Neutral Citation Number: [2011] EWHC 2362 (Admin)

Case No: CO/10208/2010

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
(SITTING AT NOTTINGHAM)

The Law Courts
60 Canal Street
Nottingham NG1 1BB

Date: 16 September 2011

Before :

LORD JUSTICE MUNBY
MR JUSTICE BEATSON

- -

Between :

R (B)	**Claimant**
- and -	
THE CHIEF CONSTABLE OF DERBYSHIRE CONSTABULARY	**Defendant**

- -
- -

Mr Ramby de Mello (instructed by Turner Coulston) for the Claimant
Ms Anne Studd (instructed by the Force Solicitor) for the Defendant

Hearing dates: 27-28 June 2011

- -

Approved Judgment

Lord Justice Munby :

1. These are judicial review proceedings relating to an Enhanced Criminal Record Certificate (ECRC) issued on 11 May 2010 and incorporating information provided by the Chief Constable of Derbyshire Constabulary pursuant to section 113B of the Police Act 1997. The Certificate related to the claimant, Dr B, a consultant employed by a Mental Health Trust.

2. The statutory scheme of which section 113B forms part is so familiar that there is no need for me to set it out. It suffices to refer to section 113B(4):

> "Before issuing an enhanced criminal record certificate the Secretary of State must request the chief officer of every relevant police force to provide any information which, in the chief officer's opinion –
>
> (a) might be relevant for the purpose described in the statement under subsection (2), and
>
> (b) ought to be included in the certificate."

3. The relevant part of the Certificate was in the following terms:

> "Section 113B of the Police Act 1997 requires the Chief Officer of every relevant Police Force to provide any information that might be relevant and ought to be included in the certificate.
>
> In accordance with this legislation the Chief Officer has considered the following information and has decided that it might be relevant for the purpose of this application and ought to be included in the certificate:-
>
> On the 4th February 2010 Derbyshire Police received a report of an incident which was alleged to have occurred at Mr B's … home address. It was alleged that on the 26th December 2009 Mr B had stabbed a male who was known to him in the chest; however, as at the 4th February 2010 the male had no visible injuries to his chest.
>
> It was later alleged on the 10th February 2010 that during the same incident the male's children [aged fourteen and sixteen] had nearly been stabbed by Mr B and that Mr B had damaged his own property with a Samari sword. It was reported that after consuming alcohol, Mr B had been trying to fight the sixteen year old child and had threatened to kill him. The sixteen year old child had then locked himself in the upstairs bathroom at which point Mr B had put a Samari knife through the bathroom door, close to the child's head. Mr B was subsequently arrested.

> Following the arrest of Mr B, three premises were searched including Mr B's address and that of his parents. A number of firearms, ammunition and two Samurai swords were found. All the weapons were seized by police and retained. When interviewed by police, Mr B gave a no comment interview in relation to the alleged offence of affray. Police enquiries have confirmed that all weapons were legally owned by Mr B but that he was in breach of his licence to possess the firearms due to inadequate storage.
>
> Advice from the Crown Prosecution Service was to take no further action. All seized weapons remain in the possession of the police who are considering the suitability of Mr B to hold a Firearms License. As at 22nd April, a final decision has not yet been made."

I shall refer to the two boys as, respectively, J and K.

The facts

4. It will be convenient first to summarise the history of the police investigations so far as they are material for present purposes and then to set out the process leading up to the issue of the Certificate.

The facts: the police investigations

5. Because of the issues relating to the firearms, the investigations by the police involved both an investigation of any criminal offences that the claimant might have committed and, as a separate matter though running in parallel, a consideration of whether any steps should be taken in relation to his firearms certificate.

6. The course of these investigations can be followed in very considerable detail through two running records or logs kept by the police: one, the 'Crime Report'; the other, the 'Incident' print. The former is essentially a factual summary of events occurring during the criminal investigation; the latter includes much analysis of events as they unfolded and illuminating explanations of police thinking, day-by-day and even hour-by-hour as the investigation proceeded. Relevant information is also contained in the pro-forma documents (in particular the 'Custody Record', the 'Risk Assessment', the 'Record of Rights' and the 'Detention Log') generated on each of the two occasions when the claimant was in custody at the police station: first, on 13 February 2010 following his arrest and then on 5 March 2010 when he surrendered to his bail. For the earlier occasion there is also the 'Police Station Record' compiled by his solicitor.

7. The first complaint was made by the boys' father on 4 February 2010. An account of how he presented and what he said on that occasion is given in a statement subsequently made on 17 March 2010 by the police officer who interviewed him. He provided more information and gave a written statement on 10 February 2010. Reviewing the case in the early hours of the next day, 11 February 2010, Inspector Cannon noted that "further enquiries are required before we consider the arrest of B." Later the same day, 11 February 2010, J went to the police station with his mother. Also on the same day his step-mother gave the police a written statement. A police

constable who spent some time speaking with J recorded him as being "vulnerable" and having "some difficulty expressing himself." The officer expressed the view that for his evidence to be used in court a video interview would be necessary. Reviewing the case later the same evening, Inspector Frost noted his belief that it was "important to get the evidence from the boys, in the best form, to support any prosecution we consider and to provide a base for revoking the firearms certificate." He asked the police constable to arrange the video interviews. In the event there were no video interviews. A written statement was taken from J the next day, 12 February 2010.

8. At about the same time as that was happening, Detective Inspector Callum was reviewing the case. He noted that the father "is proving to be unreliable" and that the statements from the father and the step-mother "provide little evidence of any offences". By the next morning, 13 February 2010, J's statement was to hand and Inspector Frost, having discussed the case with Detective Inspector Callum, noted that "we now have enough evidence to take this forward." The claimant was arrested the same morning at his parents' house. Various firearms and ammunition were found both there and at the claimant's own house, which was searched later the same day.

9. On arrival at the police station the claimant was 'processed' in the usual way. The 'Risk Assessment' recorded him as *not* appearing to be under the influence of alcohol. The 'Record of Rights' identified the claimant's 'nominated person' as being Derbyshire Mental Health Services and set out the telephone number. In fact, as the 'Detention Log' shows, the claimant telephoned them himself "and spoke with them."

10. The claimant was interviewed at the police station on 13 February 2010. We have a transcript of the tape-recorded interview. In relation to the incident on 26 December 2009 his answers were largely 'no comment'.

11. It appears from the 'Crime Report' that over the next few days police officers spoke to the claimant's employers, in order, as it was put in a note dated 15 February 2010, "to update them re B arrest in the event they need to know re potential effects on his work etc." A note dated 17 February 2010 records an officer as having spoken to someone in the human resources department of the Mental Health Trust that employed the claimant: "I have given her sparse details – B has been arrested and bailed for a public order offence." A further note later the same day records the same officer as having spoken to the Medical Director of the Trust: "I have informed him of the circumstances of the allegation and he will consider action re suspension etc." None of this forms any part of the complaints which the claimant seeks to ventilate before us, and we have accordingly not heard any argument about it. In the circumstances I observe only that the actions of the police in communicating with the claimant's employer in this way, seemingly without any prior reference to him, might be thought to require justification: see *R (H and L) v A City Council* [2011] EWCA Civ 403, [2011] UKHRR 599, paras [62], [69]. Whether justification would be forthcoming is not something we have been asked to consider.

12. On 20 February 2010 the police took a statement from K.

13. On 5 March 2010 the claimant returned to the police station. The 'Risk Assessment' again recorded him as *not* appearing to be under the influence of alcohol. The claimant handed the police a written statement he had prepared, together with various attachments, in which he alleged that he was being blackmailed by the father. Again,

we have a transcript of the interview. Following the interview, the claimant was again bailed.

14. On 11 March 2010 the police took a statement from the claimant's brother. He said that it was he who had damaged the door, in October 2009.

15. The police sought advice from the Crown Prosecution Service. The advice given, on 16 Mach 2010, indicated that further enquiries were required, commented that "Any prosecution will depend on the credibility of the witnesses", and said that "The statements of the four witnesses are all made a number of weeks after the incident and are all 'too' detailed and consistent. The defence would clearly say that there has been ample time for collusion between them". It was also noted that, despite Inspector Frost's note, the boys had not been video interviewed.

16. The view of the police at this time appears from two internal emails. In the first, dated 16 March 2010, an officer, referring to the CPS, said

> "They have again requested further enquiries but are of the feeling that he now won't be charged due to some gaps in the evidence which undermines the case against him. I suspect they are also fearful that with this undermining evidence and the fact he's likely to have top legal reps they will struggle in court. Basically if the allegation is true we have a Dr who has problems with alcohol and has (until his arrest) had legitimate access to several firearms."

In the second, dated 25 March 2010, the same officer commented "CPS are extremely reluctant to charge him … He's been bailed for about 2 weeks time as we have appealed CPS's decision".

17. In support of that appeal, the police wrote to the CPS on 29 March 2010 enclosing a copy of a letter from the father dated 18 March 2010. An undated summary of evidence by the investigating officer was prepared at about the same time. Referring to the claimant's statement, the author commented that "It's quite feasible he has been blackmailed. However, it's also feasible it has been over this denied drunken affray incident on Boxing Day … He could not offer what he's being blackmailed over or what demands have been made."

18. On 7 April 2010 the claimant's solicitors wrote to the CPS enclosing three statements, two from friends of the claimant or his family (one a Mrs J) and one from the claimant's sister. The solicitors wrote again to the CPS on 21 April 2010, enclosing a further statement from Mrs J. Mrs J's evidence, according with that of the claimant's brother, was that she had seen the damage to the bathroom door on 27 November 2009, that is, *before* Boxing Day 2009. It is important to note, however, that there is nothing to show that either of these letters (or their enclosures) was ever copied to the police.

19. The CPS decision on reconsideration was made on 15 April 2010: "There is no realistic prospect of a conviction of any offence and the suspect should be released without charge."

20. The police however decided, as it was put in an internal email on 18 April 2010, that "We will still try to keep his firearms if poss." On 21 April 2010 the officer who had interviewed the claimant on 5 March 2010 sent a memorandum about this to the Constabulary's Firearms Licensing Manager. This contained the assertion that when interviewed on that occasion the claimant had "smelt of intoxicants" but denied it when it was put to him. It may be noted that there is no statement to this effect from the officer, that there is no reference to this in the tape-recorded interview and that it is inconsistent with what was recorded in the contemporaneous 'Risk Assessment'.

21. By then the preparation of the Certificate was well under way.

The facts: the Certificate

22. The relevant application was received by the police from the Criminal Records Bureau on 29 January 2010. The process thereafter is described by Chief Superintendent Cotterill in the witness statement he prepared for these proceedings.

23. The preliminary stage in the process was undertaken by Sandra Brown, a Disclosure Assistant, who on 16 February 2010 undertook a complete check of the Constabulary's systems to identify any records relating to the claimant. This was recorded on form AT2. There was at that stage no filtering or assessment of the material. The next stage (the first stage in the process of analysis and evaluation) was undertaken by Tim Smith, a Senior Vetting Officer, on 1 April 2010, the next by Sue Davies, a Senior Disclosure Officer, on 27 April 2010, and the final stage by Chief Superintendent Cotterill, acting as the authorised delegate of the Chief Constable, on 7 May 2010. Each of these three stages was recorded on form AT3.

24. I need not refer in any detail to what Mr Smith minuted. It suffices to say that he proposed that the Certificate be in the form in which it was finally issued. Both Ms Davies and Chief Superintendent Cotterill agreed. Nor do I need to spend much time on what Chief Superintendent Cotterill said, for in effect he simply adopted Ms Davies' decision, saying

> "I agree with the rationale set out by Ms Davies to disclose … I consider it necessary & proportionate given the nature of the allegation, arrest and concerns re suitability of the applicant to hold a firearms certificate."

In his witness statement he listed the 32 attachments which he had received with the AT3: they run to a little over 200 pages.

25. The focus therefore is on what Ms Davies said. Since it is at the heart of this part of the case I should set it out in full. For ease of reference I have added paragraph numbers:

> "[1] I agree with the proposal to disclose.
>
> [2] By virtue of S113B of the Police Act 1997 the Chief Officer of every relevant police force is required to provide information which in the Chief Officers opinion might be relevant and ought to be included in an enhanced certificate.

[3] The information under consideration is of concern given its violent nature toward children and alleged inappropriate use of a weapon and therefore might be relevant and material to the Registered Body in assessing the risk that the applicant would present to children and vulnerable adults in the proposed role of Medical Director.

[4] When considering whether the information should be disclosed I have borne in mind the rationale of my colleague for disclosure and agree with that rationale. In particular, I note that the applicant has one conviction for an offence of driving with excess alcohol in 2008 which will appear automatically on the applicant's enhanced certificate. I am mindful that that will provide only a limited insight into the applicant's apparent use of alcohol.

[5] When considering whether the information about the alleged affray and failure to comply with a firearms certificate should be disclosed I have considered how reliable the evidence is. In particular, I have noted that firearms officers who searched the applicant's address and that of his parents' found ammunition that was not in secure storage. It is therefore, my view that the evidence of this failure to comply with a firearms licence is reliable. I also note that whilst the view of the Crown Prosecution Service is that no further action should be taken, the seized weapons and ammunition are retained by the police pending a decision on whether it is appropriate to return them to the applicant.

[6] With regards to the applicant's firearms I also note the statement of SR and the alleged inappropriate use of firearms in August 2009, which whilst denied by the applicant is of concern but if true, forms part of a pattern of behaviour of concern.

[7] I have considered the advice of the Crown Prosecution Service and the unsuccessful appeal of the officers against its decision not to pursue the case any further as there is no realistic prospect of a conviction. I note that they have referred to the difficulties with establishing the legal elements of affray and assault but am aware that for the purposes of disclosure of information in the case of an enhanced application, the information does not have to relate to a criminal offence. This was confirmed in the case of *R (on the application of L) v Commissioner of Police of the Metropolis: R (on the application of G) v Chief Constable of Staffordshire* (2006) where it was held that there was no distinction for the purpose of an enhanced check between conduct that, if proved would amount to a criminal offence and conduct, that even if proved would not amount to a criminal offence. The information referred to in s 113B was not confined to information relating

to criminal offences or potentially criminal activity. Relevant information extended in principal to any information that in the chief officers 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 that involved regularly caring for or, training or supervising children [or vulnerable adults]

[8] When applying this guidance and case law to the information in this case, it is my view that the information would be relevant to the Registered Body when assessing the applicant's suitability for the proposed role of medical director.

[9] I have borne in mind the inconsistencies in the evidence of the victims and the possible motive that the victims' father may have had for making the allegation against the applicant … However, I also note that there is inconsistency in the evidence of the applicant's brother who claimed that he had already caused damage to the relevant door. However, it is my view that, based on the balance of probabilities, it is more likely than not that the behaviour of the applicant was not appropriate on the day in question, resulting in the victims being so afraid that they locked themselves in separate bathrooms and that, based on the inconsistent evidence of the applicant's brother, the damage was caused to the applicant's bathroom door in the manner alleged by the victim. Whilst I accept that this may not be sufficient to amount to a criminal offence, it is behaviour that is relevant to the question of the applicant's suitability for the proposed role and therefore, ought to be disclosed.

[10] In reaching this decision I have also considered the inadequate storage of the applicant's ammunition and the retention of his weapons by police. It cannot be assumed at this stage, that the weapons will not be returned to him or that that he would be unsuccessful in any appeal against any decision to revoke his firearms licence and therefore, it is my view that given the applicant's apparent inappropriate behaviour when he has consumed alcohol, disclosure would be an appropriate step to take.

[11] In reaching this decision I have also considered the detrimental impact that disclosure may have on the applicant and the requirement for there to be a pressing need for disclosure for it to be justified and proportionate. The competing interests of applicants and third parties to have a private life and the public interest in safeguarding children and vulnerable adults was recently considered by the Supreme Court in *R (on the application of L) v Commissioner of Police of the Metropolis* [2009] where, on appeal from the Applicant against a decision to disclose as Approved Information,

information that the applicant's child had been placed on the at risk register due to neglect, the Supreme Court stated that:

> The question whether the information was relevant would depend on the facts of the case. In forming the opinion on relevance, the officer also had to ask himself whether the information was reliable as well as the degree of connection between the information and the purpose described.
>
> An opinion also had to be formed as whether it should be included in the certificate. The guidance that was available to the police correctly recognised, that attention had to be given to the impact that disclosure might have on the private lives of the applicant and any third party who was referred to in the information. In every case, the officer had to consider whether there was likely to be an interference with the applicant's private life, and if so, whether that interference could be justified.
>
> The approach in previous case law had been to tilt the balance against the applicant too far and it had encouraged the idea that priority had to be given to the social need to protect the vulnerable as against the right to respect for private life. Neither consideration has precedence over the other. Careful consideration was required in all cases where the disruption to the private life of anyone was judged to be as great, or more so, as the risk of non-disclosure to the vulnerable group. It should not be assumed that the presumption was for disclosure unless there was good reason for not doing so.
>
> [12] Accordingly, when considering the issue of proportionality in this case, as disclosure of this information would be likely to have a detrimental impact on the applicant and his employment careful consideration is required. Having considered the above factors, it is my view that non disclosure of the information would be of a higher risk to children and vulnerable adults than the detriment that would be caused to the applicant by disclosure and that therefore, disclosure would be a proportionate step to take.
>
> [13] Disclosure on this occasion, based on the information currently available would therefore be appropriate, proportionate and justified."

26. The Certificate, as I have said, was issued on 11 May 2010. It is to be noted that the claimant was not consulted about its contents before the Certificate was issued. Indeed, Chief Superintendent Cotterill accepts that he did not consider the point before arriving at his decision. It would seem from the subsequent letter of 21 June 2010 (see below) that the Constabulary's view was that there was no need to. Nor, as

Chief Superintendent Cotterill also accepts, did he consider whether the father had any criminal convictions.

27. On 1 June 2010 the claimant's solicitors wrote a pre-action protocol letter to the Chief Constable seeking disclosure of various matters and, in particular, disclosure of "all documentation obtained by the Police including the statements of the Complainants and [the father] and any other potential witnesses interviewed by the Police." The Force Solicitor acknowledged receipt by a letter dated 7 June 2010 and responded in detail in a letter dated 21 June 2010. This included the text of a proposed further ECRC on which the claimant's comments were invited:

> "Although satisfied that there was not a need to seek your client's representations prior to the CRB disclosure, I am conscious that your client has now engaged your services. Having had the opportunity to review your concerns and the file once more, ACC Cotterill is, notwithstanding the reasonableness of his original decision, nevertheless willing to provide your client with the opportunity to address him further on a more detailed disclosure that he would propose could be used should there be further need to consider an enhanced record certificate where the information may be relevant and ought to be disclosed."

The claimant's response was to instruct counsel and in due course commence proceedings.

28. The proposed text read as follows:

> "Section 113 B of the Police Act 1997 requires the Chief Officer of every relevant Police Force to provide any information that might be relevant and ought to be included in the certificate.
>
> In accordance with this legislation the Chief Officer has considered the following information and has decided that it might be relevant for the purpose of this application and ought to be included in the certificate:-
>
> On the 4th February 2010 a 48 year old male attended a police station in Derby claiming that he had been stabbed in the chest with a Samurai sword by Dr B. The complainant stated that Dr B had treated him in the past in his capacity as his Psychiatric Counsellor and had become a personal friend. At the time of the report no visible injuries were witnessed by police officers and on being challenged about this the complainant then alleged that Dr B had attempted to stab his children. No Further Action was taken on this occasion due to no apparent offences being disclosed and the demeanour of the complainant who the officer described as being nervous and salivating.

The same complainant made a second report to police on the 10th February 2010 alleging that on the 29th December 2009, one of his children [aged sixteen] had nearly been stabbed by Dr B. The circumstances leading to this were, that after socialising at the complainant's home address (where it was alleged that Dr B had consumed a large quantity of alcohol and was drunk) he was driven home by the complainant accompanied by his two sons aged 16 and 14 years. The children were left alone with Dr B whilst the complainant returned to his home address to collect items belonging to Dr B. During this time it is reported that Dr B had been trying to 'play' fight with the children. The children alleged that they became frightened by Dr B's behaviour and the older child locked himself in the upstairs bathroom, with his younger brother locking himself in the downstairs toilet. Dr B is then alleged to have put a Samurai sword through the upstairs bathroom door, close to the child's head. Dr B was subsequently arrested.

Following the arrest of Dr B, the premises were searched and a Samurai sword was found. Damage to the bathroom door was found which was consistent with a sharp object penetrating the timber work. When interviewed by police, Dr B gave a no comment interview in relation to an alleged offence of affray. Dr B later provided a prepared statement in which he stated that he had know the complainant since 2004 and had treated him for approximately one year in his capacity as a Consultant Forensic Psychiatrist. Subsequently to this he confirmed that he had continued to socialise with the complainant and his partner. In November 2009 Dr B loaned the complainant £7,000 due to his financial difficulties. With regard to the allegations of December 2009 Dr B states that the damage to the door was caused by his brother in October 2009. Dr B provided three photographs of the damaged door signed by persons claiming that they had witnessed the damage prior to the date of the alleged incident. In his prepared statement Dr B indicated that he believed he had been the victim of a blackmail/extortion attempt.

During the investigation the female partner of the complainant provided a statement in which she disclosed that she had visited the home address of Dr B with her partner and two children in August 2009. Whilst at the address Dr B is alleged to have produced a number of firearms to show one of the children and it became apparent that one of the rifles was loaded with ammunition.

The Crown Prosecution Service advised that there was no realistic prospect of conviction and that Dr B should be released without charge.

> Following the arrest of Dr B, three premises were searched including Dr B's home address and that of his parents. A number of firearms and ammunition were found. All the weapons were seized by police and retained. Police enquiries have confirmed that all the weapons were legally owned by Dr B but that he may have been in breach of his licence to possess the firearms as they were not securely stored. The Firearms and Explosives Licensing Manager has subsequently received a request from Dr B requesting the cancellation of his firearms licence."

29. There is one other factual matter I must record. The police have produced a print-out from the Police National Computer showing that the father, who was born in 1961, has convictions, dating from 1977, 1979 (twice), 1980, 1981, 1989 (twice), 1993 and 1995, for a total of 13 offences. Most were for offences of violence; three for offences of dishonesty.

The proceedings

30. The application for judicial review was issued on 28 September 2010. The decision challenged was not the issue of the Certificate on 11 May 2010 (in relation to which any application would have been out of time) but rather the decisions on 21 June 2010 to issue the proposed revised ECRC and to refuse to disclose documents. The application was supported by the claimant's witness statement dated 21 September 2010; this was supplemented in due course by a witness statement by his solicitor dated 19 November 2010. The defendant filed an acknowledgment of service disputing the claim.

31. Permission was refused on the papers by Nicola Davies J on 4 November 2010 but granted on renewal by Beatson J on 28 February 2011. The defendant filed detailed grounds of resistance dated 9 May 2011, together with witness statements, both dated 5 May 2011, from the Force Solicitor and from Chief Superintendent Cotterill. The AT2, the AT3 and the 32 attachments were exhibited to his statement.

32. By an order dated 1 April 2011 Beatson J directed that the papers be served on the Secretary of State for the Home Department. On 22 June 2011 the Home Office wrote to the court saying that the Secretary of State, having considered her position, did not believe that her intervention would be of any further assistance to the court at this stage. The letter went on to record that the Secretary of State did not consider the Article 6 point being taken by the claimant (see below) to be properly arguable; for the rest, she adopted the Chief Constable's case.

33. The hearing before us was on 27-28 June 2011. The claimant was represented by Mr Ramby de Mello and the Chief Constable by Ms Anne Studd.

The issues

34. The claimant's complaints fall under various headings:

i) First, he says that the decisions on 21 June 2010 were arrived at in breach of the procedural safeguards under Articles 6 and 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

ii) Second, he says that the decisions were incompatible with Articles 6 and 8. Linked with this is the contention that the decisions were unreasonable, indeed irrational.

iii) Third, there is a 'reasons' challenge.

35. Ms Studd disputes that Article 6 has any bearing on the process under section 113B(4). She accepts that Article 8 is engaged but denies that there was any violation of the claimant's Article 8 rights. The decision to disclose was, she says, entirely lawful and appropriate. There is no basis for objection to the wording of either the original or the proposed further Certificate.

36. I turn first to Articles 6 and 8.

The issues: Article 6

37. Mr de Mello submitted that Article 6 applies to the process on which the chief officer was here engaged. Ms Studd submitted to the contrary. In my judgment it is quite clear that Article 6 does not apply.

38. Mr de Mello took us to various authorities: *R (Wright) v Secretary of State for Health and another* [2009] UKHL 3, [2009] 1 AC 739, *R (G) v Governors of X School (Secretary of State for Children, Schools and Families and another intervening)* [2010] EWCA Civ 1, [2010] 1 WLR 2218, and *R (Royal College of Nursing and others) v Secretary of State for the Home Department* [2010] EWHC 2761 (Admin). I can take matters very shortly, for the law has been authoritatively determined by the Supreme Court in *R (G) v Governors of X School (Secretary of State for the Home Department and another intervening)* [2011] UKSC 30, [2011] 3 WLR 237, decided, as it happens, the day after we finished hearing argument in the present case.

39. Although there was a divergence of opinion as to whether the appeal should be allowed, as the majority held, the Supreme Court was unanimous on the two points that are determinative for present purposes. The first is that the "civil right" in issue in a case such as this is the right to practise one's profession. Accordingly, the question is the degree of connection required between a non-disciplinary process, such as the chief officer was here engaged upon, and the eventual loss of one's ability to practise: see Lord Dyson JSC at paras [33]-[35]. The second is that the test was correctly identified by Laws LJ in the Court Appeal: [2010] 1 WLR 2218, paras [32], [37]), namely that Article 6 may apply if the decision at the first stage will have "a substantial influence or effect" on a subsequent determination of one's right to practise: see Lord Dyson JSC (with whom Lord Walker of Gestingthorpe JSC agreed) at para [69], Lord Hope of Craighead DPSC at para [90], Lord Brown of Eaton-under-Heywood JSC at para [96] and Lord Kerr of Tonaghmore JSC at para [103].

40. Applying those principles the present case is *a fortiori*. The necessary causal connection is manifestly absent. So Article 6 does not apply.

41. Mr de Mello submitted in the alternative that Article 6 is engaged because there have been violations and breaches of Article 8. That is a *non sequitur*. If there has been a breach of Article 8, the claimant will have a remedy for that breach, and the pursuit of that remedy (for example, as here, by an application for judicial review) will attract the protection of Article 6. But the claimant, as I understand the point, is asserting something very different, namely that Article 6 applies to the process before the chief officer. It does not, whichever way Mr de Mello seeks to put the point.

The issues: Article 8

42. In contrast, Article 8 equally plainly does apply: *R (L) v Commissioner of Police of the Metropolis (Secretary of State for the Home Department and another intervening)* [2009] UKSC 3, [2010] 1 AC 410, and *R (H and L) v A City Council* [2011] EWCA Civ 403, [2011] UKHRR 599. Equally clear is that Article 8 has both a substantive and a procedural component. Since the content of the former informs the ambit of the latter, it is convenient to consider them in that order.

The issues: Article 8 – substance

43. So far as concerns the substance of his decision, the task for the chief officer was, putting the matter shortly, to apply the principles to be found in *R (L) v Commissioner of Police of the Metropolis (Secretary of State for the Home Department intervening)* [2009] UHSC 3, [2010] 1 AC 410. Each case must be judged on its own facts. The issue is essentially one of proportionality. Information such as that with which we are here concerned is to be disclosed only if there is a "pressing need" for that disclosure.

44. Prior to the decision of the Supreme Court in *L*, the effect of the decision in *R (X) v Chief Constable of the West Midlands Police* [2004] EWCA Civ 1068, [2005] 1 WLR 65, had been to tilt the balance in favour of disclosure. As Lord Hope of Craighead DPSC put it in *L* at para [38], the effect of the approach in *X* was to encourage disclosure of any information that might be relevant, and to give priority to the social need that favours disclosure over respect for the private life of those who may be affected by the disclosure. He said (para [44]) that the effect of this approach had been to tilt the balance too far against the person about whom disclosure was being made. The effect of the decision in *L* was to re-calibrate the 'balancing exercise'.

45. Explaining the proper approach, Lord Hope said (para [42]):

> "the issue is essentially one of proportionality. On the one hand there is a pressing social need that children and vulnerable adults should be protected against the risk of harm. On the other 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."

He continued (para [45]):

> "The correct approach, as in other cases where competing Convention rights are in issue, is that neither consideration has precedence over the other ... The [approach] should be restructured so that the precedence that is given to the risk that

> failure to disclose would cause to the vulnerable group is removed. It should indicate that careful consideration is required in all cases where the disruption to the private life of anyone is judged to be as great, or more so, as the risk of non-disclosure to the vulnerable group. The advice that, where careful consideration is required, the rationale for disclosure should make it very clear why the human rights infringement outweighs the risk posed to the vulnerable group also needs to be reworded. It should no longer be assumed that the presumption is for disclosure unless there is a good reason for not doing so."

46. Expressing the same point by reference to section 113B(4), the chief officer has to address two questions: first, is he of the opinion that the information "might be relevant"; second, is he of the opinion that the information "ought" to be included in the ECRC? The two questions are quite distinct and, as Lord Neuberger of Abbotsbury MR emphasised (para [79]), they must be separately considered by the chief officer.

47. It is the second question which in particular engages Article 8. "It is here", as Lord Hope said (para [40]), "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 supplied." Lord Neuberger added this (para [81]):

> "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."

<u>The issues: Article 8 – procedure</u>

48. So far as concerns the procedural aspect of Article 8, long-established Strasbourg jurisprudence, articulated by the court as long ago as 1988 and constantly repeated ever since, requires that, where Article 8 is engaged, a public authority's decision-making process must be such as to secure that the views and interests of those who will be adversely affected by its decision are made known to and duly taken into account by the authority, and such as to enable them to exercise in due time any remedies available to them: see *W v United Kingdom* (1988) 10 EHRR 29, paras [63]-[64]. The question, according to the court, is whether, having regard to the particular circumstances of the case and the serious nature of the decisions to be taken, those

affected have been involved in the decision-making process, seen as a whole, to a degree sufficient to provide them with the requisite protection of their interests. The procedural protection must be "practical and effective": see for example *Turek v Slovakia* (2006) 44 EHRR 861, para [113].

49. What then are the procedural safeguards appropriate in this kind of case?

50. It is convenient to start with the common law which, unsurprisingly, had long anticipated the Convention. In *R v Secretary of State for the Home Department ex p Doody* [1994] 1 AC 531, Lord Mustill, describing the requirements of fairness, said (page 560):

> "(5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both. (6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer."

51. In that case the issue arose of out the fixing of a 'lifer's' tariff. Lord Mustill continued (page 563):

> "it must be asked whether the prisoner is entitled to be informed of that part of the material before the Home Secretary which consists of the judges' opinion and their reasons for it. It has frequently been stated that the right to make representations is of little value unless the maker has knowledge in advance of the considerations which, unless effectively challenged, will or may lead to an adverse decision. The opinion of the Privy Council in *Kanda v Government of Malaya* [1962] AC 322, 337 is often quoted to this effect. This proposition of common sense will in many instances require an explicit disclosure of the substance of the matters on which the decision-maker intends to proceed. Whether such a duty exists, how far it goes and how it should be performed depend so entirely on the circumstances of the individual case that I prefer not to reason from any general proposition on the subject."

He continued (page 564):

> "I think it clear that the prisoner needs to know the substance of the judges' advice, comprising not only the term of years which they recommended as the penal element, but also their reasons: for the prisoner cannot rationalise his objections to the penal element without knowing how it was rationalised by the judges themselves."

But, he added (page 564), "This does not mean that the document(s) in which the judges state their opinion need be disclosed in their entirety."

52. In *L*, the Supreme Court, disapproving what Lord Woolf CJ had said in *R (X) v Chief Constable of the West Midlands Police* [2004] EWCA Civ 1068, [2005] 1 WLR 65, para [37], pointed to the need to consult with the person whose information is to be disclosed in an ECRC and to give them an opportunity of making representations before the information is disclosed. Different descriptions were given of the circumstances in which this would be appropriate: "in cases of doubt" (Lord Hope, para [46]) or "in any borderline case" (Lord Brown, para [63]). Lord Neuberger (para [84]), while agreeing with Lord Hope and Lord Brown that the duty to contact the applicant would not arise in every case, said that "the imposition of such a duty is a necessary ingredient of the process if it is to be fair and proportionate." He added (para [85]) that "the current procedures will need to be adapted to accord … considerably greater recognition to the article 8 rights of applicants." It is to be noted that although in that case the applicant had not had any opportunity to make representations before the ECRC was issued, the Supreme Court nonetheless held that it should stand.

53. In *R (C) v Secretary of State for the Home Department and another* [2011] EWCA Civ 175, the argument for the Chief Constable was that there was no need to afford the claimant an opportunity to make representations before an ECRC was issued, because the case was a clear one. Langstaff J disagreed, so did the Court of Appeal.

54. Two issues were canvassed in the Court of Appeal: whether the claimant should have been afforded an opportunity to make representations, to which the answer was yes, and, if so, whether there was a need for an oral hearing, to which the answer was no. The Court of Appeal made clear that it was not seeking to lay down any principles going beyond what the Supreme Court had said in *L*, and that the question is always fact specific, turning on the particular facts of the case: see per Toulson LJ at para [11] and Lord Neuberger of Abbotsbury MR at para [29]. Nonetheless its reasoning is illuminating.

55. In relation to the question of whether the claimant was entitled to make representations, Toulson LJ said this (para [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*."

Wilson LJ adopted a very similar approach, observing (para [25]) that:

> "prior to the grant to C of an opportunity to comment, one cannot say that the only rational conclusion would be that disclosure should be given."

Lord Neuberger commented (para [31]) that on the facts the case was very different from *L*:

> "First, the information relates to an allegation of impropriety some 15 years before the certificate. Secondly, the accuracy of the information is challenged, and the challenge receives some support from the fact that the allegation was withdrawn, although it is right to say it was renewed. Thus, the allegation embodied in the information was denied, unlike in the *L* case. Thirdly, for the reasons given by the judge, the allegation was arguably not relevant … So the facts of this case are a long way from the facts of *L*."

56. In relation to the question of whether the claimant was entitled to an oral hearing, Toulson LJ said this (para [12]):

> "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."

Wilson LJ said much the same (paras [25]-26]):

> "Although no doubt in some cases the appropriate form of contact might be face-to-face contact, in this sort of case I would consider that it would be reasonable for the Chief Constable to send to the applicant a letter enclosing a draft of the proposed certificate and inviting his comments thereon.
>
> If a response to that was to be that the applicant sought a face-to-face contact with a police officer in relation to these matters, the merits of the request would have to be weighed. But I would not disagree that it was appropriate in a number of cases, including in principle this case, for the contact with the applicant to be by letter."

57. The final case I ought to refer to is *R (H and L) v A City Council* [2011] EWCA Civ 403, [2011] UKHRR 599, where similar issues arose in relation to disclosures already made, and possible further future disclosures, by a local authority to the employers of a convicted paedophile. In relation to the past disclosures I said this (para [62]):

> "the local authority's decision should in any event be quashed for procedural irregularity. The … entire process … took place behind H's back. H and L were given no opportunity of making

> representations. They were simply presented with a *fait accompli*. The process by which they were condemned, unheard, was unfair. It fell far short of what was required both by the common law and by Article 8. These serious – indeed egregious – procedural shortcomings vitiate the entire process."

In relation to the future I said (para [69]):

> "if the process is to be fair, if it is to meet the requirements of procedural fairness demanded both by the common law and by Article 8, the local authority must consult with H (and L) and give them a proper opportunity to make their objections to what is proposed, *after* the local authority has decided what disclosure to make, and to whom, and *before* it does so"

58. Mr de Mello asserts that the claimant was entitled to much more than the Court of Appeal seems to have had in mind in either *C* or *H and L*. Article 8, he submitted, entitled the claimant to the following *before* any ECRC was issued:

i) full disclosure of all relevant documents and information in the hands of the police, including the witness statements of the father, J and K, and any other witnesses, and details of any previous convictions or "bad character evidence" relating to the witnesses that might materially affect the chief officer's opinion;

ii) the opportunity to make representations, including representations with a view to rebutting the allegations made against him;

iii) the opportunity to cross-examine the witnesses against him at an oral hearing; without this, he submitted, the process would not be Convention compliant.

Mr de Mello made clear that the disclosure he was contending for was required for two distinct purposes: first, to enable the claimant to make representations as to the issue and (if issued) the contents of any ECRC; second, in the event of an ECRC being issued, to enable the claimant to put forward his case to a prospective employee that the father, as someone with criminal convictions for dishonesty, is unreliable or was acting for some ulterior motive (in this case, blackmail).

59. I must return in due course to consider the application of Article 8 in the present case, but I cannot accept that what Mr de Mello contends for is required as a matter of general practice in cases such as this. As the Court of Appeal made clear in *C*, what is required is always fact specific and must depend on the particular circumstances of the case. That, after all, reflects the Strasbourg jurisprudence: the question, as we have seen, is whether, having regard to the particular circumstances of the case and the serious nature of the decisions to be taken, the claimant has been involved in the decision-making process, seen as a whole, to a degree sufficient to provide him with the requisite protection of his interests.

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.

61. 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. And in the same way there may (though again I suspect not in very many cases) be occasions when something more is required. Possibly, if the applicant asks for it, an opportunity to make oral representations – though this, one imagines, would normally take the form of a face-to-face meeting rather than anything in the nature of a hearing. And possibly, though again probably only if the applicant asks for it, the disclosure of documents. It will in every case be for the chief officer, in the first instance, to decide how to proceed. All I would add is that I would not expect disclosure of documents to be the norm – good reason must be shown why, in the particular case, disclosure of the gist is not sufficient to meet the requirements of Article 8. And even in those cases where it is required, any disclosure must be focused and specific. It will surely only be in a very unusual case, if at all, that anything approaching the general disclosure sought here by the claimant could ever be appropriate.

62. Mr de Mello sought to make good his submissions in support of a more general and wide-ranging duty of disclosure by reference to *HM Advocate v Murtagh (HM Advocate General for Scotland intervening)* [2009] UKPC 36, [2011] AC 731. That case related to the duties of disclosure under Article 6 in the context of a criminal trial. Here we are concerned with Article 8, not Article 6, and moreover in a very different context. In my judgment *Murtagh* does not assist us.

63. In relation to the procedural obligations under Article 8, Mr de Mello also referred us to *Gaskin v United Kingdom* (1989) 12 EHRR 36 and *Roche v United Kingdom* (2005) 42 EHRR 599. I do not find them of any assistance; they were cases in which the applicant was in essence seeking disclosure of files held by public bodies containing information about himself relevant to his present or future emotional, psychological or physical health. Likewise, Article 41 of the Charter of Fundamental Freedoms of the European Union to which Mr de Mello also referred us does not assist. Nor, except to the extent previously indicated, do I derive any assistance from *Leander v Sweden* (1987) 9 EHRR 433, *Rotaru v Romania* (2000, unreported) and *Turek v Slovakia* (2006) 44 EHRR 861, to which Mr de Mello also referred. So far as relevant for present purposes, the general principles to be found in those cases are sufficiently reflected in the decision of the Supreme Court in *L*. On their facts they are of no assistance, for they related to issues of state security (secret surveillance or the security clearance of state employees).

<u>The issues: Articles 6 and 8 – compatibility</u>

64. Mr de Mello also sought to argue that, and I quote, "the procedure set out in section 113B(4) constitutes a disproportionate interference with [Articles 6 and 8] because they make no provision for a review of the chief officer's opinion before an independent and impartial tribunal and or because it does not provide for an overall fair procedure to permit the claimant to challenge the evidence presented against

him." The argument, with all respect to Mr de Mello, is hopeless. For the reasons I have already given Article 6 has no application. That section 113B(4) is compliant with Article 8 is clear from the decision of the Supreme Court in *L*. Moreover, and as I explain below, the court is not limited to review on narrow *Wednesbury* grounds.

The issues: the task for the court

65. The function of the court is one of review, not decision on the merits. But what is the appropriate standard of review? That was not an issue considered by the Supreme Court in *L* though it had been touched on tangentially by the Court of Appeal: *R (L) v Commissioner of Police of the Metropolis (Secretary of State for the Home Department intervening)* [2007] EWCA Civ 168, [2008] 1 WLR 681, paras [40]-[41]. But subsequent authority makes it clear that the applicable standard of review is not the *Wednesbury* test of irrationality; what is required in this sensitive area of human rights is the more intense standard of review described by Lord Steyn in *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26, [2001] 2 AC 532, para [27]. In a case such as this, proportionality requires the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions; this goes further than the traditional grounds of review inasmuch as it requires attention to be directed to the relative weight accorded to interests and considerations: *R (H and L) v A City Council* [2011] EWCA Civ 403, [2011] UKHRR 599, para [41].

66. That is therefore the approach we have to apply when considering the substance of the chief officer's opinion. But if and insofar as there is a 'reasons' challenge – and part of Mr de Mello's attack here goes to the reasons as set out by Ms Davies – the court must not be astute to find failings. I venture to repeat what I said very recently in *R (E, S and R) v Director of Public Prosecutions* [2011] EWHC 1465 (Admin), para [62], a 'reasons' challenge to a Crown Prosecutor's decision to prosecute which, in the event, was held by the Divisional Court not to have been compliant with the relevant guidance issued by the Director of Public Prosecutions:

> "… a decision such as this is to be read in a broad and common sense way, applying a fair and sensible view to what the decision maker has said … as Lord Hoffmann pointed out in *Piglowska v Piglowski* [1999] 1 WLR 1360, 1372, reasons should be read on the assumption that, unless she has demonstrated the contrary, the decision maker knew how she should perform her functions and which matters she should take into account."

And I went on to point out the need to have very much in mind his warning that an appellate court – and the same must also go for this court – must "resist the temptation to subvert the principle that they should not substitute their own discretion for that of the [decision maker] by a narrow textual analysis which enables them to claim that he misdirected himself."

The issues: the procedural challenge

67. So much for the relevant legal framework, both substantive and procedural. I turn to the claimant's various complaints, and first to Mr de Mello's complaints about the procedure adopted by Chief Superintendent Cotterill and then by the Chief Constable.

68. I have already set out what Mr de Mello has to say. In essence his complaints are threefold. First, he says that the Certificate of 11 May 2010 should not have been issued without the claimant having first been given the opportunity to make representations. Second, he says that the Chief Constable was wrong to refuse disclosure of the documents sought by the letter of 1 June 2010. Third, he says that the procedure proposed in the letter of 21 June 2010 is inadequate, since the claimant is entitled to an oral hearing and to cross-examine the witnesses against him.

69. In my judgment, the claimant makes good the first complaint, though it is not in fact part of the decision under challenge. But he does not make good either of the other two.

70. On a proper application of the relevant principles this was a case in which, in my judgment, compliance with the procedural requirements of Article 8 required that the claimant be given adequate opportunity to make representations *before* any ECRC was issued. He ought to have been sent a draft of the Certificate in the form proposed by Mr Smith *before* Chief Superintendent Cotterill took a final decision. He was not; so there was, in my judgment, a breach of Article 8. On the other hand, there was nothing in the circumstances of the case to take it so far out of the typical as to require disclosure of the documents, let alone the all-embracing disclosure demanded, nor to justify anything going beyond affording the claimant, as he was eventually offered, the right to make written representations.

71. Included in the claimant's general claim in relation to disclosure is the claim that at the very least the Chief Constable should have disclosed to him the details of the father's criminal record. Ms Studd accepts, correctly in my judgment, that there may be cases where an applicant will not be able to make proper representations unless he is told that a complainant has a criminal record and is given appropriate information about it. But, she says, and I agree, this was not such a case. The key point in my judgment is that the crucial witnesses against the claimant were J and K, *not* the father. As we have seen, the view of the senior officer involved in the investigation at the time was that the father's evidence provided little evidence of any offence. It was only after a statement had been obtained from J that he, together with another senior officer, was persuaded that there was now enough evidence to take matters forward and arrest the claimant.

72. So far as concerns the claimant's pleaded case, I would therefore reject this part of his claim.

73. Ms Studd submitted that we need not consider whether Chief Superintendent Cotterill was correct or not in initially omitting to seek the claimant's views. She says that the position has been rectified by the litigation process. She points in this connection to what Toulson LJ said in *C* at para [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."

She says that, the issue having been raised in the letter of claim, and the defendant having in response provided the claimant with an opportunity to make representations, this part of the claim should be dismissed.

74. There are, as it seems to me, two quite separate points wrapped up in this, the first relating to the issue of the Certificate on 11 May 2010 and the second to the Chief Constable's letter of 21 June 2010. As to the first, I do not see how a *subsequent* opportunity to make representations can cure an earlier failure to afford such an opportunity. If the ECRC has actually been issued the damage has been done and, in the nature of things, can hardly be undone. A damnified complainant is in principle entitled to appropriate relief: cf *R (H and L) v A City Council* [2011] EWCA Civ 403, [2011] UKHRR 599, para [62]. I do not understand Toulson LJ to have been suggesting the contrary. After all, and as the Strasbourg jurisprudence makes clear, the procedure must be such as to enable the applicant to exercise in due time any remedies available to him – including, it might be thought, an application for judicial review and injunctive relief if the circumstances warrant; and the procedural protection must be "practical and effective".

75. The second point, and this was the focus of Ms Studd's submissions, is very different. The Chief Constable was offering the claimant the opportunity to make representations before any further ECRC was issued. The claimant declined to avail himself of that opportunity and simply launched proceedings. This, as it seems to me, is the very kind of situation Toulson LJ had in mind.

76. Ms Studd also observes that the claimant had, within the course of the criminal investigation, had the opportunity to put forward his account, both in the prepared statement he handed to the police on 5 March 2010 and during the course of his second interview on the same occasion. So he had, but this, with all respect to Ms Studd, misses the point. How could the claimant make effective representations about the content of an ECRC unless he knew what it was being proposed should be included in it?

77. Ms Studd is, however, on firmer ground when she points out that the issue of disclosure as canvassed in the letter of 1 June 2010 has in large part become academic. For the whole of the material sought by the claimant has, in the event, been disclosed during and for the purpose of the present proceedings.

The issues: the substantive challenge

78. Mr de Mello submits in the first place that a proper application of the principles in *L* should have led to the conclusion that none of this material ought to be included in an ECRC, not least if one balances what he says will be the permanent blight on the claimant's professional career against the unreliability of the complaints against him and the father's suspect motives. Insufficient weight, he says, was given to each of these factors. In the circumstances, disclosure was disproportionate.

79. In the alternative, Mr de Mello submits that for any disclosure of this material in an ECRC to be Article 8 compliant, it had to be balanced by disclosure in the ECRC of the fact that the father had convictions, that, according to the claimant, the father was attempting to blackmail him, the fact that there were, as the claimant would say, discrepancies in the evidence against him, and the facts, specific to J and K, which cast doubt upon their credibility and reliability.

80. Mr de Mello submits that the decision to disclose was in any event irrational:

    i) inasmuch as it took into account irrelevant factors, in particular, he says, the claimant's previous driving conviction, his being under the influence of alcohol, the matters to do with the firearms and the claimant's 'no comment' interview;

    ii) inasmuch as it failed to take into account relevant factors, in particular the statements of the claimant's brother and Mrs J and the fact, of which Chief Superintendent Cotterill was unaware at the time he came to his decision, that the father had a criminal record (a gap in his knowledge which, says Mr de Mello, must have impacted on his consideration of whether, as the claimant asserted, the father had an ulterior motive for making the allegations);

    iii) inasmuch as no or inadequate consideration was given to the father's motives for making the complaint, the staleness of the complaint, and the inadequacies of his evidence, nor to the flawed process by which the statements from J and K were obtained, nor to what are said to have been various inconsistencies in the evidence of the different witnesses;

    iv) more particularly, given the fact that the CPS had advised that there was insufficient evidence to mount a prosecution.

81. Mr de Mello directs these attacks both at the original Certificate issued on 11 May 2010 and at the later proposed Certificate enclosed with the letter of 24 June 2010. Insofar as the latter went some way to meeting his complaints, it did not, he says, go anywhere near far enough.

82. Ms Studd disputes all of this. She submits that, in essence, all Mr de Mello's submissions evolve from disputes that the claimant has on the facts of the case and

that his challenge to the Certificates (in whichever form) represents little more than his disagreement with Chief Superintendent Cotterill's views. This approach, she submits, is wrong in principle. It is for the chief officer under section 113B(4) to survey the material and form a conclusion. His decision will, of course, be subject to the court's intense scrutiny in accordance with *Daly*. But, she says, on any basis the decision here under challenge was clearly and unarguably well within a band of decision making with which this court cannot interfere.

83. Ms Studd points to Chief Superintendent Cotterill's statement as showing that he was in any event alive to and considered many of the points raised by the claimant, such as the father's unreliability, the inconsistencies in the evidence, the claimant's allegation of blackmail and the account given by the claimant's brother as to how the door came to be damaged. She points out that although the claimant's statement handed to the police on 5 March 2010 was not amongst the 32 documents listed by Chief Superintendent Cotterill as having been received by him, it was nonetheless referred to and summarised in the AT3. Other documents which the claimant complains were not considered by Chief Superintendent Cotterill (those referred to in the letters from his solicitors of 7 April 2010 and 21 April 2010) were, as she points out, not at that stage in the hands of the police, having been sent only to the CPS; but they were taken into account in the course of preparing, and are actually referred to in, the proposed revised Certificate.

84. The two fundamental questions are whether the Certificate (by which I mean both the original and the proposed revised Certificate) ought to have referred to the Boxing Day incident and whether it ought also to have referred to the claimant's previous driving conviction, his being under the influence of alcohol and the various matters to do with the firearms. In my judgment these were all matters which Chief Superintendent Cotterill was plainly entitled to decide ought to be included, not least, as it seems to me, because of – indeed precisely because of – the nature of the claimant's employment. A Mental Health Trust in its position as the claimant's employer would surely want to be made aware of the very disturbing picture presented by the material of which the police were aware – a picture, moreover, which the Trust could evaluate only if it was given the *full* picture. For what, surely, was potentially disturbing was not just what was alleged to have happened on Boxing Day 2009 but the fact that it was, or might be, part of a much wider picture involving, in addition to the sword allegedly use on that occasion, the claimant's access to firearms which were being stored in breach of the requirements of his firearms licence and material suggesting that he also had an alcohol problem.

85. 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.

86. In my judgment, and despite everything pressed upon us by Mr de Mello, this is really a very plain case.

87. The question then becomes whether there is anything of substance in Mr de Mello's other complaints.

88. So far as concerns the Certificate issued on 11 May 2010 it has to be remembered that this is *not* the subject of direct challenge before us. In the circumstances it is more appropriate to focus on what is under challenge, namely the proposed revised Certificate. In relation to the original Certificate I need add only this. I reject the contention that Chief Superintendent Cotterill's decision was irrational, whether for the reasons given or for any other reason. There is much force in the various points made by Ms Studd. And, at the end of the day, it must always be remembered that it is for the chief officer under section 113B(4) to survey the material, to form a conclusion and to decide the format and content of the ECRC. It is not the function of the court. His decision will, of course, and as I emphasise, be subject to the court's intense scrutiny in accordance with *Daly*, but the court must be wary of stepping outside its proper function. In particular, the court must avoid the temptation to embark upon the task of reformulating or revising an ECRC.

89. So far as concerns the proposed revised Certificate, I can state my conclusion very shortly. Insofar as the claimant might have had any basis for complaint about the way in which the original Certificate was formulated – and I am not saying that he did – the revised form seems to me to meet any concerns there might be.

90. In my judgment, this part of the claimant's case must also be rejected.

The issues: reasons

91. The final challenge is to the adequacy of the reasons given in justification of the decision to issue the Certificate. The AT3, says Mr de Mello, does not adequately explain why the decision was to disclose, why the claimant's rights were trumped by others, or how the balancing exercise was conducted. Moreover, he says, Ms Davies' reasoning shows a clear and fundamental error of approach on its face when, in paragraph [9], it refers to the claimant's behaviour as being relevant and continues by stating that it "therefore" ought to be disclosed. This, he complains, shows a fundamental misunderstanding of the fact that section 113B(4) requires a two-stage approach, the two questions being, as I have said, quite distinct and requiring separate consideration. He submits that this very serious error is not saved by the subsequent analysis in paragraphs [11]-[13].

92. I do not agree. The reasons why the original Certificate was issued are more than adequately explained in the AT3, supplemented as it is by Chief Superintendent Cotterill's statement. Nor, if one reads Ms Davies' reasoning as a whole – and that is how it must be read – is there any substance in the complaint based on what she said in paragraph [9]. *If* she had stopped there, then I am inclined to agree that her error – and on the face of it she fell into plain error when she used the word "therefore" – would have been fatal. But she did not stop there, and paragraph [11], in my judgment, shows her correctly recognising that she had to consider what she called "the detrimental impact that disclosure may have on the applicant" and being correctly aware of "the requirement for there to be a pressing need for disclosure for it to be justified and proportionate." She then, as we have seen, went on to summarise the decision of the Supreme Court in *L* and, in particular, its rejection of the previous approach. In paragraph [12] she directed herself impeccably in concluding that "non disclosure of the information would be of a higher risk to children and vulnerable adults than the detriment that would be caused to the applicant by disclosure" and that "therefore, disclosure would be a proportionate step to take." In the light of what she

had said in paragraphs [11] and [12], her conclusion in paragraph [13] that "Disclosure on this occasion, based on the information currently available would therefore be appropriate, proportionate and justified" cannot be faulted.

93. In my judgment, were we to interfere here we would be doing the very thing that Lord Hoffmann has emphasised we must not.

94. In my judgment, this part of the claimant's case must also be rejected.

Conclusion

95. For these reasons, this application for judicial review must, in my judgment, be refused.

Afterword

96. I cannot leave this case without commenting on the extremely unsatisfactory manner in which the papers were presented to us. Many of the matters to which I draw attention are a feature of far too many cases in the Administrative Court. The present case is, however, a particularly egregious example, most of the responsibility for which must, as Mr de Mello very frankly accepts and for which he apologises, be laid at the door of the claimant's representatives.

97. So far as relates to proceedings in the Administrative Court, the formal requirements in relation to skeleton arguments and bundles are to be found in CPR PD54A, paragraphs 15-16, and, in relation to authorities, in *Practice Direction (Judgments: Form and Citation)* [2001] 1 WLR 194, paras 3.1, 3.2, and *Practice Direction (Citation of Authorities)* [2001] 1 WLR 1001, paras 8.1-8.3. The latter need to be read in conjunction with what Sir Nicholas Wall P said in *TW v A City Council* [2011] EWCA Civ 17, para [7]; see in particular his observations as to when BAILII transcripts can, and more particularly when they must not, be used.

98. Paragraph 15.3 of PD54A provides that skeleton arguments – and this plainly means both the claimant's skeleton argument and the defendant's skeleton argument – "must" contain various items, including "a chronology of events (with page references to the bundle of documents)." Paragraph 16.1 requires the bundle to be "paginated and indexed". And on the subject of bundles practitioners could do worse than to consult, even if they continue to ignore,[1] the biting sarcasm of Sir Stephen Sedley's 'The Laws of Documents', recently republished in *Sedley,* Ashes and Sparks: Essays on Law and Justice, 2011, 228-230.

99. It would be tedious to particularise all the failings in the present case. I draw attention merely to three. First, there was no chronology. Second, the court bundle, which it was the responsibility of the claimant's representatives to prepare, contained documents in duplicate and in at least one case in triplicate (and as happens almost invariably in such circumstances we were referred at different stages in the argument to alternative versions of the same document). The arrangement of too many documents followed neither a chronological nor a thematic nor indeed any other

[1] Sir Stephen takes the opportunity of their latest publication to observe with mordant wit (page 228) that "It is a tribute to the legal profession that, although they have been widely disseminated, the Laws of Documents have had no effect whatever."

discernible sequence. The 32 attachments referred to in Chief Superintendent Cotterill's statement, running in all to some 200 pages, were included in the bundle but not in the same sequence as, nor cross-referenced to, the list set out in his statement. The index to the bundle was inaccurate in places. The consequence of all this was that proper pre-reading of the background documents, in contrast to the witness statements and other litigation documents, was almost impossible, and that the task of preparing the narrative of the facts as set out above has been made immensely more time consuming than it need have been. On top of all this, and if this was not bad enough, many of the authorities were originally supplied by the claimant's representatives, improperly and unhelpfully, in the form of BAILII transcripts. The defendant's authorities, I should make clear, were supplied by Ms Studd in proper form for inclusion in the bundle, but a complete bundle of authorities in the proper form (though even that did not comply in all respects with what is required) was lodged by the claimant's representatives only after my Clerk, on my instructions, had written to counsel on 21 June 2011.

100. There is no excuse for ignorance or non-compliance. In the case of those who practise regularly in the Administrative Court there is, and can be, absolutely no excuse for not being completely familiar with the Practice Directions and their contents and complying meticulously with their requirements. But nor is there any excuse for those who may find themselves in the Administrative Court less frequently or as birds of passage. It is the professional obligation of practitioners making a visit to some unfamiliar court or tribunal to identify in good time whether there is some particular Practice Direction or Guide or other document regulating practice before that court or tribunal and, if there is, to familiarise themselves with its requirements and then to carry them into effect. A public lawyer who strayed into the Chancery Division or the Commercial Court without having first assimilated the requirements of the Chancery Guide or the Admiralty and Commercial Courts Guide would receive short shrift. There is no reason why similar standards should not apply and be enforced in the Administrative Court.

101. I add one observation. Mr de Mello explains how preparation of both the court bundle and the bundle of authorities was delayed – took a back seat, as he puts it – while the parties were attempting to settle the case amicably. Thus, as Ms Studd points out, although the defendant's documents had been sent to the claimant's representatives on 28 May 2011, she did not receive the trial bundle from them until 20 June 2011. I would not want anything I have said to discourage timely attempts to resolve cases by negotiation, but laudable attempts to compromise, even if pursued to the door of the court, must not be allowed to become a reason for non-compliance with the court's procedures.

Postscript

102. The judgment was sent in draft to counsel in the usual way on 5 September 2011. Two matters now arise: costs and permission to appeal.

103. Ms Studd seeks an order for costs in the usual way. Mr de Mello resists. He submits that the claimant should have to pay only 50% of the defendant's costs. He points to two matters: first, the fact that the Certificate dated 11 May 2010 was issued without inviting the claimant to make representations, at a time, he says, when the law on this subject was clear; second, the fact that the police wrongly communicated with the

claimant's employer without his knowledge. Ms Studd disputes this for two reasons. In the first place, she says, the two points relied upon by Mr de Mello were not, as I have pointed out, the subject of challenge in the proceedings. Secondly, she says, the claimant's substantive arguments in respect of Articles 6 and 8 have been comprehensively rejected by the court, as has the challenge to the wording of the revised form of certificate. I agree with Ms Studd. Looking to the substance of the matter, the defendant has won and the claimant has lost. There is nothing to justify departure from the normal principle that costs should follow the event.

104. Mr de Mello seeks permission to appeal in relation to five matters:

i) the ruling relating to Article 6 in paragraph [40], particularly given the potential loss by the claimant of his employment;

ii) the rulings relating to Article 8 in paragraph [61] in respect of disclosure and an oral hearing: Mr de Mello repeats in this connection his arguments as I have summarised them in paragraph [58] and points to what he says are the inconsistencies in the evidence (the complainants' accounts being contradicted by the witness statements of Mrs J and the claimant's brother) and the allegation of blackmail together with other matters as demonstrating the need for an oral hearing;

iii) the ruling in paragraph [71] in respect of the father's criminal record: he says that we should have ruled or declared that the father's convictions should have been disclosed in the Certificate;

iv) the ruling that this was a very plain case (paragraph [86]) and that the decision in respect of the proposed revised Certificate was rational: he says that we ought to have ruled that, in light of the factual discrepancies, a substantial part of the material should not have been included in it and that in its current form the proposed disclosure is disproportionate;

v) the ruling in paragraph [92] that the reasons why the original Certificate was issued are more than adequately explained in the AT3, supplemented as it is by Chief Superintendent Cotterill's statement: he says that, for the same reasons as he advanced during the hearing, the reasons given for the decision are inadequate.

In relation to (ii) he submits that the matters he wishes the Court of Appeal to consider are of general public importance, not least having regard to their potential impact on a person's private life and employment, and that the Court of Appeal ought to have an opportunity to consider and examine them.

105. Ms Studd submits simply that, for the reasons set out in the judgment, the claimant has no real prospect of success and that permission should not be granted. She points to the fact that the court has very clearly indicated that in significant respects the claimant's application was "hopeless."

106. In my judgment this is not a case in which we should give permission to appeal. Mr de Mello does not persuade me that any of his grounds have any real prospect of success. Insofar as any of the matters which Mr de Mello wishes to canvass in the

Court of Appeal raises issues of general public importance (and I should not be taken as accepting that they do), then it is for that court, as it seems to me, and not for us to give permission on that basis.

Mr Justice Beatson :

107. I agree.