Status: Judicial Consideration or Case History Available

The Queen on the Application of X v Chief Constable of West Midlands Police & Anr

C1/2004/0219

Court of Appeal (Civil Division)

30 July 2004

Neutral Citation Number: [2004] EWCA Civ 1068

2004 WL 1640301

Before: The Lord Chief Justice of England and Wales The Right Honourable Lord Justice Mummery and The Right Honourable Lord Justice Laws

Friday 30th July, 2004

On Appeal from Administrative Court

Representation

- Mr Dan Squires (instructed by Public Law Solicitors) for the Respondent.
- Miss Fiona Barton (instructed by JH Kilby , Force Solicitor) for the Appellant.

• Mr Rabinder Singh QC and Mr James Strachan (instructed by the Treasury Solicitor) for the Secretary of State for the Home Department (Interested Party).

JUDGMENT

The Lord Chief Justice :

1. This is an appeal by the Chief Constable of West Midlands Police from a decision of Mr Justice Wall given on 23 January 2004. The appeal raises a point of some importance and difficulty in relation to the responsibility of Chief Police Officers under section 115 of the Police Act 1997 (“ the 1997 Act”). The Secretary of State for the Home Department was originally a defendant to the proceedings, but when permission to proceed with the claim against the Chief Constable was granted on 3 July 2003, permission to proceed against the Secretary of State was refused. However, because of the importance of the issues raised on the appeal, Mr Rabinder Singh QC has been allowed to make submissions on behalf of the Secretary of State as to the legal issues involved, although he has not made submissions as to the merits of the decision of Wall J on the facts.

2. The appeal relates to the enhanced criminal record certificates (ECRC) which the Secretary of State can issue under section 115 of the 1997 Act. An ECRC contains information, in addition to that which is recorded in central records, about the person to whom the certificate relates, provided by the Chief Constable. The additional information may concern offences of which the person to whom the ECRC relates is suspected of committing even though his responsibility has not been and cannot be proved. The information must, however, be information of which the Chief Constable is of the opinion might be relevant to a position which involves regularly caring for, training, supervising or being in sole charge of persons under 18 or vulnerable persons aged 18 or over. The ECRC is, therefore, a form of protection for the young and/or vulnerable: the additional information contained therein is required so as to avoid unsuitable individuals being employed for looking after such persons. However, the information contained in the ECRC can be highly prejudicial and, as is suggested happened in the present case, can blight the individual's opportunity to obtain employment in his chosen field.

3. The challenge to the ECRC is on three grounds, namely that: — • (1) the substantive criteria which have to be satisfied for the disclosure by the Chief Constable to be lawful under Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (“ the Convention”) and under the common law were not met; • (2) the decision to disclose the information by the Chief Constable was procedurally unfair under both the common law and Article 8 of the Convention and not “ in accordance with the law” as required by the latter; and

• (3) the Chief Constable had unlawfully departed from the Association of Chief Police Officers' (ACPO) Code of Practice for Data Protection in relation to information held concerning the claimant.

4. Wall J made no adverse finding as to the third ground. It has not featured in the argument before us and I do not refer to it further. Wall J did however, find in favour of X, which is the name by which the claimant was known in the court below and in this court so as to protect his identity. The finding in X's favour was on the first and second grounds. The judge made an order that the decision of the Chief Constable to provide the information contained in the ECRC dated 3 March 2003 be quashed, that the Chief Constable should not in the future provide information relating to the indecent exposure allegations currently contained in that certificate to the Secretary of State pursuant to Sections 115 (7) and 119 (2) of the 1997 Act. Wall J refused leave to appeal and helpfully recorded his reasons for refusing permission to appeal in the following terms :

> " I recognise that this case deals with an issue of public importance, and one which is, moreover, topical in the light of events at Soham and the forthcoming enquiry into them. That said:— • (1) My decision depends on the particular facts of the case;
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> • (2) Much of the applicable law was not in dispute, notably: (a) that Article 8 of the European Convention on Human Rights was engaged and (b) that the approach to disclosure under the common law taken by Dyson J in Re LM [2000] 1 FLR 612 , 622– 23 was correct;
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> • (3) I decided that the common law principle that there was a presumption against disclosure (as identified and applied in ex parte Thorpe [1996] QB 396 and followed in Re LM) was to be disapplied in the instant case (paragraph 91 of the judgment).
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> • (4) It was conceded by the Chief Constable that as a consequence of section 8.4 paragraph 14 (paragraph 135 of the judgment) of the ACPO Code, retention of the information which was the subject of the ECRC would have constituted a breach of the Code. I deliberately made no ruling on whether or not the information was " criminal intelligence" within paragraph 8.5 of the Code (judgment paras 147– 149), and made it clear that nothing in the judgment was designed to inhibit the exchange of information between the police and other statutory authorities' action in the field of child protection (judgment para. 115);
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> • (5) The claimant's case both on identification and on procedural fairness seemed to me particularly strong on the facts. For example, the argument advanced by the Chief Constable that the claimant's police interview represented his opportunity to make representations on the material to be disclosed was, I thought, manifestly unsustainable.
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> In these circumstances it is a matter for the Court of Appeal to decide if the case raises a point of law of sufficient public interest to warrant its consideration. On the merits, I have to say that I do think that the balancing exercise required in the case falls firmly in favour of the claimant on the facts, and that an appeal directed against the outcome of the case would not, therefore, have any real prospect of success." Notwithstanding these reasons, leave was granted by Lord Justice Kennedy on 24 March 2004.

The Legal Framework

5. Part V of the 1997 Act creates a statutory scheme for access by prospective employers to the criminal records and, in limited circumstances, information held by the police relating to potential employees. In addition to the ECRC, with which we are concerned on this appeal, there is a criminal conviction certificate which gives prescribed details of every unspent conviction recorded against an individual or states that there is no such conviction. This certificate is governed by section 112 of the 1997 Act. 6. There is also a criminal record certificate under section 113 of the 1997 Act. A criminal record certificate under section 113 of the 1997 Act includes cautions and spent convictions under the Rehabilitation of Offenders Act 1974 . This is provided on the application of a prospective employee, although, under section 113(2) the application must be accompanied by a statement from the prospective employer that the certificate is required for the purposes of an " exempted question" . By section 113(5) an " exempted question" is defined as: • i) … A question in relation to which section 4(2)(a) or (b) and section 4(4) of the Rehabilitation of Offenders Act 1974 (effect of rehabilitation) has been excluded by order of the Secretary of State under section 4(4) .

7. Section 115 of the 1997 Act governs ECRCs. As with criminal record certificates, section 115(1) places a mandatory duty on the Secretary of State for the Home Department (a function delegated to the Criminal Records Bureau (" the CRB") to issue an ECRC to any prospective employee who makes an application " in the prescribed form countersigned by a registered person" and pays the appropriate fee. Section 115(2) similarly requires the application to be accompanied by a statement from the prospective employer that the ECRC is required " for the purposes of an exempted question" asked — • i) in the course of considering the applicant's suitability for a position (whether paid or unpaid) within subsection (3) or (4) , or

• ii) for a purpose relating to any of the matters listed in subsection (5) .

8. A " position" is within section 115(3) of the 1997 Act " if it involves regularly caring for, training, supervising or being in sole charge of persons under 18" , and within section 115(4) if it is of a kind specified in regulations made by the Secretary of State and involves regularly caring for, training, supervising or being in sole charge of persons aged 18 or over.

9. The term " exempted question" is defined by section 113(5) of the 1997 Act as " a question in relation to which section 4(2)(a) or (b) of the Rehabilitation of Offenders Act 1974 (effect of rehabilitation) has been excluded by an order of the Secretary of State under section 4(4) " . The involvement of the Rehabilitation of Offenders Act 1974 is readily explained by the fact that it was necessary for the purposes of that Act to identify situations where the normal consequences of the passage of time in relation to the existence of previous convictions had to be changed; particularly in relation to employment, because the conviction although stale could appropriately be required to be revealed because of the sensitivity of the particular circumstances. This meant that there should be an exception to the provision of the protection which would normally be provided in relation to spent convictions.

10. Who is a registered person is dealt with in Section 120 of the 1997 Act. Sections 120(4), (5) and (6) are relevant and are in the following terms :

" (4) A person applying for registration under this section must be —

a) A body corporate or unincorporated,

b) A person appointed to an office by virtue of any enactment, or

c) An individual who employs others in the course of a business.

(5) A body applying for registration under this section must satisfy the Secretary of State that it —

a) Is likely to ask exempted questions, or

b) Is likely to countersign applications under section 113 or 115 at the request of bodies or individuals asking exempted questions.

(6) A person, other than a body, applying for registration under this section must satisfy the Secretary of State that he is likely to ask exempted questions.

(7) In this section " exempted question" has the same meaning as in section 113."

11. The ECRC itself is defined in section 115(6) of the 1997 Act as a certificate which: — • (a) gives — • (i) the prescribed details of every relevant matter relating to the applicant which is recorded in central records, and

• (ii) any information provided in accordance with subsection (7) , or

•

(b) states that there is no such matter or information.

12. I now turn to the provision of section 115 with which we are primarily concerned, namely section 115(7) that provides: • (7) 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.

13. It is also relevant to refer to section 115(8) although it is not directly involved in this case. This section provides : • (8) 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) , and

• (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.

14. The contrast between sections 115(7) and 115(8) is to be noted because in the case of section 115(8) , unlike section 115(7) , the information will be seen by the prospective employer (the

registered person) but will not be seen by the person who is the subject of the certificate since it will not be set out in the ECRC.

15. Section 115(9) of the 1997 Act imposes a mandatory duty on the CRB to send to the registered person who countersigned the application (for present purposes, once again, the claimant's prospective employer) a copy of the ECRC and any information provided in accordance with section 115(8) of the 1997 Act. By section 119(2) , where the chief officer of a police force receives a request under section 115 of the 1997 Act, he is required to comply with it as soon as practicable.

16. An applicant for an ECRC is entitled to have it issued to him under section 115(1) . If the applicant believes that the information contained in the certificate is inaccurate he may make an application in writing to the Secretary of State for a new certificate and the Secretry of State shall then consider any application under the section. Where he is of an opinion that the information on the certificate is inaccurate he shall issue a new certificate (section 117).

17. In addition, the Secretary of State is required to publish a code of practice in connection with the use of information provided to registered persons. Furthermore, a member, officer or employee of a registered body can commit an offence if he makes a disclosure of any information provided which is not authorised by the Act (see section 124).

18. Having referred to the relevant legislation, it is useful to note the following significant aspects of the statutory scheme involving ECRCs: • i) The whole process of obtaining an ECRC is initiated by the person to whom the certificate will relate. The certificate is for his purposes to enable him to obtain employment which, at least in practical terms, will not be available to him unless he obtains a certificate.

• ii) The certificate will only be seen by the applicant and his prospective employer.

• iii) The applicant has the opportunity to persuade the Secretary of State to correct the certificate.

• iv) The Chief Constable is under a duty to provide the information referred to in section 115(7) . This is subject to the requirement that the information *might* be relevant and ought to be included in the certificate. What might be relevant and what ought to be included is a matter for the opinion of the Chief Constable.

• v) The applicant is in a position to provide additional information if he wishes, whether in conflict with the certificate or not, to the prospective employer and it is the prospective employer who will make the decision as to whether he should or should not be employed.

Article 8 of the Convention

19. Having set out the statutory structure, it is convenient to consider whether section 115 of the 1997 Act is compatible with article 8 . Article 8 provides : • i) " Everyone has the right to respect for his private and family life, his home and his correspondence.

• ii) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

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

The Facts

21. The ECRC with which we are concerned contained the following information provided by the Chief Constable in accordance with section 115(7) :

> " It is alleged that on 11 December 2001 [the claimant] indecently exposed himself to a female petrol station attendant. It is further alleged that this was repeated on 7 May 2002. [The claimant] was arrested and interviewed whereby he stated that he did not think he had committed the offence but that he was suffering from stress and anxiety at the time. [The claimant], who was employed by a Child Care 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" .

22. The claimant is of good character so there were no convictions referred to in the ECRC. He is Afro-Caribbean and is aged 44. He obtained a diploma in Social Work in about 1990 and was employed as a social worker until 9 July 2002 when he was dismissed by the agency which employed him.

23. The remainder of the facts are based on those set out with meticulous care by Wall J in his judgment. They are not challenged by the parties and are as follows : " On 16 May 2002 the claimant was interviewed by the police and then charged in relation to two alleged incidents of indecent exposure, which had occurred in the early hours of the morning on 12 December 2001 and on 7 May 2002 at a local garage. The complainant, Ms.R, was the cashier at the garage, and on each occasion Ms. R was on duty on her own.

On the first occasion, Ms. R says she saw a man whom she identified as a regular customer pass by the newspaper rack, which was directly under the window next to the counter. At that point she could only see his head and shoulders. For obvious security reasons, the door to the garage shop within which Ms. R was situated was locked, and customers were served through a hatch. The man appeared to be on foot, and had not driven a car onto the garage forecourt.

Ms. R says she recognised the man because he had been in the night before and had purchased a Mars bar and a bottle of water. She says that because he was a regular customer, she pressed the button behind the counter, which unlocked the door of the shop in order to let him in. She says that as soon as he entered the shop she saw that he was naked from the waist down. His genitals were plainly visible, although he did not have an erection. She says he purchased a Mars bar with a £10 note and said to Ms. R: " I'll be back later to rape you" . After standing by the door and opening and closing it several times, the man asked Ms. R the time. She told him it was 2.50am. He then walked out of the shop and left the garage on foot. Ms. R does not appear herself to have telephoned the police, but says she later mentioned the matter to her manager.

Ms. R says the shop was well lit. She was plainly able to have a clear view of the man, whom she identified as a regular customer. She gives a description of him in which, among other details, she describes him as about 36 years of age, 5 feet 8 inches in height, black, but not very dark skinned, more of a mixed race appearance.

Ms. R says that the same man came to the garage in the early hours of 27 February 2002, 27 March 2002, and 10 and 24 April 2002. On each of these occasions he was driving a car, the make and number of which Ms. R noted (the car). On the first occasion the man made as if to draw petrol, but did not do so: on the remaining occasions he did draw petrol; he then paid for his purchases normally and left the garage without incident. On each of the last three occasion he paid through the hatch; on all four occasions the man was normally dressed, and apart from taking out the pump but not drawing petrol on the first occasion, behaved normally.

Although Ms. R noted the number and make of the car on 27 February, she does not appear to have informed the police at that stage.

At about 3.15am on 7 May 2002, Ms. R says she heard somebody tapping on the window of the shop. She says it was the same man, who was naked from the waist up, and said he wanted to buy a Mars bar. He then began to walk backwards, and Ms. R saw that he was completely naked. She refused to serve him: he pointed his finger at her and said: " I'll fucking sort you out" . He then turned round and walked off. Once again, there was no car on the forecourt, and the man appeared to have arrived on foot.

Ms. R made a statement to the police, which is dated 9 May 2002, which she supplemented on 8 June 2002. At the conclusion of the latter statement she said: —

" I can say 100% that it is the same man that drove (the car). I would recognise him anywhere and this was confirmed during the second incident. There is no doubt in my mind that it is him.

In the light of subsequent events, these three sentences are, in my judgment, significant"

The car, which Ms. R had observed on the garage forecourt, was traced by the police to the claimant's employers, who had hired it for his use. There was no suggestion that anybody but the claimant had been driving the car at the relevant time."

24. Wall J then considered the interview which the claimant had with the police on 16 May 2002. Wall J then states : " As will be apparent from the content of the disclosure set out at paragraph 3 above, reliance was placed by the Chief Constable on the claimant's police interview. The claimant declined the opportunity to obtain legal advice prior to being interviewed, and did not want a solicitor to be present during the interview itself. He was interviewed by two women police officers. At no time did he make any admissions, and at other times he specifically denied that he was the man who had exposed himself to Ms. R.

The main point, which appears to have persuaded the interviewing officers that the claimant was the man who had exposed himself to Ms. R, was his initial reluctance categorically to deny that he was the man. He said he could not remember the incidents put to him, and that he did not think it was him. One of the officers said in terms during the interview that she thought the claimant needed help, that it was the claimant who exposed himself and that he was not telling the whole truth.

No criticism is made of the interview, and it is always difficult, when reading a transcript, to get the full flavour of it. It was plainly a robust interview, and the officers' scepticism about the claimant's answers emerges very clearly. However, I feel bound to say that in my judgment, a fair and objective reading of it does not warrant the reliance placed on it.

Firstly, although it was by his own choice, the claimant did not have a solicitor's advice before and during the interview. Judging by his statements in these proceedings, which contain a forthright denial of any form of involvement, the interview might well have taken a different course had the claimant received such advice or had his solicitor been present.

Secondly, however, although criticism is made of the claimant's apparent lack of memory, and the improbability of his being unable to remember walking around naked, the interview is largely conducted by the officers by means of asking him whether or not he remembered relevant events and dates. When Ms. R's version of the first alleged indecent exposure is put to him, he is asked " Do you remember anything about that incident?" and he answers: " Not really. I cannot remember that" . One of the officers then continues: —

Q …. I think I would remember if I went into a petrol station and I had nothing else underneath, I think I would remember that, it would stick out in my mind.

A Well, I cannot remember that.

Q Is it possible that you've done it?

A I don't think so.

Q Right, you see it does not make sense to me because I'd know for a fact if I had done something like that.

Any question about any incident which begins with the words: " do you remember doing x?" contains within it the implication that the person questioned has something to remember, and was, accordingly, the person who committed the act about which he or she is being questioned. In my judgement it is unsafe then to treat the answer " no" or " I can't remember" as incredible and to give it the same implication. As Mr. Squires points out, there are four occasions in the interview where the claimant categorically denies that he was the man who exposed himself to Ms. R. If (a) Ms. R's version of the events had been put to him; (b) had the claimant been asked: " was that you?" ; and (c) had the claimant then said: " I can't remember" or " I don't think so" , the passages in the interview might, I think, have had more force.

There is much in similar vein to the exchange I have set out in paragraph 38 above. As I have already stated, later in the interview the claimant denies in terms that he swore or

> was violent, or that he had threatened anybody. At this point he also denies in terms that he had gone into the garage naked at any time. He also makes the perfectly sensible point that since this was a garage, which he acknowledged he went to regularly, and since he could be traced by his car, why would he then go back naked and on foot? The questioning officer accepts that she cannot explain why somebody would go in naked and then go back as a normal customer.

Having now read the interview several times, I have come to the clear view that the summary of it in the " Other Relevant Information" section of the ECRC is partial, and carries with it an implication that the claimant was guilty, or at the very least the author of the summary believed him to be guilty. For reasons, which I will develop in due course, I agree with Mr. Squires that it would be wrong to place weight on the interview as reliable evidence tending towards the guilt of the claimant. In my judgment it is, putting the matter at the highest from the police perspective, neutral" . 25. Like Wall J, I have also read the interview several times. And the picture that I draw from the transcript is not as favourable to the claimant as that of Wall J. I recognise that his view is just as likely to be as correct as my own, but, at least in my judgement, it was not unreasonable for the police to come to the conclusion that the claimant had been identified by the police officers because of Ms. R having taken the number of the car she thought the person who had exposed himself had used. In the interview, which was certainly conducted robustly, X did not initially categorically deny that he was the person who was involved, as emphatically or as promptly as I would myself have expected having regard to the nature of the accusation. However, if the outcome of this appeal were to depend upon whether Wall J's or my assessment of the evidence was correct, I would certainly not interfere with a judgment based upon his impression of the evidence. However, I emphasise that it was the Chief Constable who, under the statutory provisions, had to form the " opinion" as to the relevance of the material which he considered.

Events after the police interview

26. As to the events after the interview, the position is as follows :

On 9 July 2002 the claimant was dismissed from his employment. The reasons for his dismissal are currently the subject of proceedings instituted by the claimant in the Employment Tribunal which have not yet been determined.

In the interview, the claimant agreed to take part in an identification parade. Parades were arranged for 16 August and 12 September 2002, but each time they could not proceed due to a lack of suitable participants. The claimant also agreed to take part in two other forms of identification testing, but these also could not be conducted due to the witness not being present or a lack of participants.

No identification parade was ultimately held before the claimant's trial, which was due to commence in the Magistrates' Court on 25 September 2002. Immediately prior to the hearing, however, it appears that the police conducted a covert identification in court and asked Ms. R to identify the perpetrator. She picked out someone who was not the claimant. Thereupon, the Crown Prosecution Service offered no evidence against the claimant and the claimant was acquitted.

The person whom Ms. R identified as the perpetrator was pointed out to the claimant by his solicitors. According to the claimant, the man identified was considerably lighter skinned than the claimant. He was perhaps of middle-eastern origin, while the claimant is Afro-Caribbean. He was also considerably shorter than the claimant (who is 6 feet tall) and did not resemble him in appearance.

When he was charged, the claimant was told he would receive a copy of the CCTV footage from the petrol station taken at the time of the alleged incident. This was not received, and the matter was pursued by the claimant through his solicitors. He was subsequently told that the footage had been displaced or lost during the course of the case. It thus remains unclear what, if any, information the CCTV footage contained.

The making of the ECRC

Following his dismissal from his employment as a social worker on 9 July 2002, the claimant applied for another social work position to a different social work agency. That agency sought information from the CRB about the claimant. On 14 February 2003 the Head of the West Midlands Police Central Information Unit, Ms. S, received an electronically transmitted request from the CRB to supply any " approved information" about the claimant. She instructed researchers to carry out standard checks of the local, designated, force computer systems.

The result, Ms. S says, was information relating to an offence of indecent exposure, which included an alleged threat to rape. Ms. S took the view that this clearly required further investigation, and sent

for the crime file. She recites the facts she obtained from the file, noting that the record of the claimant's interview stated that: —

“ He states that he cannot recall doing what has been alleged. He is asked if it is possible that he had done it and he states that he does not think so. [The claimant] is asked if there is any reason why he would not remember doing it and [the claimant] states that he cannot remember doing it and (he) would not remember doing it because he was suffering from stress and anxiety at this time and he went to see his doctor.” The claimant complains that this is also a misrepresentation of the interview. In relation to the final sentence of the extract cited in paragraph 48, he cites what he is recorded as actually saying in the interview, which was: —

> “ I cannot remember doing that, I mean I was under a bit of stress at that time, I had been to my doctor around that time you know” .

Ms. S refers to “ aborted identification parades following objections from the claimant through his legal representative” , and to the fact that it was nearly four months after she last saw the claimant that Ms. R was asked to identify him. She also makes reference to a previous incident in June 2001, when the claimant had been arrested following complaints by several teenage girls that a man had been running around naked in public. The claimant had been found in a clothed state by the police: the girls' evidence had been inconsistent, and no further action had been taken.

Ms. S then describes the exercise through which she went in preparing her advice for the Deputy Chief Constable about the disclosure of relevant information in the ECRC. She says she balanced the claimant's rights under Article 8 of the Convention with any potential risks posed to those with whom the claimant may have had contact in the course of his new employment. She points out (as I have already found) that there is no guidance on what “ might be relevant” under section 115(7) of the 1997 Act. However, in order to undertake the balancing exercise, she carried out what she describes as “ a risk assessment and a relevance test” . The mental check list of factors she applied were as follows: — • (a) the timeliness of any previous event to this disclosure;

- (b) the seriousness of the event;
- (c) the source and reliability of the non-conviction information held on the local system;
- (d) the age and details known about any victims;
- (e) if proceedings were instigated, why they were not continued;
- (f) does the information add anything to the PNC information already provided?
- (g) the subsequent actions of the applicant;
- (h) the retention of Part V material on local systems and weeding procedures;
- (i) the likely impact on the applicant if this information was disclosed; and
- (j) the potential impact on any vulnerable group if this information was not disclosed.

As to relevance, Ms. S says she “ restricted information to that which had a direct bearing on the potential risk posed by the claimant to the safety of children and vulnerable adults” . She eliminated information of a more general nature, and says she would never disclose any information that was not already known to the claimant.

Having applied her risk assessment and relevance test to the claimant's case, Ms. S then sent a memorandum to the Deputy Chief Constable, in a standard format, requesting his approval to disclose the information stated in the memorandum. She adds that she did not include details of the earlier arrest of the claimant on 24 June 2001 (see paragraph 50 above) but that this clearly featured in her decision-making “ when the disclosure relating to the offences between 11 December 2001 and 7 May 2002 was made” .

I do not wish to be critical of Ms. S. She was plainly doing her best in difficult circumstances and without the benefit of any proper guidelines. The factors, which she identifies, seem to me to be a creditable attempt to identify relevant considerations to be taken into account. It is, however, in my judgement, unfortunate that Ms.S's affidavit does not explain how she balanced the various factors she identifies; nor does it give her reasons for reaching her conclusion that the non-conviction material should be disclosed. It is equally significant, in my view, that she does not appear to have given the Deputy Chief Constable any reasons for the decision she had reached. All her memorandum to the Deputy Chief Constable does is to present him with the information in the form in which it ultimately appeared on the ECRC, and to ask him to approve its disclosure. The Deputy Chief Constable received the memorandum and the accompanying file of papers, which he read. He records that he was required to balance the claimant's Article 8 rights against any potential risks posed to those with whom the claimant may have future contact. He approved the disclosure in the

identical terms put forward by Ms. S. His reasons for making the disclosure are stated as follows: —

> " This decision was based on the fact that the information was relatively recent, it involved an allegation of threats to rape, there had been sufficient evidence to charge and the complainant was believed to be reliable and credible. I noted the duration of time that had elapsed between the last sighting of this suspect by the complainant and the unsuccessful covert identification procedure that led to the discontinuance of the case by the CPS. Before arriving at my final decision I weighed the likely impact on the claimant if this information was disclosed, against the potential impact on any vulnerable group if this information was not disclosed."

27. Here again I have the misfortune to differ from Wall J in relation to the efforts made by Ms S. I was myself impressed by the obvious care which was taken to prepare the matter for the Deputy Chief Constable who decided the question of disclosure on behalf of the Chief Constable. The Chief Constable was right to place before the Court the process by which the memorandum was prepared.

The Determination of the Issues

28. There are a number of separate issues to be determined and I will now seek to consider those issues, referring insofar as it is necessary to do so, to the reasoning of Wall J which was set out with conspicuous clarity.

The effect of the statutory framework on the common law requirement of fairness

29. This issue as to the relevance of the common law requirement of procedural fairness is less an issue before us than it was in the court below. My view, is that in this case, there is no difficulty in coming to the conclusion that the statute has not excluded the requirement of procedural fairness. The issue is as to what form that requirement should take, having regard to the statutory framework and the facts of this case. Wall J came to the conclusion that the duty to act fairly on the part of the Chief Constable included an obligation to permit the claimant to make representations in relation to what was proposed to be disclosed. In coming to his conclusion, Wall J accepted that the need to protect children and vulnerable adults from abuse by those employed to care for them, is a pressing social need. He added, however :

> " The nature and extent of the need will depend on the facts of the individual case. Moreover, it is precisely because the stakes are so high that the balancing exercise required by Article 8 of the Convention and the application of the common law principles must be rigorously carried out (see paragraph 90 of the judgment)."

He also approached the question of disclosure on the facts of the instant case " on the basis that there is no presumption against disclosure under section 115 and that the circumstances identified in section 115 , identify, in general terms, a pressing social need for disclosure." However, he added that " this does not mean that disclosure of additional, non-conviction information under section 115 is automatic, or that it is not surrounded by the stringent conditions of natural justice and procedural fairness" . (See paragraph 91 of the judgment).

30. Wall J also surveyed many of the relevant authorities in this area. In particular he received assistance from R v The Chief Constable of North Wales Police ex parte Thorpe [1999] QB 396 and R v A Local Authority in the Midlands ex parte LM [2000] 1 FLR 612 .

> 31. As to ex parte Thorpe , the present situation is very different, because the disclosure in that case had not been made in a statutory framework such as exists under section 115 . He referred to the fact that in the Divisional Court, Lord Bingham LCJ had accepted a submission made by the Secretary of State, that there was a strong presumption in that case that information should not be disclosed and that : " (1) … such a presumption being based on a recognition of (a) the potentially serious effect on the ability of convicted people to live a normal life; (b) the risk of violence to such people; and (c) the risk that disclosure might drive them underground. (2) There is a strong public interest in ensuring that police are able to disclose information about offenders where that is necessary for the prevention or detection of crime, or for the protection of young or other vulnerable people. (3) Each case should be considered carefully on its particular facts, assessing the risk posed by the individual offender; the vulnerability of those who may be at risk; and the impact of disclosure on the offender. In making such assessment, the police should normally consult other relevant agencies (such as social services and the probation service)."

32. Wall J then referred to the fact that Lord Bingham LCJ had added :

> " When, in the course of performing its public duties, a public body (such as a police force) comes into possession of information relating to a member of the public, being information not generally available and potentially damaging to that member of the public if disclosed, the body ought not to disclose such information save for the purpose of, and to the extent necessary for ,performance of its public duty or enabling some other public body to perform its public duty."

33. He also referred to my judgment in the same case in the Court of Appeal where I said (at [1999] QB 396 at 427) :

> " On behalf of the Home Secretary, Mr. Eadie advanced careful and well-balanced submissions as to how the duty (which he accepted existed) to act fairly should be exercised. He agreed that there are cases where it would be desirable, so as to ensure as far as possible that the police are acting on accurate information and so as to ensure the necessary degree of fairness, to afford individuals in the position of the applicants some opportunity to comment. However, whether such an opportunity should be afforded, and the form that it should take, depends on the particular circumstances of a particular former offender. In determining what should be done, the overriding priority must remain to protect the public, particularly children and other vulnerable people. The time scale involved may make it not possible to afford an opportunity to comment. The information in the police's hands may be of a category, which means that it is unlikely that the subject could be expected to add anything of value. The information available to the police may be information upon which the subject has already had an opportunity to comment. The information may be of a nature, which means it would be undesirable for it to be disclosed because of its confidentiality or sensitivity or on the grounds of public interest immunity. There is no formal procedure with which the police should be required to comply. The police should be allowed to act in a sensible, pragmatic way. It should be remembered that they have to rely upon the advice of experts and they should not be required to test opinions, which they have received from experts."

> 34. Having made those citations from ex parte Thorpe , Wall J referred to the helpful judgment of Dyson J in ex parte LM where he stated : " In my view, the guiding principles for the exercise of the power to disclose in the present case are those enunciated in R v Chief Constable of North Wales Police ex parte Thorpe . Each of the Respondent authorities had to consider the case on its own facts. A blanket approach was impermissible. Having regard to the sensitivity of the issues raised by the allegations of sexual impropriety made against LM, disclosure should only be made if there is a " pressing need" . Disclosure should be the exception, and not the rule. That is because the consequences of disclosure of such information for the subject of the allegations can be very damaging indeed. The facts of this case show how disclosure can lead to loss of employment and social ostracism, if not worse. Disclosure should, therefore, only be made if there is a pressing need for it …
>
> What was required of the police and the social services department in this case was that they examine the facts, and carry out the exercise of balancing the public interest in the need to protect children against the need to safeguard the right of an individual to a private life. How should the balancing exercise be carried out? All relevant factors must be considered. It is not possible or desirable to attempt to provide an exhaustive list. It seems to me, however, that the following factors will usually have to be considered by the police and the local authority that is contemplating disclosure of allegations of child sexual abuse to a third party."

35. Wall J then added :

> " The first factor, which Dyson J then identified, was the authority's, own belief as to the truth of the allegation. The greater the conviction that the allegation is true, he said, the more pressing the need for disclosure. The second factor was the interest of the third party in obtaining the information. The more intense the legitimacy of the interest in the third party in having the information, the more pressing the need to disclose is likely to be. The third factor was the degree of risk posed by the person if disclosure is not made."

36. While the statements of Lord Bingham LCJ, Dyson J and myself do indicate a general approach, in my judgement, to apply them to the present case, except with the utmost of caution, can be misleading. I am conscious that as a result Wall J may have been led astray by my judgment. First of all, as already indicated and as Wall J accepted, here there is no presumption against disclosure. On the contrary, the position is more positive in favour of disclosure than was indicated by Wall J. Having regard to the language of section 115 , the Chief Constable was under a duty to disclose if the information might be relevant, unless there was some good reason for not making such a disclosure.

37. This was obviously required by Parliament because it was important (for me 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 judgement 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. Furthermore, whatever the shortcomings in the interview by the police, the interview was extensive and the claimant had had during that interview ample opportunity to set out his account. More importantly, under section 117 , the claimant is given an opportunity to correct the certificate. An opportunity which he has not taken advantage of. In addition, as already indicated, the claimant was in a position to give his account of what happened to the person who it was most important should hear that account, namely his proposed employer.

39. If he had had an opportunity to make representations to the Chief Constable, that would only have assisted him if he could have persuaded the Chief Constable that there was no truth in the allegations. I do not see how being in a position to make representations could have achieved such an outcome. Before this Court and the Court below, the claimant has had an opportunity to make all the representations he could possibly make, and the only matter as it seems to me of significance, to which he could draw attention, was the difference between the features of the person whom he says Ms. S identified, and his own features. For this information to be of any significant value, it would require objective confirmation and, as far as I am aware, that objective confirmation is not available. For it to be obtained would require further police investigations, and activities of that sort are outside the requirements of fairness in the case of this statutory structure.

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. This being the situation, even if the Chief Constable was under an obligation to provide an opportunity for representations as contended, it is difficult to see how that opportunity could have achieved a situation where the need for disclosure did not still meet the " might be relevant" requirement.

The effect of Article 8(2)

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

42. Accepting, as already indicated, there was no want of fairness upon the Chief Constable, I do not accept that there can be any valid criticism of the manner in which the Deputy Chief Constable took the decision he did on behalf of the Chief Constable. He did consider the question of proportionality but remained of the opinion that there should be disclosure.

43. This conclusion of the Chief Constable is not surprising. If the claimant was guilty of the conduct

which was alleged, then that conduct would be highly relevant to the question of his employment with children or vulnerable adults. It was information of which the prospective employer should be aware, together with any additional information which the claimant might want to place before him. However, I recognise that despite the claimant's ability to have the certificate corrected, and his opportunity to put forward his explanation, it is probable that he still would not obtain employment, as it is unlikely the employer would be prepared to take the risk.

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 worse (as was pointed out by Lord Justice Mummery in argument) than it would be if the 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 my judgement, the making available of that information in accordance with the law, as occurred here, could not be contrary to Article 8(2) .

46. Wall J came to a different conclusion because he carefully reconsidered the material which was before the Chief Constable and, in addition, took into account material which was not before the Chief Constable. On that basis, he was prepared to conclude that this was not a case where the Chief Constable was entitled to rely on Article 8(2) and furthermore that, in reality, this was not a case in which the Chief Constable could have formed the opinion that he did. In my judgement, however, Wall J was not required, either on the grounds of fairness or because of Article 8(2) , to, in effect, form his own opinion as to what might be the relevance of the disclosed information.

47. The statute properly conferred the responsibility of forming an opinion on the Chief Constable and, having formed that opinion perfectly properly that certain information might be relevant, it is not for the courts to interfere. The Chief Constable should consider questions of fairness and if he had come to the conclusion in this case that the claimant should have an additional opportunity to reconsider the matter, then that would be perfectly in order. However, not having formed that opinion, there was no legal obligation on him to approach the claimant again and so he has to be judged on the material which was actually available to him.

48. In my judgement this appeal should be allowed and the orders made by Wall J set aside and the claim dismissed.

Lord Justice Mummery :

49. I agree that the appeal should be allowed for the reasons given by my Lord. 50. There are only two points on which I wish to comment. The first is the employment aspect of the context, in which the disclosure application form was completed and submitted by X, and in which the Chief Constable formed the opinion that the matters disclosed in the ECRC " might be relevant" for the specified purpose and " ought to be included in the certificate" under s 115(7) of the 1997 Act.

51. X applied for a position which would involve regularly caring for, training, supervising or being in sole charge of persons aged under 18. An ECRC was required for the purposes of an exempted question asked " in the course of considering X's application for the position." The person considering X's application was his prospective employer. He would make the critical decision whether to appoint X to a position, which would bring him into contact with the vulnerable person, whom the ERCR procedure is designed to protect.

52. The overall responsibilities of the prospective employer, including the responsibility for deciding the applicant's suitability for the 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 employer, the prospective employer had a legitimate interest in receiving it. He had more immediate and direct interest than anyone else in the availability to him of 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.

53. The prospective employer is also a person with rights and freedoms, which it may be necessary protect under Article 8(2) of the Convention.

54. We have not seen X's completed application form for the post. We have been told by Mr Squires, on his client's instructions, that X had already informed the prospective employer of the matters disclosed in the ECRC. In so doing, he clearly appreciated its potential relevance from the employer's point of view. This is acknowledged by his own evidence in these proceedings that the provision of the information in the ECRC " has had a devastating effect on me. It means that I have no hope of working in my chosen profession and career again." Good practice would normally require a prospective employer, who is responsible for appointments to positions covered by section 115 , to make inquiries about criminal charges, as well as about criminal convictions, as they " might" be relevant to the decision whether or not to make an appointment. Common sense also suggests that a suitable applicant for such a position would, in any case, take the precaution of volunteering information about such matters to a prospective employer. There is nothing to prevent the applicant from also making full representations to the prospective employer about why the matters disclosed are, in fact, irrelevant, should be disregarded and do not affect his suitability for the position for which he has applied.

55. Before providing information in the ECRC, the chief officer was required by section 115(7) to form an opinion that the information (a) " might be relevant" for the purpose of considering X's suitability for such a position, and (b) " ought to be included in the certificate." In the formation of his opinion on the possible relevance of the information, and whether there was a good reason for including it in the certificate, the pressing needs of prospective employers are relevant factors. In order to make properly informed decisions about appointments falling within the ECRC regime prospective employers need to have relevant information about the applicant seeking a position with the employer, which would bring an applicant into contact with the people the ECRC procedure was designed to protect.

56. I agree with my Lord that the making available of the information in the ECRC was in accordance with section 115 of the 1997 Act and was not contrary to Article 8 of the Convention. The effect of the judge's order would be to deprive the prospective employer of information which he, as well as the chief officer, consider " might be relevant" and " ought to be included in the certificate." That is an unacceptable state of affairs. If the information is disclosed, the prospective employer can evaluate it in the light of the applicant's representations denying involvement in the alleged offences, arrest and subsequent prosecution, and any other relevant material. If the information is not disclosed, and the applicant is given a clear ECRC by the chief officer, the prospective employer may be making his decision about the appointment on incomplete information and on a false basis.

57. The second point is a short one. This case was argued before Wall J and this court on the basis that Article 8 (1) of the Convention applied, and that the disclosure complained of in the ECRC violated X's right to respect for his private life. In paragraph 57 of his judgment, Wall J recorded that " it was common ground between counsel in the instant case that Article 8 is engaged on the facts of this case." As the matter was common ground, we have heard no argument on it. I simply wish to state that I must not be understood as agreeing that Article 8(1) applies to the information disclosed in the ECRC relating to a criminal charge and a prosecution, which was discontinued. I would need to hear full argument on the point before reaching a conclusion on it.

Lord Justice Laws :

58. I agree with both judgments.

Order: Appeal allowed; orders made in court below set aside; X's cross appeal dismissed; no order as to costs here or below save detailed assessment of appellant's costs; leave to appeal refused; liberty to apply in writing.