *The Bichard Inquiry Report* (June 2004, HC 653), paragraph 4.105.2 of which "recognise[s] that the purpose of vetting is crime prevention".

76. I do not think that any of this material will bear the weight which Ms Kilroy and Ms Lang seek to give it. In the first place, there are phrases which provide much less support for such a reading. Thus, although paragraph 10 of the Home Office circular refers, as we have seen, to the "risk or likelihood of an offence being committed", there are, as Mr Oldham pointed out, other more equivocal passages. Thus paragraph 9 refers to "a risk to children (or vulnerable adults)" and paragraph 31 says that:

> "the issue of relevancy should be considered solely in terms of whether information suggests that the applicant poses a risk of physical or mental abuse to children."

And paragraph 39 says:

> "But, in the final analysis, the main consideration must be the protection of the vulnerable. Therefore, if the information is cogent and relevant, and indicates a risk, it is appropriate and proportionate that it should be revealed."

Moreover, as Mr Oldham pointed out, paragraph 26 specifically refers to the fact that, depending upon the circumstances of the case and the reasons for the action taken, the revocation of a shotgun licence – not something that necessarily connotes anything criminal – could be very relevant.

77. Moreover, as Mr Oldham pointed out, none of this material – or at least none of the parts I was shown – even glosses, let alone attempts to explain the meaning of, the key words in section 115(7) – "any information". Furthermore, as both Ms Barton and Mr Oldham correctly point out, even if it did, no amount of 'official' explanation can affect the meaning of the statute.

78. Ms Lang also referred me to the *Association of Chief Police Officers: Code of Practice for Data Protection* (issued October 2002) and *Guidance on the Management of Police Information* (published as a final draft v3.4 by the Association of Chief Police Officers in February 2006). I have to say, with all respect to her, that none of this seemed to me to throw any light at all upon anything I have to decide.

79. Fourthly, and finally, it was suggested that whereas the police have expertise in the investigation and prevention of crime they do not necessarily have the same expertise in relation to child protection or other analogous issues. I can only say that, although this may be the perception of those whose experience is confined to the Crown Court or the Administrative Court, it is simply contrary to the everyday experience of those familiar with the workings of the family justice system. Police officers are routinely and intimately involved in the entire child protection system, just as police officers are routinely and intimately involved in many areas of work relating to the protection of vulnerable and exploited adults. L's case, indeed, is a good and entirely typical example. A police officer from the local police Child Protection Team attended and, as we have seen, actively participated in the Child Protection Conferences about X. Indeed, it is a striking fact that the police child protection records in relation to X ran to 489 pages, far in excess of the 168 pages which sufficed to record the relevant data on CRIS.

The point of principle: conclusions

80. As was correctly pointed out by Ms Barton and Mr Oldham, the short and simple answer to all this is to be found in the statutory language, which in my judgment is perfectly clear. Section 115(7) refers to "any information". If Parliament had intended to limit the relevant types of information, for example, by confining it to information of criminal or potentially criminal activity, it would have been the easiest thing in the world for it to do. But it chose not to. It made the statutory scheme apply to "any" information. In my judgment, "any" means "any".

81. The point in fact goes a little further. As we have seen, the only statutory limitation on the "information" which is to be included in an enhanced criminal record certificate is that it must be information which in the chief officer's opinion (section 115(7)(a)) "might be relevant" for the purpose of (section 115(2)) an exempted question asked by a prospective employer "in the course of considering the applicant's suitability for a position" which (section 115(3)) "involves regularly caring for, training supervising or being in sole care of" children. As a matter of common sense, information is not "relevant" for this purpose only if it relates to criminal or potentially criminal activity. On the contrary, there may be information which is highly "relevant" for this purpose even though it relates to activity – or inactivity – which is not on any view criminal. Children and vulnerable adults can suffer harm – including very grave and even fatal harm – just as much at the hands of the incompetent as the negligent, the feckless as the reckless. After all, Z died whilst at school, even though there was, as Hughes J ruled, no criminal misconduct.

82. I remind myself that, as Lord Woolf CJ put it in *R (X) v Chief Constable of the West Midlands Police* [2004] EWCA Civ 1968, [2005] 1 WLR 65, at para [20], the purpose of the legislation is:

> "to enable information to be available to prospective employers, where the nature of the employment means that particular care should be taken to ensure that those who are working with the appropriate categories of persons can be relied on to do so, without those in their care coming to harm if they are under the age of 18 or vulnerable adults."

As he said at para [2]:

> "The ECRC is … a form of protection for the young and/or vulnerable: the additional information contained therein is required so as to avoid unsuitable individuals being employed for looking after such persons"

The fact is that the criminal law, taken in isolation, may be no safe or even very useful guide to whether a potential carer of children or vulnerable adults is, to use Lord Woolf's words, "suitable" or someone who can be "relied on". A much wider range of information may be highly relevant in assessing such difficult matters. Parliament surely recognised this when it deliberately extended the net to embrace "any" information so long only as it is "relevant".

Discussion – L's case

83. Ms Kilroy attacks the certificate on five different grounds. I shall take them in turn.

84. First, Ms Kilroy asserts that the information in the certificate is not "relevant" because it does not disclose or relate to any criminal offence. For reasons I have already given there is no substance in this point. Information is capable of being relevant even if it does not relate to any criminal or potentially criminal activity.

85. Secondly, Ms Kilroy asserts more generally that the information in the certificate is not relevant because there is no necessary or relevant connection between lack of care or neglect within the family and unsuitability to be employed as a midday assistant to supervise children in a school playground during lunch breaks. According to Ms Kilroy, DCI Gibson and CS Morris were superficially and wrongly equiparating two different types of supervision or control in what she says were two quite different contexts. With all respect to Ms Kilroy I simply cannot agree. It seems to me obvious as a matter of first impression, indeed as a matter of common sense, that it would be highly relevant for the potential employer of a school playground supervisor, whose duties would seemingly include ensuring that the children in her charge do not hurt themselves or each other and do not absent themselves from the school premises during school hours, to know that the supervisor has had her own twelve year old son put on the Child Protection Register under the category of neglect and, moreover, on the basis that she has been unable to control his behaviour in circumstances where he has frequently gone missing from home, truanted from school and gone shoplifting.

86. In fact, of course, the Commissioner does not have to go that far. The question is not what I think. The question is whether "in the chief officer's opinion" the information "might" be relevant and, if so, whether "in the chief officer's opinion" it "ought" to be disclosed. To that there can, in my judgment, be only one answer. DCI Gibson and CS Morris were entitled to conclude that the information they were proposing to disclose was, as DCI Gibson put it (decision paragraph [1]) "highly relevant". As Ms Barton puts it, and I can only agree, L's alleged lack of control and supervision of her own child, X, which had led to X's name being included in the Child Protection Register was directly relevant to the post she sought; the very role which L was being employed to carry out at the school – controlling and supervising children – was the very role which the local authority had had concerns about her carrying out in respect of her own child. As Ms Barton puts it, lack of supervision puts vulnerable pupils at risk, risk to themselves and risk to other pupils. L had seemingly demonstrated an inability to control X, and that was a fact that DCI Gibson and CS Morris were entitled to conclude was relevant – indeed highly relevant – to L's employment in a supervisory role.

87. Thirdly, Ms Kilroy complains that DCI Gibson and CS Morris failed to appreciate the limited scope and purpose of a Child Protection Conference and wrongly failed, in particular, to appreciate that it makes no 'findings'. I do not agree.

88. In the first place it is to be noted that DCI Gibson correctly recognised (decision paragraph [1]) that much of what was contained in the child protection records was "rumour, conjecture, and uncorroborated allegations." He was careful when drafting what afterwards became with only minor alterations the information disclosed in the certificate (decision paragraph [2]) to discriminate between this kind of un-

particularised and largely un-sourced material, which he rightly excluded, and the detailed, particularised and securely sourced material which he chose to include. Thus he excluded the concerns about drugs and prostitution (see paragraphs [17] and [19] above) and confined himself to those matters which, as we have seen, had been the subject of specific and detailed reports by various professionals to the Child Protection Conference on 29 January 2002 (see paragraph [18] above). Moreover, he was careful to say (decision paragraph [2]) that this was merely what had been "alleged". But DCI Gibson and CS Morris were in my judgment entitled to conclude, not least from the detailed minutes of the Child Protection Conference on 29 January 2002, that there had been a full and careful assessment of the facts by a number of professionals and that there was a proper objective basis for the decision to include X's name on the Child Protection Register. After all, there was nothing in the minutes of the Child Protection Conferences to suggest that L had ever denied the primary facts about X's behaviour. Her response (see paragraph [20] above) had been to deny that it was a cause for concern and to assert that it was other people's fault.

89. In my judgment DCI Gibson was fully entitled to conclude, as he did (decision paragraph [1]), that L "has consistently displayed a lack of ability to adequately care for and supervise her own child". Likewise, in my judgment, DCI Gibson was fully entitled to say (decision paragraph [1]) that "I consider this to be highly relevant … the [employer] should be made aware of her history when considering her employment application."

90. Ms Kilroy understandably concentrates her fire on CS Morris, who, after all, was effectively the final decision-maker. She criticises his references to the evidence as being "factual" (decision paragraph [3]), to the "incident" as having been "admitted" (decision paragraph [5]), to the "source" as one that "can be relied upon" (decision paragraph [6]) and to there being "evidence to support the allegation" (decision paragraph [7]). In my judgment these criticisms are unfair and depend upon an over-literal reading of CS Morris's words and an over-analytical approach to his reasoning. DCI Gibson had been careful to separate out the detailed facts, which could be sourced and in large part substantiated, from the un-sourced and unsubstantiated rumour, conjecture and allegations. X's convictions were a matter of record and the primary facts relied upon by the local authority and, in turn, by DCI Gibson had seemingly not been challenged by L. There was evidence – detailed evidence – to support the allegations, for example, the evidence deployed at the Child Protection Conference on 29 January 2002 by the police and by the school. And those were "sources" that could properly be relied upon.

91. Fourthly, Ms Kilroy submits that CS Morris carried out the balancing exercise required by Article 8(2) on the basis of a wholly false premise, namely that the information was "in the public domain" (decision paragraph [3]) and that its disclosure (decision paragraph [13]) would cause "little disruption" to L's private life "as the information will be known to most people to whom disclosure is made." Ms Barton frankly accepts that this was wrong, though pointing out that X's conviction was in the public domain, but submits that this error does not invalidate CS Morris's decision. I agree. As Ms Barton pointed out, CS Morris had it very much in mind (decision paragraph [12]) that the effect of making the disclosure might be to exclude L from employment.

92. Fifthly, and finally, Ms Kilroy submits that CS Morris gave no consideration to the risks to L, and consequently to X, if L, as a result of what was included in the certificate, was, as she put it, excluded from employment. Those risks, she says, had to be balanced against the potential risks to the children in the playground if L kept her job. This submission, with all respect to Ms Kilroy, is misconceived. In the first place, CS Morris did have regard not merely to L's rights but also to X's rights (decision paragraph [3]). More importantly, the primary task of DCI Gibson and CS Morris was to decide whether, in their opinion, the information "might be relevant" to L's employer. If it was – as they were plainly entitled to conclude it was – then they were equally plainly entitled to conclude that the information should be disclosed, absent what Lord Woolf CJ in *R (X) v Chief Constable of the West Midlands Police* [2004] EWCA Civ 1968, [2005] 1 WLR 65, at para [41], had called "any untoward circumstance". The task of the chief officer is to determine whether the information "might be relevant" to an employer. If not, *cadit questio*. But if it is, then it is for the employer, rather than for the chief officer, to evaluate its weight and significance and the chief officer will therefore ordinarily conclude that it ought to be disclosed. The fundamental policy adopted by Parliament, as Lord Woolf CJ put it "in order to serve a pressing social need", and a policy which, as we have seen, is entirely Convention compliant, is that (see what Lord Woolf CJ said in *R (X) v Chief Constable of the West Midlands Police* [2004] EWCA Civ 1968, [2005] 1 WLR 65, at para [37]):

> "the information should be disclosed even if it only might be true. If it might be true, the person who was proposing to employ the claimant should be entitled to take it into account before the decision was made as to whether or not to employ the claimant."

93. Ms Kilroy submits that, for all these reasons, the decision to disclose was fatally flawed and that it cannot be justified under Article 8(2). I do not agree. On the contrary, and as Ms Barton correctly points out, DCI Gibson and CS Morris were not making any assessment at all of L's suitability for the post she sought. They were simply putting her employer in possession of certain information – information that was "relevant" within the meaning of section 115(7) – to enable the employer to ask appropriate questions of L, make an assessment of the risk and, if they chose to employ her, manage that risk. In other words, DCI Gibson and CS Morris were doing precisely what the statute required of them. I can see no flaw or error either in their approach or in their decision, a decision which in my judgment was quite manifestly compliant both with the statutory regime and with the Convention.

94. L's claim for judicial review fails and must be dismissed.

Discussion – G's case

95. Ms Lang attacks the certificate – that is, the second certificate – on the ground that the defendant erred in law and exercised his power irrationally (and/or without taking all relevant considerations into account and/or without conducting a proper risk assessment) in making disclosure when:

   i) the purpose of the disclosure of information under section 115(7) is to identify a potential risk of criminal offences against children, not other concerns about incompetence or civil negligence;

ii) G had been acquitted of the criminal charge;

iii) there was no rational basis for a belief that G had committed or might in future commit a criminal offence against children in her care;

iv) information regarding acquittals should not be disclosed under section 115(7) unless the circumstances of the acquittal raise legitimate concern as to whether an offence may have been committed although not proved;

v) only limited weight could be given to Hughes J's observation that there was a prima facie case of civil negligence against G when he had not heard any evidence from G, was not determining a civil claim and in fact made no finding of negligence.

96. I should point out that ACC Lee did not proceed on the basis suggested in (iii). He expressly acknowledged that G's conduct was not criminal and that she was entitled to be treated as wholly innocent of the charge. His reasoning was quite different. It was (I extract the key passages from his explanation as set out in paragraph [54] above) that:

> "the records held by the Defendant showed that the claimant has been connected with, and to a material degree culpable for, the failure in supervision or management at [the school] which lead to the death of a vulnerable pupil. I know that [G's] behaviour was not criminal, but a review of the Judge's comments made it clear to me that he was not saying she was blameless …
>
> Whatever word one chooses to describe [G's] approach to that risk, whether it is "mistake," (as [G] contends), or error of judgement, or negligence, or some other word, it seemed to me, and it still does seem to me, that these facts might be relevant to an employer, at least where the employment in question involved the custody of children. Moral culpability did not seem to me to be the main issue. The main issue was that a child in her care had died from a risk of which she was aware and which she had, self evidently, not managed successfully."

97. Mr Oldham's submission is simple and, in my judgment, unanswerable. He says that the claim must fail however it is formulated:

i) As to vires, Mr Oldham submits that section 115(7) permits, indeed obliges, the inclusion in a certificate of (to quote Bean J's words) "evidence of negligence by a teacher not amounting to a criminal offence" where the chief officer reasonably considers that the information "might be relevant" for the statutory purposes. I agree.

ii) As to any irrationality or 'factors' challenge, Mr Oldham submits that on the facts of this case it simply cannot be said that ACC Lee's decision that the information might be relevant for these purposes is *Wednesbury* unreasonable or that he failed to take any relevant factors into account. Again, I agree.

98. I have already set out my conclusion that the "information" referred to in section 115(7) is not confined to information of criminal or potentially criminal activity. On the contrary, section 115(7) extends in principle to "any" information which in the chief officer's opinion "might be relevant" for the purpose of a question asked by a prospective employer "in the course of considering the applicant's suitability for a position" which "involves regularly caring for, training supervising or being in sole care of" children. This conclusion provides the short answer to the greater bulk of Ms Lang's case.

99. I should one further observation in relation to limb (iv) of Ms Lang's submissions. I have no quarrel at all with this proposition – which, after all, is to be found in some of the 'official' guidance to which I have already referred – so long as its true significance is appreciated. It applies, as it seems to me, in a case where the only possibly relevant information is that someone has committed a criminal offence, for example, where there is no doubt that a criminal offence has been committed and the only issue is whether the offence was committed by A or B and where, the criminal offence apart, there is nothing else to report about A. But the present cases are very different.

100. The question in both cases is not Did L do it? or Did G do it? – in the sense of Was it done by A or by B? In the present cases what L and G did (or failed to do) is clear – or at least clear enough. The question is not so much whether or not they did (or failed to do) what they are said to have done (or failed to do), but rather whether what they are said to have done (or failed to do) is, of its nature, something that falls within section 115(7), always bearing in mind that section 115(7) is not confined to information of criminal or potentially criminal activity. If there is information which, quite independent of any criminal character it may have, "might be relevant" within the meaning of section 115(7), then it will retain that character, and be disclosable as such, whether or not the relevant activity is criminal, whether or not there has been a criminal prosecution and whether or not the defendant (if prosecuted) has been acquitted (and, if so, whatever the reason). So this point does not help Ms Lang.

101. The only remaining question is whether ACC Lee could reasonably and lawfully have concluded that the information contained in the certificate was information which "might be relevant" for the purpose of a question asked by a prospective employer "in the course of considering [G's] suitability for a position" which "involves regularly caring for, training supervising or being in sole care of" children. To that question, in my judgment, there can be only one answer. ACC Lee's decision was not irrational. Nor did he fail to take into account and given appropriate weight to relevant matters.

102. I can do no better than to summarise the way in which Mr Oldham put his case, for I agree entirely with what he says. He submits that the attempt to challenge the exercise of ACC Lee's discretion involves attempting to establish that it was perverse of him to believe that the information disclosed might be relevant to a person considering employing G in a post teaching and/or supervising children and to believe that he ought therefore to disclose it. Mr Oldham submits, and I agree, that it quite impossible for G to establish this. Mr Oldham says, and I agree, that it might well be relevant for a school or LEA or other person considering employing G that (and I quote the certificate) "Whilst [G was] in the position of head teacher at a special needs school a pupil wandered off of the premises onto the main road with fatal consequences." It had not been established that G was without responsibility for this occurrence, albeit

that there was no arguable case that she was criminally responsible. Furthermore, says Mr Oldham, and again I agree, ACC Lee could legitimately believe that this might be of relevance to a potential employer in the education sector. It cannot be said, submits Mr Oldham, that the information would be of legitimate concern to no reasonable employer. Indeed, he says, and I agree, it can easily be imagined that some employers would be concerned for good reason to be aware of such information.

103. Nor is there any basis, in my judgment, for any assertion that ACC Lee failed to take any relevant consideration into account or that he failed (insofar as he was required to) to conduct a proper risk assessment. I have set out ACC Lee's reasoning *in extenso*. It shows that he considered the case very carefully, took all the relevant factors into account, including the important fact that G had been acquitted, and carefully considered whether, on balance and having weighed all the relevant factors, there ought to be disclosure. He gave compelling reasons to justify his decision. I cannot fault his reasons. Moreover, at the end of the day he was careful to point out in the certificate "that it is for the employer and/or the professional body to decide whether the information herein is or is not relevant to the issue of the applicant's suitability for the position".

104. G's claim for judicial review fails and must be dismissed.

105. I should add one final observation. Among the other papers very properly disclosed by the Chief Constable in defence of this claim there is an internal memorandum dated 17 February 2004 addressed to ACC Lee and written by an Acting Detective Inspector. It contains these observations:

> "The police were extremely critical of the presentation of the case at court, and a report highlighting our concerns was forwarded to the CPS.
>
> The CPS did not (would not) reply to that report in writing but in a subsequent meeting with their representatives, our criticism of counsel was accepted, but it was agreed that it was not possible in the circumstances to take the case further."

106. I should make it clear that there is nothing which even begins to suggest that ACC Lee's decision in relation to G was in any way affected by his force's disappointment at the outcome of the criminal proceedings. Nor, as I should also make clear, is there anything in this which throws the slightest doubt on the propriety of G's acquittal. ACC Lee, to repeat, was quite clear in his evidence that G had been acquitted and is "entitled to be treated as wholly innocent of the charge".

Conclusions

107. For these reasons both these claims for judicial review fail and must be dismissed.

Endnote

108. For the avoidance of doubt I should make it clear that the *only* issue I have been asked to consider in these two cases is as to the legality and propriety of the disclosure of certain information for the purposes of and pursuant to section 115(7) of the Police

Act 1997. I have not been invited to consider any restraints there might be preventing disclosure in accordance with section 115(7) of, for example, confidential child protection information obtained by the police in circumstances preventing its further dissemination. That is an issue which may arise at an earlier stage in the process than that which I have here been engaged with, particularly if the police are in possession of documents or information derived from private proceedings in a family court. It is an issue which Sumner J has very recently had to consider. It is not an issue I have had to consider in these two cases, just as Sumner J did not have to consider in his case the issues that I have been considering here.