Neutral Citation Number: [2006] EWHC 579 (Admin)

Case No: CO/2295/2005

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24 March 2006

Before :

MR JUSTICE MUNBY

- -

Between :

R (B)	**Claimant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant**
- and -	
THE COMMISSIONER OF POLICE OF THE METROPOLIS	**Interested Party**

- -
- -

Mr Dan Squires (instructed by Hereward & Foster) for the claimant
Mr Steven Kovats (instructed by the Treasury Solicitor) for the defendant
The interested party was neither present nor represented

Hearing date: 15 February 2006

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

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Mr Justice Munby :

1. This is an application for judicial review which raises a question as to the meaning and effect of section 117 of the Police Act 1997 in relation to an enhanced criminal record certificate ("ECRC") issued under section 115. It is convenient, before I go any further, to set out the legal framework.

The legal framework

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

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

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

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

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

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

> (b) the person questioned shall not be subjected to any liability or otherwise prejudiced in law by reason of any failure to acknowledge or disclose a spent conviction or any circumstances ancillary to a spent conviction in his answer to the question."

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

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

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

6. Section 115(7) provides that:

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

7. Section 117, which is at the heart of the present case, is headed "Disputes about accuracy of certificates". It provides that:

> "(1) Where an applicant for a certificate under any of sections 112 to 116 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.
>
> (2) The Secretary of State shall consider any application under this section; and where he is of the opinion that the information in the certificate is inaccurate he shall issue a new certificate."

The functions of the Secretary of State are, of course, performed by the Criminal Records Bureau ("CRB").

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

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

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

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

> the claimant. This was the policy of the legislation in order to serve a pressing social need."

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

> "The disclosure, if made, would obviously interfere with his right to a private life ... Disclosure of allegations of child sex abuse is on the face of it a substantial interference with a person's right to a private life: see *R v Chief Constable of North Wales Police ex p Thorpe* per Buxton J at 416B–C, approved by the Court of Appeal at 429B".

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

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

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

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

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

13. He added at para [45]:

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

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

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

15. It will have been noted that at para [41] Lord Woolf CJ recognised that it might be that "the evidence made it so unlikely that the information was correct, that it ... would be disproportionate to disclose it." Earlier at para [37] he had said:

> "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."

He continued at paras [39]-[40]:

> "[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 R 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."

16. Lord Woolf CJ also considered section 117, albeit in passing. After the passage in para [37] which I have set out above, Lord Woof continued in para [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."

17. So much for the basic legal framework. I turn to the facts.

The facts

18. The claimant, B, has a daughter, X, who was born on 18 April 1986. She suffers from learning disabilities as a result of foetal alcohol syndrome. Whilst still a child X was the victim of sexual abuse. So much is clear and undisputed. What is disputed is whether B was himself an abuser of his daughter or whether he merely failed to protect her from abuse by another (or others). From the time her mother died in 1995 until the events I am about to describe B was X's sole carer.

19. I can pick up the story on 20 November 2000 when X, then 14½ years old, made a remark to a social worker about her father "shagging her". On 11 December 2000 B was questioned by the police. On 15 December 2000 X was raped by another man, Z, who was the son of a friend of B. The rape (of which Z was subsequently convicted) took place in B and X's family home whilst Z was staying with them. On 16 December 2000 X was removed from B's care. The same day she was jointly examined by Dr C and Dr W. On 18 December 2000 X was interviewed by the police. On 18 January 2001 B was arrested and interviewed by the police. He vehemently denied that he had raped his daughter. He was not charged. On 7 February 2001 the decision was taken not to prosecute him. On 12 February 2001 a letter was written to him indicating that no further action was to be taken in relation to the allegation of abuse.

20. By then care proceedings in relation to X had been started by the local authority under Part IV of the Children Act 1989 and she had been taken into foster care. A care order was made by consent in July 2001. X was placed in care. I have not seen the papers in the care proceedings but I understand that 'threshold' was conceded by B on the basis of failure to protect – I use the phrase in the sense familiar to family lawyers, not with any connotation of the various offences created by section 1 of the Children and Young Persons Act 1933 – specifically on the basis that B was unable to protect X from harm by others.

21. On 21 November 2003 an application was made by B and his employer for an enhanced criminal record certificate under section 115 of the Police Act 1997. The application form indicated that the position was as voluntary worker – "volunteer" – with what is in fact a charity. The application form also stated that "The position involves "working with children"" and that the category code for the position was 04, that is "A position whose normal duties involve unsupervised contact with children under arrangements made by a responsible person."

22. A certificate was issued on 24 August 2004. In addition to recording that B had no fewer than 25 convictions spanning the period from 1967, when he was sixteen, until 1995, the certificate contained the following "relevant information disclosed at the Chief Police(s) discretion":

> "[B] born [date], in December 2000, had his daughter [X] removed from his custody under the authority of a Police Protection Order. He was also in the same premises when his friend twice vaginally and anally raped his daughter. The friend was sentenced to 3 years imprisonment. [X] was placed on the Child Protection Register. In January 2001 the applicant was arrested following an allegation that he had raped his daughter. He denied all the allegations. This allegation was not proceeded with. There is evidence of the daughter having a history of anal abuse."

23. On 2 December 2004 B's solicitors sent to the CRB his 'Dispute Confirmation Form (AF15)' dated 1 December 2004 in which he set out the basis upon which he sought the correction of the certificate in accordance with section 117 of the Police Act 1997. He wrote:

> "By way of additional information, I would state the following:
>
> 1 On the Friday before Christmas 2001 my daughter was being examined at the ... Hospital. A Sgt [S] at some point in the evening told me that there was no evidence to suggest that I had interfered with my daughter. This was stated in the presence of a social worker from [the local authority] although I do not have his name.
>
> 2 In July 2002 no findings were made against me in the High Court.
>
> 3 I have a copy letter from my solicitors Joy Merriam and Company who acted for me at the time when the allegations were made. This letter confirms that, "no further action will be taken against me in relation to this matter and this is the end of the matter." Verification as to the authenticity of this latter can be provided by my existing solicitors, Hereward & Foster.
>
> 4 My daughter is not subject to Adult Protection Order and I have unrestricted access to her.
>
> 5 Accordingly, I consider that the information contained in the disclosure to be prejudicial and misleading. I therefore seek deletion as to any reference that I have at any time engaged in any form of sexual activity with my daughter."

24. On 13 January 2005 the CRB replied:

> "We have investigated the matter with our data sources and they are satisfied that the information held is correct and no further action will be taken regarding your dispute."

The facts: B's case

25. B's case on the facts, as set out in his counsel's very detailed and helpful skeleton argument (from which the following otherwise un-sourced quotations are taken), can be summarised as follows.

26. First, it is said that the evidence which suggested that B might have raped X was, even in January 2001 when he was arrested, "not strong". The evidence was two-fold. First, the comment X had made about his having 'shagged her'. But even at the time she made the remark in November 2000 "there was strong evidence to suggest it was a joke". (This contention is elaborated in some detail in paragraphs 10-11 of the skeleton argument.) Secondly, medical evidence that X exhibited signs of chronic anal abuse. As I have said, on 16 December 2000 X had been jointly examined by Dr C and Dr W. Both are highly expert in the relevant field of medical practice. Their examination revealed anal scarring. Dr C expressed the opinion in a report dated 17 January 2001 that this scarring, taken in combination with various other observed features, "strongly supports possibility of chronic anal abuse." It was this report that prompted the police to arrest B the next day, on 18 January 2001.

27. Secondly, it is said that "information emerged after January 2001 which made it still clearer that there was no substantial evidence from which it could be concluded that [B] had raped his daughter." It is said that, during the care proceedings, "evidence emerged which undermined significantly the two, already relatively weak, grounds for suspecting that [B] might have abused his daughter."

i) In the first place it is said that "further evidence emerged during the care proceedings suggesting that [X] had been joking when she said that her father had "shagged" her." (This contention is elaborated in paragraph 15 of the skeleton argument.)

ii) Secondly, "evidence emerged during the care proceedings which suggested that [X] had almost certainly been abused by someone other than her father. It was suggested during the care proceedings that [X] had been sexually active and might have been pressurised by third parties to engage in prostitution."

iii) Thirdly, "evidence also emerged during the care proceedings suggesting that [X] probably had been sexually abused by someone when she was a child … when she was very young" – at a time when she was living with her mother and "had little if any contact with her father."

iv) Fourthly, and in many ways most importantly, reliance is placed on Dr W's evidence in the care proceedings. Dr W in a report dated 26 June 2001 expressed the opinion that the appearance of the scarring (that is, its appearance when X was examined on 16 December 2000) "was not compatible with abuse having occurred within the previous 24-48 hours", the

> fact that the scar had healed indicating that "the scar is months old ... it could be months, it could be years". Pointing out that "anal abuse in children rarely causes any abnormal physical findings on examination" and that "therefore it is possible for a child to be anally abused on many occasions over a short or long period of time without there being any physical findings", Dr W opined that it was "impossible to know whether the anal abuse had been on one occasion or many occasions and over what period of time" and that the appearance of the scarring "does not exclude abuse having occurred in previous 24-48 hours ... and that abuse not leaving any abnormal findings."

28. The suggested importance of this is expressed in the skeleton argument as follows:

> "The significance of the medical evidence that emerged in June 2001 was that if [X] had indeed been repeatedly abused it might suggest that the culprit was someone who had considerable contact with her, which may have justified suspecting her father. If, however, she had been abused on a handful of occasions, or just once, there is no particular reason to suspect her father as opposed to anyone else."

29. Reliance is also placed by B on the local authority's actions, or rather inactions, in two different respects:

i) First, at the final hearing of the care proceedings the local authority did not seek any finding that B had sexually abused his daughter, merely a finding that he had failed to protect her from sexual abuse by others. B's solicitor, who has considerable experience of care cases (but who, it is to be noted, was not involved in the care proceedings), has filed a statement in which she opines that it was "likely that if the local authority had considered that there was sufficient evidence to sustain a finding that [B] had abused his daughter they would have sought it."

ii) Secondly, attention is drawn to the fact that X, who it will be appreciated has now turned 18, is spending long periods at home with B, seemingly without objection on the part of the local authority. "Given [X's] learning difficulties, one would have thought that if the local authority believed that [B] sexually abused her it would certainly have intervened."

This part of B's case is summarised in the assertions that "at the end of the lengthy care proceedings the local authority did not conclude that [B] had sexually abused [X]" and that "the fact that the local authority, which has intimate knowledge of the case after the care proceedings and continues to have contact with [X], has not intervened, speaks volumes about the conclusion it reached on the abuse allegation and the risk [B] poses to [X]."

30. The conclusion for which the skeleton argument contends is that "even if the evidence that was known in January 2001 might suggest there was a risk that [B] abused his daughter, events that have occurred and the evidence that has emerged since then suggests that it is most unlikely that that is the case. The evidence that now points towards [B] having sexually abused his daughter is all but non-existent".

The facts: the significance of the care proceedings

31. Given the way in which B puts his case on the facts, it may be helpful to spend a few moments considering the nature of the exercise the court is engaged in when hearing care proceedings.

32. Whether or not there are 'split' hearings (as in the more complex cases), the hearing of a care case involves two stages: the first the so-called 'threshold' or fact-finding stage and the second the so-called disposal stage. The importance of the initial, or fact-finding, stage is two-fold. First, it is the stage at which the court determines whether the 'threshold' is satisfied in accordance with section 31(2) of the Children Act 1989, in other words whether it has jurisdiction to go on to make a care order. The court cannot make a care order unless:

> "it is satisfied –
>
> (a) that the child concerned is suffering, or is likely to suffer, significant harm; and
>
> (b) that the harm, or likelihood of harm, is attributable to –
>
> (i) the care given to the child, or likely to be given to him if the order were not made, not being what it would be reasonable to expect a parent to give to him; or
>
> (ii) the child's being beyond parental control."

Secondly, it is the stage at which the court makes the primary factual findings on the basis of which it then proceeds to the disposal stage.

33. At the disposal stage (assuming threshold has been established) the court is concerned to decide what kind of order to make – a care order, a supervision order, some other kind of order or occasionally no order at all. If what is being sought by the local authority is a care order, the court is also concerned at the disposal stage (see section 31(3A)) to consider whether or not to approve the care plan prepared by the local authority in accordance with section 31A.

34. In cases of alleged sexual abuse (just as in many cases of alleged non-sexual physical abuse) there may not be too much difficulty in deciding whether there has been abuse. Often the much more difficult question is whether it is possible satisfactorily to

identify the perpetrator(s). The first stage is for the court to identify those who are to be considered as included in the pool of possible perpetrators. Someone is to be included in the pool of possible perpetrators if, but only if, there is a "real possibility" that he or she was the perpetrator, or one of the perpetrators, of the abuse, or part of the abuse: *North Yorkshire County Council v SA* [2003] EWCA Civ 839, [2003] 2 FLR 849, at para [26]. Having excluded any potential perpetrators on the basis that there is no real possibility that they caused any part of the abuse, the court is left with a pool of possible perpetrators. The next stage is to consider which of the possible perpetrators was in fact the (or a) perpetrator. For this purpose the standard of proof is the ordinary civil standard of the 'balance of probability' as defined and described by Lord Nicholls of Birkenhead in *In re H and others (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC 563 at page 586. This is the test both where the question is, Has there been abuse? and also (see *Re G (a child) (non-accidental injury: standard of proof)* [2001] 1 FCR 97 at paras [17]-[18]) where the question is, Who was the (or a) perpetrator? If the court is unable to identify which of the possible perpetrators was in fact the (or a) perpetrator, the court has to proceed to the disposal stage of the proceedings on the footing that each of those left in the pool is a possible perpetrator: see *In re O and another (Minors) (Care: Preliminary Hearing)* [2003] UKHL 18, [2004] 1 AC 523, at paras [27]-[28].

35. I have drawn attention to these matters, which are of course very familiar to those practising in the family courts, though perhaps less familiar to others, because they serve to bring out two points which need to be borne in mind when evaluating B's case. The first is readily apparent. There may be cases in which the court is able to find, to the relevant standard of proof, that J has sexually abused K. There may be cases in which the court is able positively to exonerate J from an allegation of sexual abuse; there may be material which enables the judge to find, not merely that the case against J is not proved but to go further and say that he is satisfied to the relevant standard of proof that J is not an abuser. Sometimes, however, in the nature of things the judge is unable to come to such clear-cut findings. Suspicion may remain, even if there is not a sufficient likelihood of J's guilt to include him in the pool of possible perpetrators. Or J may find himself in the pool of possible perpetrators, because there is a "real possibility" that he is a perpetrator, but in circumstances where, even at the end of what may a long trial, there is insufficient evidence to enable the judge to make a finding to the relevant standard of proof either that J is a perpetrator or to exonerate him positively from the allegation. Not infrequently the outcome of a 'threshold' or fact-finding hearing is to leave the identity of the perpetrator(s) uncertain.

36. The other point is, perhaps, less obviously apparent. Although care proceedings are inquisitorial, and often involve a detailed investigation of a child's home life and history, they are not a general inquiry into everything that has happened. The local authority has, in the final analysis, two concerns, both of course directed to the child's protection and welfare: first, to establish 'threshold' so that the court has jurisdiction to make a care order and, second, to establish such facts as will persuade the court not merely to make a care order but also to approve the particular plan for the child that the local authority has produced under section 31A. In some cases the local authority will wish to go further. It may seek to persuade the judge to make additional factual findings which it is thought are important either for the child or, possibly, for another child of the family. But often there will be no present need, and if no need no

justification, for exploring, perhaps at some length and at great cost and ultimately without any clear conclusion, matters the proof of which is not necessary to enable the local authority to obtain the order it seeks. A local authority may have little difficulty in proving sexual abuse. It may have more or less well-founded suspicions that a parent is the abuser. But if the parents are prepared to concede threshold on the basis of failure to protect, and do not resist the local authority's plan for the removal of the child into long-term foster care, the local authority may conclude that there is nothing, or nothing sufficient, to be gained by pressing on with what it knows may be the unsuccessful attempt to prove that the parent was an abuser. And even if the local authority is initially minded to press on, the judge in the proper exercise of his case management powers may conclude that, on balance, and for a variety of reasons, the possible advantages of the exercise are outweighed by the disadvantages.

37. If I seem to belabour these points it is because I think that B is seeking to read much more into what seems to have been the local authority's stance in this case than the facts before me warrant. It is clear that the local authority did not, at the end of the day, seek to pursue the allegation that B had abused his daughter. The local authority was content to obtain a consent order. It may be, as B would have it, that this reflects no more than the local authority's assessment of the strengths and weaknesses of its case against B. But it may be – and the material before me does not show us what the basis of its thinking actually was – that the local authority adopted an essentially pragmatic approach. The material before me is consistent with the view, but not consistent only with the view, that the reason why the local authority did not proceed was because it recognised that it was, as B would have it, most unlikely that he had abused his daughter, or even because it thought that the evidence supporting that contention was, as B asserts, all but non-existent. But there is nothing in the materials I have been shown to demonstrate that that was in fact the local authority's view. And even if it was, it would not necessarily carry B very far, given what Lord Woolf CJ said in *R (X) v Chief Constable of the West Midlands Police* [2004] EWCA Civ 1968, [2005] 1 WLR 65.

38. That is a point to which I must return in due course. But at this stage there is one final point to make about the facts as B seeks to analyse them. The truth is that the medical evidence is nothing like so strongly exculpatory as he would like to have me believe. Indeed there is not in reality anything, even in Dr W's evidence, which B can point to as exculpating him. I can see that Dr C's evidence goes further than Dr W's, but there is not, as it seems to me, any necessary inconsistency between what they are saying. It is merely that Dr W was more cautious in the conclusions she derived from the joint examination than Dr C. More significantly, Dr W's account of the existence of the healed anal scar – which she said could not have been caused by anything done to X the day before by Z – was plainly, on the face of it, evidence of anal abuse in the past, and, moreover, anal abuse some time in the past since the scar was, in her opinion, months old at least. Moreover, her evidence was that a child could be anally abused "on many occasions" without there being "any physical findings". Even on Dr W's findings, therefore, there was evidence of anal abuse which could not be attributed to anything done by Z on 15 December 2000. The difference between Dr C and Dr W really came down to this, that the observed physical features were in Dr W's view no more than consistent with anal abuse on more than one occasion in the past whereas in Dr C's view they strongly supported the possibility of chronic anal abuse. It is one

thing to say that, in the light of this medical evidence, there might have been little chance of persuading a judge to the rigorous standard required by *In re H and others (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC 563 that B had sexually abused his daughter; it is a very different thing to say that the medical evidence was such as virtually to rule B out as a perpetrator.

The proceedings

39. On 12 April 2005 B commenced judicial review proceedings against both the Commissioner of the Metropolitan Police and the Secretary of State for the Home Department.

40. On 31 May 2005 Ouseley J refused permission, stating that the decision in *R (X) v Chief Constable of the West Midlands Police* [2004] EWCA Civ 1068, [2005] 1 WLR 65, was wholly against the claim. B renewed his application, which came before Bean J on 17 August 2005. He refused permission as against the Commissioner but granted permission as against the Secretary of State: *R (B) v The Commissioner for the Metropolitan Police* [2005] EWHC 3212 (Admin). The Commissioner thereafter became an interested party.

41. B's case against the Secretary of State as set out in the grounds attached to his Form N461 is two-fold: first, that the CRB failed to reach an independent opinion on the accuracy of the allegations contained in the certificate as required by section 117 and misdirected itself as to its duties pursuant to section 117 and, second, that it failed to use its powers under section 117 to remove the allegations from the certificate notwithstanding that their disclosure breached Article 8 of the Convention.

42. The case came on for hearing before me on 15 February 2006. Mr Dan Squires appeared on behalf of B, Mr Steven Kovats on behalf of the Secretary of State. The Commissioner was neither present nor represented, but had filed a skeleton argument by Ms Fiona Barton.

The point of principle

43. The point of principle concerns the proper construction of the words "the information in the certificate is inaccurate" in section 117(2) of the Police Act 1997.

44. B's case is that it is not enough that the information in the certificate is accurate, in the sense that it accurately records an allegation; where the information consists of the recording of an allegation, the information will only be "accurate", he says, if the allegation itself is true. B's case in substance is that, although the certificate has accurately recorded the fact that the allegations were made, there is in fact no substance to the allegations themselves. Mr Squires helpfully summarises the difference between the parties as being that whereas B argues that under such

circumstances section 117 requires the Secretary of State to form an opinion on the accuracy of the underlying allegations, the Secretary of State, by contrast, contends that he is required by section 117 to determine only whether the fact that the allegations were made against an individual has been accurately recorded, and that he has no duty to consider whether the underlying allegations have any foundation.

45. In my judgment the Secretary of State's view as to the meaning of section 117(2) is correct and B's is wrong. There are various matters all of which, as it seems to me, point in this direction.

46. First, there is the very wording of section 117(2) itself. Section 117(2) focuses attention on the question whether the "information" in the certificate is "accurate", not whether it is "relevant" – the word used in section 115(7) – nor whether it is "truthful" or "true". If one asks oneself, What is the "information" which is contained in the certificate in this case? the answer is clear. It is (I quote the critical part of the certificate) that:

> "In January 2001 the applicant was arrested following an allegation that he had raped his daughter. He denied all the allegations. This allegation was not proceeded with. There is evidence of the daughter having a history of anal abuse."

If one asks oneself, Is that information "accurate"? the answer again is clear. The certificate sets out a number of facts. None of these facts is, or could be, disputed by B. They are all factually accurate. So the information in the certificate is accurate.

47. The point is a short one. Assume that a certificate states that "L has alleged that M raped N." If L has indeed alleged that M raped N, then the information in the certificate is accurate, whether L is telling the truth or not. If, on the other hand, L has alleged that M raped Q, then the information in the certificate is inaccurate. In the first case there is nothing for the Secretary of State to do under section 117(2). In the second case the Secretary of State can, and no doubt will, issue a new certificate under section 117(2) setting out the corrected and now accurate information that "L has alleged that M raped Q."

48. I make clear, so that there can be no misunderstanding, that the Secretary of State's powers under section 117(2) are not, of course, confined to that part of the certificate which contains the information supplied by the chief officer of police under section 115(7). The Secretary of State's powers extend to any of the "information" contained in the certificate. Thus as Mr Squires correctly submits, section 117(2) will apply if the certificate contains inaccuracies in relation to such matters as the applicant's name, date of birth or employment.

49. Secondly, there is the way in which section 117(2) fits into the overall statutory scheme. It is important to remember what the purpose of the legislation is. As

explained by Lord Woolf CJ in *R (X) v Chief Constable of the West Midlands Police* [2004] EWCA Civ 1968, [2005] 1 WLR 65, at para [20], it is, as we have seen:

> "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."

He explained the legislative policy at para [37]:

> "it [is] 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."

50. Moreover, the legislative scheme provides for the decision whether information "might be true", and therefore whether it ought to be disclosed, to be taken not by the Secretary of State but by the chief officer of police. As Lord Woolf CJ said in *R (X) v Chief Constable of the West Midlands Police* [2004] EWCA Civ 1968, [2005] 1 WLR 65, at paras [18] and [36]:

> "[18] … 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 …
>
> [36] … Having regard to the language of section 115, the Chief Constable was under a duty to disclose if the information might be relevant, unless there was some good reason for not making such a disclosure."

51. In short, the legislative policy (and one which, as we have seen, is Convention compliant) is that information which "might be true" should be disclosed, that the decision whether or not to disclose is one for the chief officer of police, and that the ultimate decision as to what use to make of the information is one for the prospective employer.

52. B's contention as to the true meaning of section 117(2) conflicts with the legislative policy and confuses the roles of the Secretary of State and the chief officer of police. The acid test of whether information is to be disclosed is not whether it is true but whether it might be "relevant". It is enough that the information "might be true". To

assert, as B does, that it is the function of the Secretary of State under section 117(2) to form an opinion on the accuracy of the underlying allegations is on the face of it to step outside the legislative policy. For it could potentially deprive the prospective employer of information which is relevant, because it might be true, merely because the Secretary of State had formed a certain opinion as to accuracy of the underlying allegations. If, on the other hand, all that is being said is that it is the function of the Secretary of State to form an opinion on the accuracy of the underlying allegations, in the sense of deciding whether they might be true, then that is to confuse the roles of the Secretary of State and the chief officer of police and, in effect, to set the Secretary of State up as a court of appeal from the chief officer of police.

53. As Mr Kovats correctly observes, whether information might be relevant for the purposes for which the certificate was requested, and whether the information ought to be included in the certificate, are matters which Parliament has decided are to be determined by the chief officer of police. Any complaint by B that the allegations recorded against him are so flimsy and/or of such little relevance to the purpose for which the certificate is required that they ought not to be included in the certificate, needs, as Mr Kovats submits, to be directed against the chief officer of police, not against the Secretary of State.

54. In the present case, of course, B did precisely that, seeking to challenge the decision of the Commissioner as well as the decision of the Secretary of State. But he was refused permission to apply for judicial review against the Commissioner, both by Ouseley J and again by Bean J, on the simple ground, with which I entirely agree, that any such claim was precluded by the decision in *R (X) v Chief Constable of the West Midlands Police* [2004] EWCA Civ 1968, [2005] 1 WLR 65. In my judgment, the Commissioner's decision to include the challenged material in the certificate is unimpeachable. The Commissioner, in my judgment, was plainly entitled to conclude that the allegation against B was not so obviously devoid of substance that it ought not to be disclosed. He was, in my judgment, entitled to conclude that the allegation might be true, in the sense in which that phrase was used by Lord Woolf CJ in *R (X) v Chief Constable of the West Midlands Police* [2004] EWCA Civ 1968, [2005] 1 WLR 65, and accordingly entitled to conclude that it "might be relevant" within the meaning of section 115(7). I refer back in this context to what I have already said in paragraphs [37]-[38] above.

55. Explaining why he was refusing B permission to apply for judicial review against the Commissioner, Bean J said this ([2005] EWHC 3212 (Admin) at paras [5]-[6]):

> "[5] ... there was independent evidence from a consultant paediatrician which, if accepted, tended to support the truth of the allegations. It cannot, in my view, be said that the evidence of possible wrongdoing was so weak, so unreliable or so trifling that it cannot be true or, putting it the other way round, that it does not meet the test laid down by the Lord Chief Justice that it "only might be true". Mr Squires, however, seeks to distinguish the case of X on this basis: that the allegations against his client were made more than four years ago. The

> ECRC was applied for and issued in 2004. The position has changed, in that care proceedings brought in respect of the claimant's daughter were eventually dealt with on the basis not that the claimant had himself abused his daughter, but rather that he had, as in his evidence he accepts he had, failed to protect her from a sexual offence committed by a friend or acquaintance. Mr Squires argues that this and other factual points which he wishes to press tend to show that the allegations against his client were at any rate now are so weak as to be incapable of belief.
>
> [6] I regret to say that I am not persuaded. It may be that there are exceptional cases where supervening events require, as a matter of law, that the chief officer decline to include allegations originally made in an ECRC because it is no longer possible to reasonably say they might be true. An example might be where a court finds that an allegation was manifestly untrue. If a chief officer of police failed to take account of that, that might well be judiciary reviewable notwithstanding the decision in X. But it does not seem to me that there is in reality anything to distinguish between the Commissioner's position in the present case from that of the Chief Constable in the case of X. Accordingly, while I have sympathy with the case which Mr Squires seeks to put forward against the Commissioner, it does not seem to me, in the light of X, that it is arguable. I therefore refuse permission as against the Commissioner."

I respectfully agree.

56. Thirdly, the Secretary of State has neither the power nor the resources nor, it might be thought, the necessary skill and expertise to conduct police-type inquiries into the weight, relevance or truthfulness of allegations. Section 115(7) specifically imposes on the chief officer of police the duty of evaluating whether the information "might be relevant" and, if so, whether it "ought to be included in the certificate." In contrast, the Secretary of State's only function – and a function exercisable, as Mr Kovats points out, only *after* the certificate has been issued – is to consider whether the information is "accurate". There is nothing in section 117(2), or indeed elsewhere in Part V of the Police Act 1997, to suggest that the Secretary of State has the kind of functions which B's contentions would necessarily attribute to him. Moreover, as Miss Stern, appearing at that stage for the Secretary of State, put it in the course of her submissions to Bean J (see [2005] EWHC 3212 (Admin) at para [13]), the CRB, being a bureau of record rather than an investigative body, is ill-equipped to perform any more extensive task than correcting simple errors of fact.

57. This is not just forensic assertion. As Mr Nicholas Snelham, the Head of Policy at the CRB, explained in his witness statement filed following the hearing before Bean J:

> "I and my colleagues at the CRB regard the question of what information should be included in an ECRC under section 115(7), as distinct from information obtained from 'central records', as one for the chief officer of police and not for us. Indeed, we do not have any resources which would enable us to form any reliable view upon the relevance of the material so included, or upon whether or not it ought to be included in an ECRC. Those are matters which depend on forensic analysis by the police bearing in mind the context which their files, and personal experience, provides. We have no power to require such information to be provided to us, and even if it were, it is unlikely that we would have the expertise or skills reliably to makes such assessments."

58. Mr Squires seeks to escape from this conclusion with a number of arguments.

59. First, he submits that the part of Lord Woolf CJ's judgment in *R (X) v Chief Constable of the West Midlands Police* [2004] EWCA Civ 1968, [2005] 1 WLR 65, at para [38] which I have set out in paragraph [16] above "requires" that B's reading of section 117(2) be followed. I do not agree. I readily accept that what Lord Woolf CJ said about section 117 is not some peripheral or throwaway remark and that it is part of his reasoning in rejecting the argument in that case that there was a right to make representations to the police. (That said, I have been shown the skeleton arguments that were before the Court of Appeal and they show that, as I was told, there were no submissions from any of the counsel involved either as to the significance, let alone as to the meaning, of section 117.) I can accordingly accept that Lord Woolf CJ was accepting that there is a right to make representations to the CRB, albeit only after the certificate has been issued. But that, after all, is clear from section 117(1) itself. However, there is nothing in what Lord Woolf CJ said to suggest that he had in mind the undertaking by the CRB of the kind of task for which B contends. On the contrary, he did no more than summarise the statutory language, pointing out that section 117 affords the applicant an opportunity to "correct" the certificate. Despite Mr Squires's valiant arguments to the contrary, there is, in my judgment, nothing in what Lord Woolf CJ said to show that the CRB's functions under section 117 extend beyond checking the accuracy with which the allegations have been recorded or extend to evaluating the underlying accuracy of the allegations themselves.

60. Secondly, Mr Squires submits that a different reading of section 115(7) is required if there is not to be a breach of Article 8. He submits that it is "possible" for the purposes of section 3(1) of the Human Rights Act 1998 to interpret section 117 as he would have me read it and that it is necessary to do so in order to avoid a breach of Article 8. He relies upon the well-known observations of Lord Nicholls of Birkenhead in *In re S (Minors) (Care Order: Implementation of Care Plan)* [2002] UKHL 10, [2002] 2 AC 291, at para [37].

61. As I have already said, I am quite content to assume (without deciding) that Article 8 is here engaged in both of the respects referred to in paragraph [10] above. But there

are, as it seems to me, two simple and conclusive reasons why Mr Squires's arguments based on Article 8 must fail. The first flows from the analysis of the impact of Article 8 undertaken by Lord Woolf CJ in *R (X) v Chief Constable of the West Midlands Police* [2004] EWCA Civ 1968, [2005] 1 WLR 65. The statutory scheme is Convention compliant and, as Lord Woolf CJ put it at para [41], "meets the requirements of article 8(2)". More specifically, as Lord Woolf CJ spelled out in paras [37] and [41] (see the relevant passages set out in paragraphs [9], [12] and [15] above), the statutory scheme is Convention compliant notwithstanding (a) that the information disclosed only "might" be true and (b) that there is no opportunity to make representations prior to the information being disclosed. There is no need to read section 117(2) in the way for which Mr Squires contends in order to make it Convention compliant. It is, in my judgment, Convention compliant read in the way in which Mr Kovats would have me read it and the way in which I believe it should be read.

62. The second objection to Mr Squires's argument flows from the fact that B has, quite properly in my judgment, been refused permission to apply for judicial review of the Commissioner's decision. It follows from this, as Mr Kovats correctly submits, that on the facts of the case the supply to B's employer of the information contained in the certificate was proportionate in all the circumstances. As Mr Kovats puts it, the refusal of permission to apply for judicial review of the Commissioner's decision is fatal to B's case against the Secretary of State insofar as it is based on Article 8.

63. Thirdly, and finally, Mr Squires submits that the CRB's current practice is, on the Secretary of State's reading of section 117, *ultra vires*. I do not agree.

64. The CRB's practice, as explained by Mr Snelham, is as follows:

> "However, not withstanding our limited powers and obligations under section 117, as a matter of practice the CRB does process, but does not determine, disputes which go to the relevance of the material in the ECRC, the truth or justification for the matters which are reflected in the ECRC, and to the question of whether or not it ought to have been included in the ECRC. If, in any particular case, the chief officer of police, having considered such dispute, referred on to him by the CRB, alters his view as to whether or not the information was relevant or should have been included in an ECRC, then the CRB would be bound under section 117(2) to issue a new ECRC. This is because the ECRC as already issued would no longer accurately reflect the information now provided by the chief officer of police under section 115(7). The information in the certificate would therefore be inaccurate, as under section 115(6) the information in the certificate should be that which has been provided by a chief officer of police under section 115(7)."

65. As I understand it, Mr Squires's argument is that it will, on the Secretary of State's reading of section 117, be *ultra vires* the CRB to issue a new certificate in these circumstances. The CRB's powers under section 117(2) are triggered, he says, only if the applicant applies for a new certificate in accordance with section 117(1) because he "believes that the information contained in the certificate is inaccurate", and that will not be so, on the Secretary of State's interpretation of the word "inaccurate", if the applicant's real complaint is, as in B's case, that the allegations are unfounded. Put shortly, Mr Squires submits that the power to issue a new certificate under section 117(2) is triggered – and triggered only – by an application made under section 117(1).

66. I do not accept this argument, which in my judgment is based on a mis-reading of section 117(2). The power to issue a new certificate conferred on the CRB by the second part of section 117(2) – "and where he is of the opinion that the information in the certificate is inaccurate he shall issue a new certificate" – is not, as a matter of language, confined to circumstances where there has been an application under section 117(1). I see no reason why, for example, if a chief officer of police recognises that he has made a mistake and brings that fact to the attention of the CRB of his own motion and without any complaint from the applicant, the CRB should not be empowered under section 117(2) to issue a new certificate, always assuming, of course, that it is "of the opinion that the information in the [original] certificate is inaccurate". The process described by Mr Snelham is, in my judgment, and essentially for the reasons he gives, both *intra vires* the CRB and entirely lawful. And the same result follows if the chief officer of police has changed his mind because additional information has come to light since the original certificate was issued. Section 117(2) empowers the CRB to issue a new certificate if it is of opinion that the information in the original certificate "is" inaccurate. The statutory focus is on whether the information "is" inaccurate – ie, is, as at the date when the CRB forms its opinion, inaccurate – not whether it was inaccurate when originally supplied to the CRB by the chief officer of police.

Conclusion

67. This application for judicial review fails and must be dismissed.

68. In my judgment the CRB does not have the functions under section 117 that Mr Squires seeks to attribute to it. Section 117 means what the Secretary of State says that it means, not what B would like it to mean.

69. There are two final matters I should add.

70. The first is that, even if Mr Squires were correct in his reading of section 117, it would almost certainly do B no good. The totality of the material which is now available does not, as I have sought to explain, in any way exculpate B. The Commissioner was entitled, as I have said, to decide as he did. And there is no reason to believe that the CRB, if it had the duty of re-considering the matter on the merits

and re-evaluating all the material which is now available, would come to any materially different conclusion.

71. The other matter is this. Because of the extensive basis upon which Mr Squires put his case I have not had occasion to consider the precise limits of the CRB's power under section 117 to correct inaccuracies in a certificate. Plainly that power extends to the kind of case which I referred to in paragraph [47] above and to the kind of case exemplified by Bean J's reference (see [2005] EWHC 3212 (Admin) at para [13]) to an incorrect statement that "DC Jones believes that the applicant is a paedophile" when it is in fact DC Smith who has that belief. But the powers of the CRB are not, in my judgment, quite so limited.

72. 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, but 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 been convicted." In such a case the original certificate would, in my judgment, be "inaccurate" and the CRB would accordingly have the power under section 117 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.