Neutral Citation Number: [2008] EWHC 2811 (Admin)

Case No: CO/8596/06

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/11/2008

Before :

THE HONOURABLE MR JUSTICE WYN WILLIAMS

- -

Between :

THE QUEEN **on the application of**	**Claimant**
S	
- and -	
CHIEF CONSTABLE OF WEST MERCIA CONSTABULARY	**Defendant**
- and -	
CRIMINAL RECORDS BUREAU	**Interested Party**

- -
- -

Peter Prescott QC (instructed by **Messrs Beech Jones De Lloyd Solicitors**) for the **Claimant**
Georgina Kent (instructed by **Head of Legal Services of the Defendant**) for the **Defendant**
The Interested Party did not appear and was not represented
Hearing dates: 3 November 2008

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....
THE HONOURABLE MR JUSTICE WYN WILLIAMS

Judgment Approved by the court for handing down.

Mr Justice Wyn Williams :

1. The Claimant is now aged 49. As a younger man he played rugby union as an amateur but to a high competitive level. For some years preceding 2006 he involved himself in various training and support roles with his local rugby club.

2. In 2006 he decided to re-apply for a position as a coach at his club. As coach, the Claimant would be an employee of the club and, as I understand it, the Rules of the Rugby Football Union required that he apply to the Interested Party for an Enhanced Criminal Record Certificate (hereinafter referred to as "ECRC"). In summary, and ECRC provides not only information about convictions or cautions recorded against a person but also, in some circumstances, gives information about allegations which have been made against him.

3. The Claimant made an application for ECRC on or about 5 March 2006. He did not anticipate receiving anything other than a certificate which stated that he had no criminal convictions or cautions whatsoever.

4. On 17 July 2006 the Interested Party issued an ECRC to the Claimant. The document was headed *"Strictly Private and Confidential"*. However it was sent both to the Claimant and to an administrative assistant at the offices of the Rugby Football Union at Twickenham.

5. Under the heading *"Police Records and Convictions Cautions Reprimands and Final Warnings* the words *"None Recorded"* appeared. However in a section entitled *"Other relevant information disclosed at the Chief Police Officer(s) discretion West Mercia"* the following appeared:-

> *"On 14th March 2004, Police arrested and charged the Applicant with 11 counts of outraging public decency. The offences were committed between November 2003 and March 2004.*
>
> *The details surrounding the incident are that the Applicant drives from his home address to the Lickey Hills and jogs around the area minus his shorts, wishing passing females 'good morning' as he runs past them. Various reports from different females were received at different times.*
>
> *The Applicant was interviewed in relation to the allegations and denied exposing himself, but did admit jogging in the area every Sunday morning.*
>
> *The allegations were amended to section 5 Public Order Offences and the case proceeded to Redditch Magistrates Court on 7th February 2005. The Applicant pleaded Not Guilty to 5 counts of using threatening abusive or insulting words or behaviour within the hearing or sight of a person likely to cause harassment, alarm or distress.*
>
> *The Applicant was found Not Guilty on all 5 counts."*

6. When he received the ECRC the Claimant telephoned the Interested Party to assert that the ECRC was inaccurate. His complaint was that the information contained in the section to which I have referred should not have appeared at all in the certificate.

He completed documentation provided to him by the Interested Party which confirmed the basis of his complaint. However despite his complaint in due course the Claimant was informed by the Interested Party that the Defendant had confirmed that their records were accurate and that the information was properly included upon the ECRC.

7. On 18 October 2006 the Claimant issued these proceedings. In the proceedings, as originally formulated, the Claimant sought declaratory relief to the effect that the information contained in the ECRC had been provided unlawfully by the Defendant to the Interested Party.

8. On 13 November 2006 Master Venne made an order at the request of both Claimant and Defendant whereby the proceedings were stayed until 19 February 2007 *"to allow the parties the opportunity to seek informal resolution to this issue"*. In due course a further order was made for a continuation of the stay.

9. On 4 December 2007 the solicitor for the Defendant wrote to the Claimant's solicitors to inform them that *"the proper way forward in this matter is for S's application for an Enhanced Criminal Records Certificate to be reconsidered in the light of the all the information now available."* The solicitor suggested that she intended to ask the Deputy Chief Constable of the West Mercia Force, DCC Arundale, (hereinafter referred to as "the DCC") to consider the matter afresh and determine whether or not any reference to the Claimant's arrest, trial and subsequent acquittal should be made in the ECRC.

10. The letter identified the information which the DCC would have before him and the letter concluded with these two short paragraphs:-

> *"If you wish to make representations in writing for the DCC to consider when making his decision, I will also place these before him. Perhaps you would also let me know if there is any material which you think he should be in possession of when making his decision.*
>
> *I look forward to hearing from you and if you wish to make representations, could I please hear from you by 4 January."*

11. It is common ground that the Claimant made no representation in response to this letter. However, he did take the following steps. Firstly he invited the court to grant permission for amendments to be made to the grounds of claim; secondly he invited the court to consider the issue of permission.

12. On 25 April 2008 His Honour Judge Mackie QC gave permission to amend and also granted permission to apply for judicial review.

13. The Defendant's response was two-fold. First, he maintained the stance that he had behaved lawfully, by his delegated subordinates, when providing the information contained in the ECRC to the Interested Party for inclusion within the ECRC. Second, he informed the Claimant that the DCC had made a decision on 6 March 2008 to the effect that the information which the police held about the Claimant being charged with and acquitted of offences ought to be disclosed in an ECRC. This information was communicated to the Claimant by a letter to his solicitors; the letter specified the

information which the DCC had taken into account in reaching his decision; it also enclosed a statement dated 16 May 2008 made by the DCC which outlined the reasons why he had reached his decision.

14. The other enclosure sent with the letter was a document, in draft, which contained the wording which the Chief Constable proposed to substitute for the words contained on the ECRC.

15. The draft enclosed was considerably longer than the entry on the ECRC. Nonetheless it is necessary to quote it in full. It reads:-

> *"1. On 7 February 2005 at the Redditch Magistrates Court the Applicant was tried and acquitted of five 5 public act order offences.*
>
> *2. Six different women alleged that they saw a man jogging in the Lickey Hills on dates between November 2003 and 14 March 2004. They alleged that the man was wearing a vest but no shorts and that the man wished them "good morning" as he jogged past.*
>
> *3. On 14th March 2004 two of the women saw the Applicant in his silver BMW car in the car park of the Lickey Hills. They took the Applicant's car registration number and told police that the Applicant was the same man they had seen jogging in the Lickey Hills without shorts that morning and on previous occasions. One of these women described the jogger on 14th March 2004 as wearing a grey vest with black lines down the side.*
>
> *4. These two witnesses and two other witnesses who attended identity parades did not identify the Applicant in the identity parade. One of the six witnesses did identify the Applicant as the jogger in an identification parade. One witness did not attend an identity parade.*
>
> *5. The Applicant was arrested on the 14 March 2004 when a grey vest with black stripes down its side was found in the washing basket in the Applicant's bedroom. In interview the Applicant denied all the offences. The Applicant accepted that he had jogged in the Lickey Hills on the morning of 14th March 2004 and that he had worn the grey vest with back stripes down the side. The Applicant agreed that he had driven to the Lickey Hills in his silver BMW car on 14thMarch 2004. The Applicant denied that he had been jogging in the Lickey Hills on other occasions when the offences are alleged to have been committed.*
>
> *6. On 7th February 2005 at the Redditch Magistrates Court the Applicant was tried and acquitted of all 5 public order act offences arising from these allegations. The Applicant called a witness to give evidence that he could not have been in the Lickey Hills on one or more of the other occasions when the offences are alleged to have been committed because he was elsewhere.*
>
> *7. The police conclude that notwithstanding the Applicant's acquittal the allegations against the Applicant might be true because the police do not have any adverse information about the witnesses which causes the police to question the credibility or motive of the witnesses who identified the Applicant.*

> *8. The police consider that the information disclosed might be relevant because the behaviour of the jogger who is prepared to jog in a public area with no shorts on and to wish a number of women good morning as he jogged past, and to do so regularly, is such that he would not be a suitable person to work with children.*
>
> *9. The police make this disclosure because the police have concluded that allegation against the Applicant might be true and that the information disclosed might be relevant to the question of the Applicant's suitability to work with and/or coach children and that therefore this is information that prospective employer should be aware of and may find material together with any additional information which the Applicant might want to place before them."*

16. The Claimant objects to this draft with as much vigour as he had previously objected to the ECRC itself. His primary stance is that no information about the alleged offences and his acquittal should be included upon an ECRC. His fallback position, however, is that the proposed contents of the certificate are so inaccurate so as to be seriously misleading and, therefore, a certificate in the form of the draft will be unlawful.

17. I should explain why it is that S objects to the disclosure so vehemently. He does not dispute that he is the person who was charged and tried with the offences specified in the ECRC. He objects to those facts being disclosed, together with the alleged surrounding circumstances of the offences, however, because he asserts that the Magistrates not only acquitted him of the charges but, when giving their reasons for so doing, effectively exonerated him. That being so, submits the Claimant, it is irrational or unreasonable for the Chief Constable or his delegated subordinates to conclude, as the draft statement asserts, that he might be guilty of the offences as charged.

18. It is to be observed that at the time when the Defendant provided information to the Interested Party for inclusion in the ECRC in the summer of 2006 his staff had lost the file which related to the criminal proceedings. The only information which was in the possession of the Defendant about the proceedings against the Claimant was that which was held in computer records. Essentially, the sum total of information contained in those records was that which was set out in the ECRC.

19. The decision to disclose that information in an ECRC was taken not by the Defendant himself but rather by Ms Katharine Binnersley. At the material time she was the Head of the Central Data Unit at West Mercia Constabulary having held that post from 1 April 2005. She had delegated responsibility for decisions such as the one now under consideration.

20. The circumstances in which she made her decision are set out in a witness statement made by Ms Binnersley dated 8 November 2006. In it she says that the issue of whether disclosure should be made and, if so, in what form was raised for her attention by a member of her staff, Johanna Lennon, and following a discussion with Ms Lennon she decided to make disclosure in the form that it appears in the ECRC. Paragraphs 6 and 7 of her witness statement are important in understanding the thought processes which led her to the view that the information should be disclosed.

> *"I discussed this case with Johanna Lennon and was made aware of the fact that the Claimant had been arrested on suspicion of outraging public decency and that he had allegedly been seen by members of the public running pasts females wearing no shorts. She also made me aware that he had been interviewed in respect of the incidents (11 in total), the information held was between 2/3 years old and nothing further had come to the attention of the police since. We both considered the information to be both relevant and serious. Johanna stated that, having checked that the victim did not have a history of making complaints, she had no reason to question the credibility of the allegation. She recognised the serious impact that a disclosure could have on the Claimant and that he had been found 'not guilty' at court, but, given the seriousness of the information, the fact that it had been received from several different sources, the fact that CPS had found sufficient evidence to charge and that she was not able to establish the reasons for the not guilty verdict from either the court or the CPS, she recommended a factual, balanced disclosure. I agreed with her recommendation and the proposed wording of the disclosure.*
>
> *7. In making this decision I was clearly conscious that the Claimant had been found not guilty following a hearing in the Magistrates' Court. I knew that we had been unable to establish the reasons for the not guilty verdict. The files were no longer available but the alleged offence was recorded on West Mercia Constabulary's computerised CRIMES system. I therefore knew that there had been sufficient evidence to charge the Claimant and for him to appear before the Court. I also regarded it as significant that the charges had arisen after allegations made by six different females."*

21. As is clear from her statement Ms Binnersley was completely unaware of the reasons why the Claimant was acquitted by the Magistrates. She says that Ms Lennon was unable to establish the reason for the not guilty verdict from either the Court or the CPS though no details are given as to what enquiries were made. Specifically, I have no evidence before me to suggest that any enquiry was directed to the prosecuting solicitor or barrister who had conducted the prosecution at the Redditch Magistrates Court.

22. As I have said despite the Claimant's protestations, the Interested Party (after consultation with the Defendant) refused to remove the information disclosed on the ECRC or, indeed, modify it. These proceedings ensued and the Claimant set about obtaining evidence to establish what had occurred at the Magistrates Court. The result was a statement made on 24 July 2007 by Mr Adrian Charles Bryant, the solicitor who had acted for the Claimant in the criminal proceedings.

23. Mr Bryant's statement makes it clear that the sole issue in the criminal proceedings was identity i.e. whether it was proved that it was the Claimant who had conducted himself in the manner described by the various witnesses. There was never a suggestion, as I understand it, that the witnesses were other than honest and doing their best to describe what they had seen. There was no challenge to the assertion made that a male person had run in the Lickey Hills area on a number of occasions with no clothing over the lower half of his body. To repeat, the sole issue was whether it was the Claimant who had behaved in that way.

24. In Mr Bryant's witness statement, he makes the assertion that the evidence at trial established that the Claimant could not have been the man in question. However, it is not Mr Bryant's assertion which is of importance but rather his record of what the Magistrates said when giving their reasons for acquitting the Claimant. In paragraph 8 of his witness statement Mr Bryant says:-

> *"8. I was present when the verdict was given by the Magistrates. They said that in their view the prosecution witnesses were honest but mistaken in identifying the Claimant as the jogger that they had seen. They concluded that S could not have been the perpetrator. In short they said that they so concluded because of the following relevant and salient findings:*
>
> - *The witnesses said that the perpetrator was the same man that they had seen on several earlier occasions and in particular on 7 March 2004 and 14 March 2004. It was therefore impossible that S could have been the perpetrator because S was supervising a rugby match on 7 March 2004 at the time of an alleged incident and so had an alibi which, since the witnesses were honest and they were corroborating each other must have meant that it was another man who was doing the indecent jogging in that area.*
>
> - *S had and has a prominent 13 inch surgical scar on his leg and buttocks that could not have failed to have been noticed if it had been him. None of the witnesses noticed the scar despite several alleged viewings of the jogger's buttocks and legs.*
>
> - *S wore a vest with prominent stripes and lettering upon it that could not have failed to have been noticed if it was him. None of the witnesses noticed the prominent stripes and lettering despite each of them confirming that they had seen both the front and back of the jogger's vest at close quarters and on several occasions.*
>
> - *The witnesses said that the man spoke with a local (Birmingham) accent whereas S speaks with a Welsh accent."*

25. Mr Bryant made a contemporaneous note of the remarks of the Chairman of the Bench which he exhibited to his witness statement. Mr Bryant's writing is difficult to understand but no one before me suggested that Mr Bryant's summary, in his witness statement, was in any way inconsistent with his contemporaneous note.

26. Mr Bryant's evidence admits of only one conclusion, namely that the Magistrates took the view that the Claimant was innocent in the full sense of the word of the charges brought against him.

27. As I have said the disclosure decision taken by Ms Binnersley was considered afresh by the DCC. He has made a detailed witness statement dated 16 May 2008 in which he describes the material which he took into consideration when making his decision, how his decision making process unfolded and the reasons why he reached the conclusion that disclosure should be given in the form of the draft ECRC.

28. The material which the DCC considered was information provided to West Mercia Constabulary by the Claimant's solicitors on 21 February 2007; the witness statement of Mr Bryant; a witness statement from a man I shall describe as JC (the alibi witness at trial); photographs of the Claimant's scarring; a summary of the tape recorded interview with the Claimant following his arrest; and a document entitled *"AT3 – Disclosure Rationale Audit Trail"* which contained a summary of the witness statements which had been taken by the police in the course of the initial investigation – a document which had been compiled by Ms Zoe Bowden, a civilian employee of the Constabulary. The DCC also took into account information given to him by a senior officer, Chief Inspector Williamson, who had spoken to the officer in the case a PC Williams. I should say for completeness that the documents which had been supplied by the Claimant's solicitors to the Defendant on 21 February 2007 included all the witness statements which had been made for and in the course of the criminal investigation.

29. The DCC formed the opinion that the Claimant may have been the person involved in the alleged unlawful activity in Lickey Hills. He says that he reached that conclusion, notwithstanding the acquittal of the Claimant by the Magistrates, because of his own appraisal of all the material which had been provided to him.

30. In these proceedings Mr Prescott QC, leading Counsel on behalf of the Claimant, accepts that the decisions to give disclosure made by Ms Binnersley and the DCC are susceptible to judicial review in this court only if such decisions are shown to be irrational or unreasonable in the **Wednesbury** sense. Before turning to deal with whether the Claimant has demonstrated irrationality or unreasonableness it is necessary that I refer, albeit comparatively briefly, to the relevant statutory provisions and cases decided upon them.

31. The relevant statutory provision is section 113B of the Police Act 1997. That provides:-

> *"(1) The Secretary of State must issue a criminal record certificate to any individual who—*
>
> *(a) makes an application under this section in the prescribed form countersigned by a registered person, and*
>
> *(b) pays in the prescribed manner any prescribed fee.*
>
> *(2) The application must –*
> *(a) be countersigned by a registered person, and*
> *(b) be accompanied by a statement by the registered person that the certificate is required for a prescribed purpose*
>
> *(3) An enhanced criminal record certificate is a certificate which—*
>
> *(a) gives the prescribed details of every relevant matter relating to the applicant which is recorded in central records, and any information provided in accordance with subsection (4), or*
>
> *(b) states that there is no such matter or information.*

(4) Before issuing an enhanced criminal record certificate the Secretary of State 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.

(5) The Secretary of State shall also 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),

(b) ought not to be included in the certificate, in the interests of the prevention or detection of crime, and

(c) can, without harming those interests, be disclosed to the registered person.

(6) The Secretary of State shall send to the registered person who countersigned an application under this section—

(a) a copy of the enhanced criminal record certificate, and

(b) any information provided in accordance with subsection (5)."

32. Section 113 came into force on 6 April 2006. There had been, however, a predecessor section (S115 repealed on 6 April 2006) in more or less identical form. The authorities which I was asked to consider all deal with the predecessor section.

33. The leading authority is a decision of the Court of Appeal in **R(X) v Chief Constable of West Midlands Police and another [2004] EWCA Civ 1068**. The relevant facts in this case are set out in substantial detail in the judgment of Lord Woolf CJ – see paragraphs 21 to 26. It is sufficient for the purposes of this judgment to summarise the facts simply by reference to the information which was contained with the ECRC in that case.

> *"It is alleged that on 11 December 2001 X indecently exposed himself to a female petrol station attendant. It is further alleged that this was repeated on 7 May 2002. X was arrested and interviewed whereby he stated that he did not think that he had committed the offence but that he was suffering from stress and anxiety at the time. X, who is employed by a childcare company at the time of the alleged offences, was charged with two counts of indecent exposure, however the alleged victim failed to identify the suspect during a covert identification parade, and the case was subsequently discontinued".*

34. The relevant principles to be derived from **X** are those which are set out below from the judgments of Lord Woolf CJ and Mummery LJ. I quote:-

"36. ……..…..having regard to language of section 115, the Chief Constable was under a duty to disclose if the information might be relevant, unless there was some good reasons 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. In my judgment it imposes too heavy an obligation on the Chief Constable to require him to give an opportunity for a person to make representations prior to the Chief Constable performing his statutory duty of disclosure.

38. ……..…..under section 117, the Claimant is given an opportunity to correct the certificate.

39. ……..…..…

40. While recognising fully how damaging the disclosure could be to the Claimant, because of the public interest in the information being made available to the prospective employer, unless the Chief Constable was to be persuaded that there was a strong probability that this was a case of mistaken identity, the Chief Constable was entitled to be of the opinion that the information still might be relevant so that it had to be disclosed ……..…..…

44. If the information disclosed did not relate to him this would be deeply regrettable, because I accept that it is likely that the Claimant would never again obtain employment in the area in which he would like to work. However, while that is true, his position would be no worst (as was pointed out by Lord Justice Mummery in argument) than it would be if prospective employer had himself asked the question, (which would be in accord with good employment practice to adopt for this class of employment) as to whether the Claimant had ever been charged with any criminal offence. The Claimant would have to answer this question honestly and the position would have been revealed with the same result.

45. This, as it seems to me, goes to the heart of this case. 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 his judgment Mummery LJ explains:-

"52. The overall responsibilities of the prospective employer, included the responsibility for deciding the Applicant's suitability for a particular position, were relevant to the disclosure decision. While the Applicant had an interest in seeing that the information was not disclosed in the ECRC to the prospective employers, the prospective employer had a legitimate interest in receiving it. He had more immediate and direct interest than anyone else and the availability to him and any information about the job applicant which "might be relevant" to

his decision whether or not to appoint him to a position of the kind described in section 115(2) and which he ought to know. The disclosure of the matters in the ECRC is not simply a matter between X and the Police: prospective employers and the vulnerable people, towards whom the employer has heavy responsibilities, are also potentially affected by the decision whether or not to disclose information in the ECRC."

Mummery LJ then went on to make the point to which Lord Woolf referred in paragraphs 44 and 45 of his judgment.

35. Two decisions made in the light of the decision in **X** were drawn to my attention. The first in time is **R (B) v The Secretary of State for the Home Department and another [2006] EWHC 579**. In that case Munby J emphasised that the issue for the reviewing Court was whether or not the Chief Constable was entitled to conclude that the allegation in question might be true in the sense that the phrase was used by Lord Woolf CJ in **X** and, accordingly, entitled to conclude that it might be relevant within the statutory provisions. The Learned Judge, however, also touched upon a point which is relevant to Mr Prescott's fallback position in this case. In the last paragraph of his judgment Munby J said:-

"There may be cases where, although the information supplied by the Chief officer of Police is correct so far as it goes, it is in fact thoroughly mis-leading, whether by reason of suggestio falsi or supressio veri, for example, the statement that "K has been prosecuted for the rape of L" may be entirely correct, so far as it goes, bat may, in fact, be thoroughly misleading, if, for example, it omits to add, "but was acquitted by the Jury" or, as the case may be, "was exonerated after the police discovered that the rape was in fact committed by M, who has subsequently being convicted." In such a case the original certificate would, in my judgment, be "inaccurate" and the CRB would accordingly have the power to issue a new certificate in corrected – and therefore "accurate" form – and this, I should add, must in principle be the case whether the certificate was misleading at the time it was issued or whether it has only become misleading as a result of subsequent events."

36. In the very recent decision of **R(Pinnington) v Chief Constable of Thames Valley [2008] EWHC 1870 (Admin)** the Divisional Court said:-

*"47. ……The ultimate issue ……is whether the information "might be relevant" for the purpose described. By the terms of the statute, it is for the Chief Constable (or his delegate) to form an opinion on that issue. The question for the court, in the exercise of its supervisory jurisdiction, is whether the opinion formed by the officer concerned was reasonably open to him. It is a straightforward **Wednesbury** test, to which no gloss needs to be or should be applied. In forming his opinion on relevance, the officer must ask himself whether the information might be true: if the answer to that question is in the negative, there can be no reasonable basis for concluding that the information might be relevant. The assessment of whether the information might be true will involve careful consideration of the available evidence but does not require the application of any additional test. It is a matter of judgment, reviewable by the court, as I have said, only on a **Wednesbury** basis. I would specifically reject Ms Griffith's attempt to impose a higher threshold than the relatively low threshold inherent in*

> *the question whether the information "might be true". That the threshold is relatively low is supported by the approach taken by Munby J ……in **D**, following **X**.*

37. With the principles set out above firmly in mind, I turn to consider whether the two decisions in this case were irrational or unreasonable.

38. I have reached the clear conclusion that the decision made by Ms Binnersley was unreasonable in the **Wednesbury** sense. This decision was taken on the basis of very limited material. Ms Binnersley accepts that she had no idea why it was that the Claimant had been acquitted. For all she knew he had been completely exonerated. In the context of a case such as the present I simply do not see how any decision maker could make a decision to the effect that the allegations made against the Claimant might be true when he or she had no information, whatsoever, to explain why the Claimant was acquitted by a criminal court after a trial in respect of charges founded upon the allegations.

39. Further, in my judgment, a reasonable decision maker in the context of a case such as the present would not disclose the existence of the allegations without first taking reasonable steps to ascertain whether they might be true. One of the most obvious reasonable steps to take in ascertaining whether the allegations might be true was to find out why the alleged perpetrator was acquitted by a criminal court.

40. In reaching this conclusion, I do not intend to impose upon a Chief Constable too onerous duty in attempting to obtain relevant information before a decision is made. Normally, there will be no difficulty because, of course, in most cases the police force will not have lost the relevant file. However, in a situation where the decision maker knows that information is incomplete since the file is lost it does not seem to me to be reasonable for the decision maker to do nothing to ascertain the reason for the acquittal before making his or her decision on disclosure. I appreciate that there is evidence in this case which suggests that some kind of enquiry was made of the Court and the CPS. As I have said, however, no details of the enquiry are given. What is apparently crystal clear, however, is that no attempt was made to speak to or communicate with the person who conducted the prosecution. The allegations made in this case were obviously unusual and the sort of allegations that would stick in the mind of the prosecuting advocate. Further and in any event it is to be inferred that the prosecuting advocate would do as Mr Bryant did, namely make a note of the reasons given by the Magistrates for the acquittal. Whilst it is not to be expected that an advocate would keep his or her notes of individual cases for very substantial periods of time there is, at the very least, reason to expect that the advocate in question would have kept his or her notebook for a period which was for little more than a year.

41. To repeat, in my judgment, the first decision made by Ms Binnersley was unreasonable. She failed completely to take into account the reason why the Claimant had been acquitted; she should have made enquiries of the prosecuting advocate at the very least as to why the Claimant had been acquitted and then taken account of such information as she received before deciding whether to disclose the allegations.

42. I turn, therefore, to the issue of the rationality and/or reasonableness of the decision of the DCC. In short, the resolution of this issue depends upon whether it was reasonably

open to the DCC on the totality of the material before him to conclude that the allegations made against the Claimant might be true.

43. There can be no doubt that the evidence assembled by the police during the course of the investigation justified both the charging and the prosecution of the Claimant. In summary, one witness identified the Claimant at an authorised identification procedure as the person she had seen running around Lickey Hills with no clothing on the bottom half of his body on 14 March 2004. She said, also, that she had seen him once before some months previously. Two different witnesses alleged that the Claimant was the person running around Lickey Hills on the morning of Sunday 14 March 2008 with no clothing on the bottom half of his body – albeit they failed to identify him at a subsequent identification procedure. Other witnesses gave a general description of the perpetrator of the offences which was not substantially inconsistent with the Claimant being the man. Further, the Claimant accepted in his interview under caution that he regularly ran in Lickey Hills on Sunday mornings and, in consequence, was in the vicinity of the area where the alleged offences were said to have occurred on at least some of the relevant occasions.

44. It is also to be observed that the criminal trial ran its full course i.e. there was no attempt to submit to the Magistrates at any stage that the Claimant had no case to answer in respect of any of the charges brought against him.

45. An important part of the prosecution case was that the Claimant had engaged in a repetitive course of conduct between November 2003 and 14 March 2004. That is important in this sense; the case for the prosecution was that it was the same man behaving in the same way during that time period. That is what the witnesses were asserting and, in any event, it was inherently improbable that more than one person was behaving in the manner described in Lickey Hills in this time period.

46. The fact that the Claimant was alleged to have behaved in this way over a comparatively protracted time scale gave him the opportunity to present to the Court alibi evidence in respect of any precise dates upon which he was alleged to have committed an offence. At least one of the charges alleged against him related to 14 March 2004. On that day, which was the day of his arrest, the Claimant admitted that he was running in Lickey Hills at or about the time that the alleged criminal behaviour took place. Accordingly, alibi evidence did not arise.

47. However, the Claimant was also charged, specifically, with having behaved in the manner described on the preceding Sunday, namely 7 March 2004. The basis of that charge was the evidence of two of the three women who had purported to identify the Claimant as being the person they had seen on 14 March 2004. One of those women (whom I shall refer to as JM) made a statement to the Police dated 10 March 2004 which began:-

"On Sunday 7 March 2004 at 08:00, I drove up to Lickey Hills Country Park. I went up with my friend JW. We had been in the park about half an hour ……. I saw a male coming towards us".

48. The woman JW made her statement on 14 March 2004. She confirmed what JM had said. There is no reason to suppose other than that the two women gave that evidence to the Magistrates.

49. Given the precision of this allegation the possibility arose that the Claimant could provide evidence of an alibi. He did just that– he adduced evidence from JC. There is no proper record of what JC said in evidence to the Magistrates. However he made a witness statement dated 17 October 2007 in which he sets out his recollection of the evidence which he gave. In essence it was that he had met the Claimant at a rugby club (not the Claimant's club but a club at which an away fixture were being played) shortly before 10.00 am on 7 March 2004 and that such was the distance between the Claimant's home and this club that the Claimant would have had to leave his home by about 8.45am at the latest to be at the away club by just before 10.0'clock. It was JC's view that there was no reasonable possibility that the Claimant could have been running in Lickey Hills in running gear minus his shorts at about 8.30 am and yet be at the rugby club by just before 10.00am.

50. In the light of the reasons advanced by the Magistrates for acquitting the Claimant it is clear that they believed JC. On the basis that they believed him the prospects of the Claimant being in Lickey Hills at approximately 8.30am were clearly remote.

51. On the basis that the Claimant was not the offender on 7 March 2004 it was, at the very least, highly unlikely that he was the relevant offender at any other time. To repeat the prosecution case was that there was but one man and it was the Claimant.

52. In paragraphs 13 to 17 of his witness statement the DCC sets out how he approached the decision whether or not to give disclosure. It is encapsulated in paragraph 16 where he says:-

> "*Before I answered these questions I had to first decide whether the information 'might be true'. In considering this question I asked myself is this an obvious case of mistaken identity on the part of the witnesses, or is it the case that the Claimant may have conducted some, or all, of the relevant allegations made against him?"*

53. I must say that I am surprised that the DCC was apparently contemplating as a real possibility that the Claimant may have committed some but not all of the offences. As I have said the case was never presented on the basis that there was more than one person involved and, to repeat, such a scenario seems to me to be wholly improbable. In my judgment, the DCC acted unreasonably or irrationally if his approach in truth was that the Claimant may have committed some but not all of the offences.

54. Nonetheless, I propose to proceed on the basis that, in reality, the DCC was considering whether it might be true that the Claimant had committed all the offences with which he was charged.

55. In my judgment, it is of central importance in answering that question to consider the material as it related to the offence allegedly committed on 7 March 2004. At the risk of repetition unless it might be true that the Claimant had committed this offence it could not be said, reasonably or rationally, that he had committed any other offence.

56. In paragraph 21 of his witness statement the DCC sets out how he approached the specific allegation relating to 7 March 2004. He says:-

> *"…….one was the potential alibi for 7 March 2004. Of the information I read, I considered it still to be the case that the Claimant may have been the person*

> *responsible on the 7 March 2004 (and particularly strong evidence in relation to this is the identification of him by the witnesses). I am conscious there could be confusion over dates and a previous incident could have occurred at a different time and date or on the same date alleged i.e. 7 March 2004, at an earlier time. The original case file was not before me and I had no information in relation to distances between the relevant locations mentioned."*

At paragraph 31 the DCC returns to the issue of the alleged offence on 7 March 2004. It reads:-

> *"PC Williams could not recall receiving a defence statement in accordance with the Criminal Procedures and Investigations Act 1996. In view of this, there was no opportunity to investigate the alibi provided by the defence on the day of the trial, prior to that trial. PC Williams was also on annual leave at the time of the trial and could not attend court, which precluded her an opportunity of closely liaising with the prosecuting CPS lawyer during the trial, to assist in probing the defence alibi."*

In paragraph 33 the DCC continues:-

> *"Finally and significantly, despite the alibi evidence of JC, I considered that there would be a window of opportunity for the Claimant to commit the offence on 7 March 2004 and still be [at the rugby club] for shortly before 10.00am. The AA route planner indicates that it takes one hour and 8 minutes to travel from [the Claimant's home to the rugby club]."*

57. I appreciate, of course, that the DCC was obliged to reach his own opinion about whether the allegations made against the Claimant might be true. In my judgment, however, in order to reach a conclusion which was reasonable and rational it was necessary for him to bear in mind the following factors.

    i) The Magistrates heard all the relevant evidence; consequently they were in the best position to assess the truthfulness accuracy and reliability of all the witnesses who gave evidence before them; those witnesses, of course, included the Claimant and JC as well as the witnesses for the prosecution.

    ii) The Magistrates made an unequivocal finding to the effect that the Claimant did not commit the alleged offence on 7 March 2004. They gave reasons for so finding; the reasons were worthy of careful scrutiny. The reality is that the Magistrates must have accepted the evidence of JC; I say that since otherwise their conclusion that the Claimant could not have committed the offence makes no sense.

    iii) The Magistrates also found that the prosecution witnesses as to the identity of the Claimant were honest but mistaken.

58. It was also important for the DCC to have appreciated that his own assessment was one undertaken only on the papers. Obviously he personally was not present when the evidence was heard but, crucially, he did not receive information from any other police officer who had been present at court when the evidence was heard. Indeed he

received no information from anyone about what was actually said at Court save for that provided to him on behalf of the Claimant.

59. What then were the reasons given by the DCC for reaching the conclusion that it might be true that the Claimant had committed the offence on 7 March 2004? It appears that he relied upon evidence of identification, the possibility that there could be confusion over dates i.e. that the offence had not been committed on the 7 March but some other day and the possibility that the Claimant may have been in Lickey Hills committing the offence on 7 March 2004 and yet also arriving at the rugby club by just before 10.00am.

60. The two witnesses who identified the Claimant as being responsible for the offence on 7 March 2004 were JM and JW. It seems to me to be fanciful to think that they were describing an offence on a different Sunday. JM made her statement on 10 March 2004. It beggars belief to think that she could have wrongly specified 7 March 2004 as the date of the offence in a statement made three days later. JW made her statement on 14 March; it is just as difficult to believe that she was mistaken about the date of the previous incident.

61. It is also extremely unlikely, in my judgment, that JM and JW specified the wrong time for the commission of the offence on 7 March 2004. Of course, they may have been inaccurate to some extent. Their basic account, however, was that they arrived in Lickey Hills at about 8.00 am and the incident happened about half an hour later. There is no obvious reason, in my judgment, why the women were inaccurate as to the relevant time by more than a few minutes.

62. Their identification evidence was described by the DCC as “particularly strong” (see paragraph 56 above). I simply do not know how the DCC could have reached that conclusion. It is true that both those women said that the man they saw in the BMW car on 14 March 2004 was the same man that they had seen on 7 March 2004. At an identification parade conducted no more than about six weeks later, however, both women failed to identify the Claimant.

63. Courts in this country are very familiar with witnesses who are apparently convincing on an issue relating to identity but who are in fact mistaken. In any event, in this case, I simply do not understand how the DCC was able to categorise the evidence of these two women as he did when (a) they had been categorised as honest but mistaken by the Magistrates (who, after all had heard and assessed them); (b) they had failed to identify the Claimant at an identification procedure and (c) he had received no report from anyone as to the nature of the actual evidence they had given at the Magistrates Courts about identification.

64. As is apparent from their reasons the Magistrates attached significance to the fact that none of the identifying witnesses described the offender as having a scar to his buttocks or legs. While such a point may, justifiably, throw some doubt upon identification evidence it would not, on its own, necessarily prove that a person who did have a scar to his buttocks or legs was not the offender. However, this point should not be considered in isolation. When this point is considered together with the alibi evidence very strong grounds exist to suggest that the Claimant was not the offender on 7 March 2004.

65. The DCC also attached weight to the information provided to him to the effect no notice of alibi had been served in advance of the hearing. It is by no means clear, as a matter of fact, that no such notice was served. As I have said the file has been lost and the DCC was relying upon the memory of the officer in the case; she was not certain about whether or not an alibi notice has been served and she was not at court during the trial.

66. I am prepared to accept for the purpose of this judgment that the DCC was entitled to take into account information to the effect that an alibi notice may not have been served. In general terms the fact of non service of such a notice could permit a decision maker to be sceptical as to the validity of the alibi evidence relied upon in the absence of such a notice. The difficulty, however, is that the Magistrates would have been addressed about the absence of an alibi notice if that was the true state of affairs and, without doubt, would have taken into account its absence when weighing the reliability of the alibi evidence. There is no suggestion in the reasoning of the Magistrates that the absence of alibi notice impacted, adversely, upon their view of the alibi evidence. I cannot accept that the DCC was entitled to take into account the possibility of there being no alibi notice in this case and use that fact to cast doubt upon the reliability of the alibi evidence when the persons who actually heard the alibi evidence were convinced of its accuracy and truthfulness.

67. In his judgment in **X** (paragraph 40 thereof) Lord Woolf CJ recognises that a good reason for non-disclosure of an allegation which might otherwise be justifiably disclosed would be where the Chief Constable formed the view that the case probably involved mistaken identity.

68. In my judgment this case falls into that category. In my judgment the reasonable decision maker in the position of the DCC in this case would have reached the conclusion that this was probably a case of mistaken identity. There really was a substantial body of information which suggested that the Claimant was not the offender on 7 March 2004 and if that was correct it was very unlikely that he was the offender on any other occasion.

69. In those circumstances it seems to me that it was irrational or unreasonable in the **Wednesbury** sense for the DCC to conclude that it might be true that the Claimant was the offender. I appreciate that the Claimant has had to surmount a high hurdle in order to demonstrate that. In this case, however, he has done so.

70. I stress, however, that this decision is very specific to the facts of this case. I do not suggest for one minute that allegations should not be disclosed in an ECRC simply because the alleged offender has been acquitted. The circumstances surrounding the acquittal are all important. There will be instances where an alleged offender is acquitted but only because the Magistrates (or Jury) entertain a reasonable doubt about the alleged offender's guilt. The tribunal of fact may harbour substantial doubts. In such circumstances, however, it might well be perfectly reasonable and rational for a Chief Constable to conclude that the alleged offender might have committed the alleged offence. To repeat, however, there are very powerful reasons in the instant case why it is very unlikely that the Claimant committed the alleged offences. That being so it was not reasonably open to the DCC to conclude that he might have done so.

71. Mr Prescott QC suggests that even if the DCC justifiably concluded that the allegations against the Claimant might be true nonetheless this was not an appropriate case in which to give disclosure. He suggests disclosure was not necessary in respect of a request made by a would-be coach of rugby union teams even if those teams consisted of or included young boys. I disagree. In my judgment the Chief Constable was perfectly entitled to take in view that the information ought to be included in the certificate if he was satisfied, reasonably, that it might be true that the Claimant was the alleged offender. I accept the submissions made by Ms Kent to the effect that a would-be employer would regard allegations such as made against the Claimant as relevant when considering whether to employ a person who would have or might have contact with young boys (or for that matter, in the modern age of rugby union, young girls).

72. One point has concerned me more than any in relation to the decision at which I have arrived. There can be no doubt that a would-be employer would be perfectly entitled to enquire of a would-be employee whether or not he had been charged with any criminal offence when he was considering that person for employment with boys or girls. If that question had been asked of the Claimant, of course, he would have had to disclose the allegations under consideration. In **X** the fact that the information contained in the ECRC would probably have been elicited by prudent questions from the employer weighed very heavily in the reasoning of the Court.

73. Ultimately, I have been persuaded that the fact that an employer could, legitimately, elicit the relevant information by appropriate questions is not determinative of the issue of whether the Chief Constable should give disclosure. Lord Woolf CJ clearly contemplates in **X** that situations might arise where disclosure would not be justified and the one example which he cites is where, demonstrably, the likelihood is that the alleged offender has been the victim of mistaken identity. Further, if the fact that an employer can elicit the information by appropriate questioning is determinative there would be no real purpose in the statutory test set down in section 113B.

74. Finally, I should address shortly the position in this case upon the assumption that I am wrong in my view that the decision of the DCC to give disclosure was unreasonable or irrational. In this scenario I have reached the clear conclusion that the proposed disclosure – in the form of the draft ECRC – is inaccurate to the extent of being misleading in its description of relevant events. Although it is not for me to formulate precisely what it is that should be said it seems to me that the draft set out within Mr Prescott's Skeleton Argument is far closer to a fair and balanced account than is the account in the draft ECRC. Ms Kent complains that Mr Prescott's draft is too favourable to the Claimant. I disagree with that proposition. The draft essentially encapsulates the true state of affairs.

75. In my judgment this claim succeeds. In formulating my order I have taken into account the written submissions of the parties which were sent to me following the distribution of this judgment in draft. I stress, however, that I did not conduct the hearing in private and, accordingly, while it is obviously appropriate to anonymise the Claimant and prevent publication of anything which might lead to his identity none of the other orders of similar type, as now sought by the Claimant, are appropriate