Case No: CO/8186/2012

Neutral Citation Number: [2013] EWHC 869 (Admin)

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

The Rolls Building
7 Rolls Building
Fetter Lane
London
EC4A 1NL

Date: 19/04/2013

Before:

THE HONOURABLE MR JUSTICE STUART-SMITH

- -

Between:

THE QUEEN (on the application of L)	**Claimant**
-and-	
THE CHIEF CONSTABLE OF CUMBRIA CONSTABULARY	**Defendant**

- -
- -

Stephen Broach (instructed by **Goodmans Law**) for the **Claimant**
Charlotte Ventham (instructed by **Cumbria Police Legal Services**) for the **Defendant**

Hearing dates: 5 March 2013

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Judgment

Mr Justice Stuart-Smith:

Introduction

1. The claimant is an experienced secondary school teacher aged in his mid-forties. The defendant is the Chief Constable of Cumbria Constabulary and is therefore responsible for the provision of information for Enhanced Criminal Records Certificates pursuant to the Police Act 1997 as amended. By these proceedings the Claimant challenges the defendant's decision, communicated by letters dated 15 May and 27 July 2012, not to remove contested information from the "other relevant information" section of the claimant's Enhanced Criminal Record Certificate ("ECRC"). He contends that the provision of the contested information and the refusal to remove it unjustifiably infringed his right to private life contrary to Article 8 of the European Convention on Human Rights and was therefore unlawful. If successful in his challenge the Claimant seeks damages for the breach. This judgment addresses the issue of breach but not the issue of damages.

2. Permission to apply for Judicial Review was granted by Lang J on 15 January 2013. When giving permission, Lang J made an order pursuant to CPR Rule 39.2 that the Claimant should be referred to by the letter L in any public documents in these proceedings and that there should be no publication whether in electronic format, or hard print, of the name or address of the claimant or of any particulars likely to lead to the identification of the claimant without the leave of the court. That order is extended and remains in force as a result of this judgment.

3. This judgment:

    i) Addresses the relevant principles to be applied in this case at [4-28];

    ii) Summarises the factual background at [29-67];

    iii) Discusses the application of the relevant principles to the facts of the case at [68-91];

    iv) Concludes at [92] that, for the reasons set out in the judgment, L's challenge succeeds.

The Relevant Principles

4. The principles to be applied on an application like this are the subject of high authority and are now well established.

5. The power and duty to provide ECRCs derives from s.113B of the Police Act 1997. That section has been the subject of amendment from time to time. Between 28 February 2009 and 9 February 2012, which is the material period for present purposes, it stated as follows:

> "113B Enhanced criminal record certificates
>
> (1) The Secretary of State must issue an enhanced criminal record certificate to any individual who-

(a) Makes an application […], and

(b) Pays in the prescribed manner any prescribed fee

…

(3) An enhanced criminal record certificate is a certificate which-

(a) gives the prescribed details of every relevant matter relating to the applicant which is recorded in central records and any information provided in accordance with subsection (4), or

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

(4) Before issuing an enhanced criminal record certificate the secretary of state must request the chief officer of every relevant police force to provide any information which, in the chief officer's opinion-

(a) might be relevant for the purpose described in the statement under subsection (2), and

(b) ought to be included in the certificate. "

6. Where an applicant who challenges the legality of inclusion of information in an ECRC relies upon Article 8, the issue for the Court is whether there has been an interference with the applicant's right to private life and, if such interference has occurred, whether it is lawful. In deciding whether it is lawful or not, the court scrutinises the decision and any justification advanced for it to see whether there was sufficient justification for the interference with the applicant's private life: see *Huang v Home Secretary* [2007] 2 AC 167 at [13]. The outcome of the court's enquiry is essentially a binary decision: was any interference lawful or not? It is no part of the courts purpose to go further and to direct the provider of an ECRC precisely how he might edit or adjust the information so as to act lawfully. If the court rules that the decision under challenge is unlawful, it is then for the Chief Constable to take a fresh decision.

7. The nature of the court's enquiry has been variously described. In *R (SB) v Governers of Denbigh High School* [2007] 1 AC 100 Lord Bingham of Cornhill said at [30]:

> "It is clear that the court's approach to an issue of proportionality under the Convention must go beyond that traditionally adopted to judicial review in a domestic setting . . . . There is no shift to a merits review, but the intensity of review is greater than was previously appropriate, and greater even than the heightened scrutiny test . . . . The domestic court must now make a value judgment, an evaluation, by reference to the circumstances prevailing at the relevant time: *Wilson v First*
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> *County Trust (No 2)* [2004] 1 AC 816, paras 62-67. Proportionality must be judged objectively, by the court . . . ."

8. Further guidance on the nature of the court's enquiry is provided by *Belfast City Council v Miss Behavin' Limited* [2007] 1 WLR 1420 at [31] per Baroness Hale of Richmond and *R (Aguilar Quila) v Home Secretary* [2012] 1 AC 621 at [44 – 46] per Lord Wilson. That guidance establishes that:

   i) In human rights adjudication, the court is concerned whether the human rights of the claimant have in fact been infringed, not with whether the administrative decision maker properly took them into account;

   ii) The burden is upon the Defendant to establish that any interference with the rights of the claimant under article 8 was justified.

9. The leading authority on the provision of ECRCs is *R (L) v Commissioner of Police of the Metropolis* [2010] 1 AC 410. At [24] Lord Hope explained why ECRCs which are typically part of the process of recruitment for employment affect private life:

> "In the context of this case it is sufficient to note that it has been recognised that respect for private life comprises, to a certain degree, the right to establish and develop relationships with other human beings;… . Excluding a person from employment in her chosen field is liable to affect her ability to develop relationships with others, and the problems that this creates as regards the possibility of earning a living can have serious repercussions on the enjoyment of her private life:… . She is entitled also to have her good name and reputation protected; As Baroness Hale said in *R (Wright) v Secretary of State for Health* [2009] AC 739, para 36 the fact that a person has been excluded from employment is likely to get about and, if it does, the stigma will be considerable. "

10. The speeches of Lord Hope and Lord Neuberger both addressed the balancing act which has to be carried out by the Defendant when considering what to include in an ECRC. At [42] Lord Hope said:

> "So the issue is essentially one of proportionality. On the one hand there is a pressing social need that children and vulnerable adults should be protected against the risk of harm. On the other there is the Applicant's right to respect for her private life. It is of the greatest importance that the balance between these two considerations is struck in the right place."

11. The Supreme Court recognised that the effects of an adverse ECRC may be very serious for an applicant. At [43] Lord Hope highlighted the likely effects of the release of sensitive information on the applicant's opportunities for employment and said:

> "… it is no answer to these concerns that the ECRC is issued on the application of the persons concerned. It is true that they can choose not to apply for a position of the kind that requires such a certificate. But they have, in reality no free choice in the matter if an employer in their chosen profession insists, as he is entitled to, on an ECRC. The answer to the question whether there is any relevant information is likely to determine the outcome of their job application. If relevant information is disclosed they may as a result be cut off from work for which they have considerable training and experience. In some cases they could be excluded permanently from the only work which is likely to be available to them. They consent to the application, but only on the basis that their right to private life is respected.

12. At [75] Lord Neuberger made the same point saying:

> "It seems to me realistic to assume that in the majority of cases, it is likely that an adverse ECRC,…will represent something close to a killer blow to the hopes of a person who aspires to any post which falls within the scope of the section."

13. As the facts of the present case show, this assessment by the Supreme Court is no understatement. It is, almost self evidently, no answer to say that it is for the prospective employer who receives the adverse ECRC to determine whether the information is either well founded or of sufficient seriousness to justify the withholding of an offer of employment. The reality is, as Lord Neuberger said, that an adverse ECRC is likely to be a killer blow, even if only because of the additional work that would be required on the part of the prospective employer to determine whether the information in the ECRC means that the subject poses a real risk or not. It needs no imagination to understand that an employer who is remotely risk averse will not employ someone who is the subject of an adverse ECRC particularly if the prospective employment involves working with children or young adults and the adverse information on the ECRC suggests any possible risk of inappropriate sexual behaviour on the part of the applicant.

14. In *L* the Supreme Court identified that s.113B (4) imposes two requirements that must be satisfied before information is included in an ECRC. The first is that, in the Chief Officer's opinion, the information might be relevant. This involves a low threshold. The effect of this low threshold is tempered by the second requirement, which is that in the chief officer's opinion the information "ought to be included in the certificate". At [81], Lord Neuberger gave guidance on the competing factors which may require to be weighed up:

> "Having decided that information might be relevant under s 115(7) (a), the chief officer then has to decide under s 115(7) (b) whether it ought to be included, and, in making that decision, there will often be a number of different, sometimes competing, factors to weigh up. Examples of factors which

could often be relevant are the gravity of the material involved, the reliability of the information on which it is based, whether the applicant has had a chance to rebut the information, the relevance of the material to the particular job application, the period that has elapsed since the relevant events occurred, and the impact on the applicant of including the material in the ECRC, both in terms of her prospects of obtaining the post in question and more generally. In many cases, other factors may also come into play, and in other cases, it may be unnecessary or inappropriate to consider one or more of the factors I have mentioned. Thus, the material may be so obviously reliable, relevant and grave as to be disclosable however detrimental the consequential effect on the applicant."

15. The particular features indentified by Lord Neuberger have subsequently become institutionalised in Statutory Disclosure Guidance issued by the Home Office in July 2012. But it is important to note that the specific factors identified by Lord Neuberger were not and are not an exhaustive list. All relevant factors must be weighed up by the Chief Officer and, subsequently, the Court.

16. Ultimately the issue is one of proportionality on which authoritative guidance is given at [19] of the speech of Lord Bingham of Cornhill in *Huang*:

"In *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69, 80, the Privy Council, drawing on South African, Canadian and Zimbabwean authority, defined the questions generally to be asked in deciding whether a measure is proportionate:

"whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective."

This formulation has been widely cited and applied. But counsel for the applicants (with the support of Liberty, in a valuable written intervention) suggested that the formulation was deficient in omitting reference to an overriding requirement which featured in the judgment of Dickson CJ in *R v Oakes* [1986] 1 SCR 103, from which this approach to proportionality derives. This feature is (p 139) the need to balance the interests of society with those of individuals and groups. This is indeed an aspect which should never be overlooked or discounted. The House recognised as much in *R (Razgar) v Secretary of State for the Home Department* [2004] 2 AC 368, paras 17-20, 26, 27, 60, 77, when, having suggested a series of questions which an adjudicator would have to ask and answer in deciding a Convention question, it said that the judgment on proportionality:

> "must always involve the striking of a fair balance between the rights of the individual and the interests of the community which is inherent in the whole of the Convention. The severity and consequences of the interference will call for careful assessment at this stage." (see para 20)."

17. At this stage, it is necessary only to highlight the third of the de Freitas questions: the means used to impair the right or freedom must be no more than is necessary to accomplish the objective.

18. Three further points of guidance on the court's approach to the issue of proportionality may be noted:

    i) In *R(B) v Chief Constable of Derbyshire Constabulary* [2011] EWHC 2362 (Admin) Munby LJ (with whom Beatson J agreed) said at [43] that information such as that with which the court was concerned in that case (allegations of serious violence towards two children) was to be disclosed only if there was a "pressing need" for that disclosure;

    ii) The Court should give appropriate weight (but not "deference") to the opinion of the original decision maker, taking account of his experience, special expertise, and access to specialist sources of knowledge and advice. However, the primary decision maker's views cannot be decisive. Ultimately it is for the court to decide whether or not the applicant's Convention Rights have been breached: see *Miss Behavin'* at [37] per Baronness Hale, *Quila* at [61-63] and *R (BBC) v Secretary of State for Justice* [2012] EWHC 13 (Admin) at [53];

    iii) There is no presumption in favour of disclosure. Neither the social need to protect the vulnerable nor the right to respect for private life of the applicant automatically has precedence: see Lord Hope at [43-44] of *L*.

19. The principles set out above were essentially common ground between the parties. One issue of principle that divided them was how information which was not taken into account by the original decision maker should be treated by the Court when making its decision. The issue arises in this case because the defendant did not take into account the transcript of a police interview with L which took place shortly after the allegations were first made by the complainant: that interview was first brought forward when it was disclosed by the defendant and exhibited to a witness statement served the day before the present hearing. Logically, however, there are two different categories of information which may fall to be considered. The first is information, such as that in the present case, which might reasonably have been taken into account by the primary decision maker but was not. The second is information which only comes into existence after the primary decision, or which could not reasonably have been available to the primary decision maker.

20. For the Defendant, Miss Ventham submits that information emerging subsequently (which, she submitted, included the transcript of police interview in this case) should be left out of account when reviewing the lawfulness or otherwise of the original decision; but she submitted that it could and should be brought into account at a later

stage, when deciding whether or not to grant the discretionary remedy of Judicial Review. In support of her submissions, she refers to the speech of Lord Bingham at [30] of the *Denbigh High School* case, cited above, including his reference to the decision of the court being "an evaluation, *by reference to the circumstances prevailing at the relevant time*." (Emphasis added). And she refers to the authorities establishing that the Court's decision is not a merits review or re-hearing as such, but is a scrutiny of the lawfulness of the decision that was made by the primary decision maker.

21. For the Claimant, Mr Broach submits that the Court may and should take into account subsequently arising information when scrutinising the lawfulness of the primary decision. He relies upon *Manchester City Council v Pinnock* [2011] 2 AC 104. Among the issues considered by the Supreme Court was whether a Judge who is asked to make an order for possession under s. 143D(2) of the Housing Act 1996 is permitted to carry out his own article 8 assessment of the proportionality of making such an order. At [68-79], the Supreme Court explained why the judge was permitted to carry out such an assessment: a local authority deciding whether to bring possession proceedings against a demoted tenant would have a duty to act rationally as well as a duty under article 8 to consider proportionality, which includes investigating the relevant facts; a court would have jurisdiction, under normal judicial review principles, to satisfy itself that the local authority have indeed acted reasonably and have investigated the relevant facts fairly; from which it must follow that any decision to bring or continue possession proceedings would be susceptible to judicial review. Continuing the argument, at [73-74] the Supreme Court said:

> "73. In our judgment, once it is accepted that it is open to a demoted tenant to seek judicial review of a landlord's decision to bring and continue possession proceedings, then it inevitably follows that, as a generality, it is open to a tenant to challenge that decision on the ground that it would be disproportionate and therefore contrary to article 8. Further, as we saw at paras 31 to 43 above, the European court jurisprudence requires the court considering such a challenge to have the power to make its own assessment of any relevant facts which are in dispute. We have already pointed out, at para 28 above, that Lord Scott and Lord Mance, in particular, reached this conclusion in *Doherty v Birmingham City Council* [2009] AC 367, paras 68 and 138. The European court acknowledged this development in *Kay v United Kingdom* [2011] HLR 13, para 73. In these circumstances we are satisfied that, wherever possible, the traditional review powers of the court should be expanded so as to permit it to carry out that exercise.
>
> 74. In summary: where it is required in order to give effect to an occupier's article 8 Convention rights, the court's power of review can, in an appropriate case, extend to reconsidering for itself the facts found by a local authority, or indeed to considering facts which have arisen since the issue of proceedings, by hearing evidence and forming its own view."

22. Mr Broach relies upon the Court's reference to "considering facts which have arisen since the issue of proceedings" at [74] as supporting his submission that the Court in a case such as the present can and should consider all information, whenever arising, when scrutinising the lawfulness of the Chief Constable's decision to include information in an ECRC.

23. The key to the issue is to be found by examining again the nature of the court's enquiry and the nature of the conduct which is being scrutinised. In doing so it is important to distinguish between a conventional judicial review challenge alleging *Wednesbury* unreasonableness, on the one hand, and a challenge (such as the present) alleging a breach of the Claimant's Convention rights, on the other. Different considerations apply in each case:

    i) Where the substance of the challenge is a rationality challenge to a decision made at a particular point in time, the lawfulness of that decision should generally be assessed by reference to material which was (or could reasonably have been) available to the primary decision maker when that decision was made. In such a case, it is conceivable that later information may come into play when the Court is deciding whether to make available or to withhold the discretionary remedies of judicial review. However,

    ii) Where the challenge asserts a breach of the Claimant's Convention rights, the role of the Court is different, not least because the Court is itself a public authority within the meaning of s. 6(3) of the Human Rights Act 1998 and is therefore prohibited by s. 6(1) from acting in any way which is incompatible with a Convention right. This requires the Court to have regard to the continuing effects of its decisions in a manner which differs fundamentally from that which applies in the case of a traditional rationality challenge by way of judicial review. In an HRA case, it is therefore to be expected that up to date information will take a central place in the Court's decision-making process.

24. The issue in the present case, as stated in the Claimant's Facts and Grounds, is whether the Chief Constable's decisions not to remove information from ECRCs relating to the Claimant were lawful when it was taken. That might, if taken at face value, suggest that the Court's scrutiny should be solely directed to the time of those decisions and the competing factors that were relevant to the decisions when they were taken. However, it is obvious that the decision of the Court will have a continuing effect, which requires the Court to have regard to material arising after the original decisions were made, so that the Court does not unwittingly breach the requirements of s. 6 of the HRA 1998.

25. *Pinnock* provides clear support for this approach. I am not convinced that the passage from *Denbigh High School* upon which Miss Ventham relies is authority to the contrary. Lord Bingham's use of the phrase "circumstances prevailing at the relevant time" is supported by reference to *Wilson v First County Trust (No 2)* [2004] 1 AC 816, paras 62-67. There Lord Nicholls had said:

> "62 The legislation must not only have a legitimate policy objective. It must also satisfy a "proportionality" test. The court must decide whether the means employed by the statute to

> achieve the policy objective is appropriate and not disproportionate in its adverse effect. *This involves a "value judgment" by the court, made by reference to the circumstances prevailing when the issue has to be decided. It is the current effect and impact of the legislation which matter, not the position when the legislation was enacted or came into force.* (I interpose that in the present case no suggestion was made that there has been any relevant change of circumstances since the Consumer Credit Act 1974 was enacted.)" [Emphasis added]

When read in the context of the citation from *Wilson*, it seems to me that Lord Bingham's "circumstances prevailing at the relevant time" include those occurring up the date of the Court's decision. Accordingly, the passage in *Denbigh* supports the approach of the Claimant and not that of the Defendant.

26. After the hearing in the present case, Lang J gave judgment on 8 March 2013 in *R (Ex p. A) v Chief Constable of Kent Constabulary* [2013] EWHC 424, which is another case concerning a challenge to the disclosure of allegations in an ECRC. When considering the role of the Court in such a case, Lang J said:

> "41. In *Belfast City Council v Miss Behavin' Ltd* [2007] 1 WLR 1420, Baroness Hale confirmed, at [31], that:
>
> "The role of the court in human rights adjudication is quite different from the role of the court in an ordinary judicial review of administrative action. In human rights adjudication, the court is concerned with whether the human rights of the claimant have in fact been infringed, not with whether the administrative decision-maker properly took them into account."
>
> 42. In order to carry out this role effectively, the court has to consider the facts as they are found at the time of its adjudication, and not limit itself to the facts in existence at the time of the original decision. In *Huang* Lord Bingham explained that the "first task" of the immigration tribunal was "to establish the relevant facts" which "may have changed since the original decision was made". Outside the immigration context, the House of Lords has confirmed in *Manchester City Council v Pinnock* [2011] 2 AC 10, that the European law requires the domestic court to make its own assessment of the facts at the hearing before it. Lord Neuberger said at [45] and [73]:…"

After citing [45] and [73] from the speech of Lord Neuberger in *L*, Lang J continued:

> "43. Although the relevant court in *Pinnock* was the County Court, I consider that the Administrative Court has to carry out a similar exercise as it is the sole court with power to review whether the Defendant's decision will result in a breach of the Claimant's human rights. In doing so, it has to consider the

> Claimant's human rights as at the date of the court hearing. If it confines its consideration to a date in the past, and ignores the current position, it might itself act in breach of the Claimant's rights, contrary to section 6(1) HRA 1998."

27. I respectfully agree with the approach adopted by Lang J. The judgment in *Ex p. A* itself builds on her earlier judgment in *R(Almeida) v RB Kensington and Chelsea* [2012] EWHC 1082, with which I also respectfully agree. I merely add one observation at this stage. Just as the Court should bear in mind that it is not the primary decision maker, so also it should bear in mind that proceedings for judicial review do not necessarily enable the Court to determine disputed questions of fact[1]. The present case is a case in point: at the heart of the case lies an allegation of misconduct by L towards a young woman that has not been tested or determined either by admission or by a court of record or other fact finding tribunal – on the contrary, it is disputed root and branch by L, no legal proceedings followed, and no finding has been made by any disciplinary or regulatory body. This state of uncertainty applied to the Defendant when making his decisions, just as it applies now to the Court. It follows that the guidance given by Lord Neuberger at [81] of *L* is as applicable to the Court's approach as it is to the approach to be adopted by the primary decision maker.

28. I turn now to the factual background of the case.

The Factual Background

29. L was 41 at the time of the incident that gave rise to these proceedings. He is 44 now. He had taught for a number of years at a secondary school as community sports co-ordinator and PE teacher. One of the pupils at the school was the complainant to whom I shall refer as C. For two years until mid 2009 L had "employed" C as an assistant one night per week in the delivery of sports to others. The precise nature of this "employment" is not disclosed. L says that it came to an end when he told C that he could no longer employ her. At the time of the alleged incident to which I shall refer below, C was aged 18 but was still a student at the school.

30. In early 2010 L had an extended period of sick leave. On Friday 7 May 2010 he went to a pub with his friend, to whom I shall refer as Mr H. I shall refer to the landlord of the pub as Mr G. Mr H was an appointed governor of a primary school. There is no real room for doubt that C was in the pub at the same time as L. Beyond that fact, there is no agreement between L and C about what happened while they were there.

31. On 11 May, the Tuesday after the alleged incident, C made a complaint which was recorded in a hand written statement which included the following:

> "I am 18 years old. I'd had a drink but I remember everything.
> He'd had a drink.
>
> …

[1] Although directions may be made to enable the determination of disputed issues of fact: see *R (Al-Sweady) v Secretary of State for Defence* [2009] EWHC 2387 (Admin); [2010] HRLR 2.

> He come up to me and was talking. He hugged me. He'd not done it before. "Do it again" he said and he pressed my chest to him – 4 to 5 times. "I need to go" I was uncomfortable but I knew I could handle it. It was because of who he is I felt uncomfortable. I kept bumping into him throughout the night. He whispered "I want you to come round to mine- 2 hours- £200 every month". I laughed it off but he kept repeating it throughout the night- (4-5 times at least). A saw the hugging. I'm sure. When I'd been propositioned I told R. I wasn't sure what to do. I wasn't sure who to come to" (A and R are identified by name in the statement)."

32. The following day C signed a further handwritten statement in which she elaborated on the account she had given the previous day. This second statement said that it was L who had gone to hug C. It was consistent with the first statement in alleging that L had said "do it again" and had repeatedly pushed C's chest against his own and in alleging that L had propositioned C with an offer of money. She added the allegation that she had seen L in school on Tuesday (11 May) and that, when she had done so, he had looked down at the floor and had not acknowledged her, which he would normally do.

33. The school suspended L on 12 May 2009. The police subsequently became involved.

34. On 16 May 2009 C gave a 9 page witness statement to the police which was taken by PC Owen. The statement went into considerable detail. In it, C said that she had gone to the pub between 11.30 to 12.00 pm after going to another pub and that she was neither drunk nor merry. She said that she had been talking to A and R during the course of the evening, both of whom she identified by name. She added further detail about her meeting with L, saying "I was surprised and pleased to see him so greeted him by saying it was nice to see him and how was he. We both hugged each other, as I hadn't seen him for such a while. This wasn't a normal greeting but it didn't feel out of place at the time". She then described how she had released her grip of L after about 2-3 seconds but that he had not let go of her and kept asking for another hug. She repeated the allegation that he had propositioned her and offered her money, though she said that the word "sex" had not been used. There are a number of details in the statement which could be said to ring true and there is nothing on the face of the statement to indicate that the allegations she was making were malicious or untrue.

35. A copy of the police incident log indicates that the log was closed on 17 May 2010. In the summary section the log states "No offence is disclosed. School informed by [PC Owen]" This information is corroborated by an entry in the form by which L's school referred the matter to the Independent Safeguarding Authority, whose role is to help prevent unsuitable people from working with vulnerable groups including children. The referral form recorded that on 21 May 2010 PC Owen informed the school's head teacher that no criminal action would be taken.

36. Despite this apparent closure of the file, L was interviewed by PC Owen under caution on 23 May 2010. Only a brief summary of the interview was taken into account by the Defendant when making the challenged decisions. Furthermore it is not clear how or why the interview came about, given that the police had informed the school on 21 May that no criminal action would be taken. A police "Voluntary

Attendance Log" dated 29 May 2010 records that the attendance was "for interview re harassment and sexual touching on [C]…" L says in his witness statement that he received a telephone call from PC Owen asking him to report to the police station as there had been an "issue" raised relating to his conduct. He says that he was told in the initial telephone conversation that he had not committed a crime and that it was a matter of "clearing up" what happened. That is consistent with what the school had been told on 21 May; but the date of the telephone conversation between L and PC Owen is not known and there is no record of it in the documentation disclosed by the Defendant.

37. A transcript of the interview under caution was agreed and produced very shortly before the hearing. In the interview L denied having spoken to or even seen C. The allegations were put to him by reference to the contents of C's police witness statement. His response to the allegations, repeatedly, was that he did not speak to C or see her when in the pub. He said that he did not remember seeing C in the school on the occasion when, according to C, they had passed shortly after the alleged incident and he had put his head down. When asked for his version of events he said that he had gone to the pub from another pub at about 1.00am in company with Mr H. He said that his main concern was getting Mr H home because he was so intoxicated. In a passage of the interview which is not entirely clear, he said that Mr H had at some stage gone to sleep, that they had left the pub at 2.30-3.00am and that Mr H had collapsed outside a bank, after which he had to walk him. The general impression given by the transcript is that L was saying that Mr H was severely intoxicated, and that they had been in the pub from about 1.00 to 2.30-3.00am. The interview is recorded as having lasted for 16 minutes.

38. Police involvement in 2010 appears to have concluded on 12 June 2010 when a "No Further Action File" was produced in which an acting Police Sergeant authorised that no further action should be taken for the offence of "harassment- sexual touching". The reason given was "no criminal offences have been disclosed". The court was told that the document was largely prepared by PC Owen and signed off by a superior officer.

39. On 12 July 2010 the ISA decided that it was not appropriate to include L on the Children's Barred List or the Adults Barred List. It is clear from the disclosed documentation that the ISA had C's two statements to the school but not her police statement.

40. L's conduct was also referred to the General Teaching Council for England, his regulatory body. At a meeting on 19 November 2010 the GTC considered the material which had been submitted to it, which included C's two handwritten statements to the school, a witness statement from L in which he denied having had contact with her at the pub, information from L that he had been told when the police had dealt with the issue that there was no case to answer and he would be allowed to return to work, and a short signed statement from Mr G, the landlord of the pub, in which he said "on the night he is alleged to have acted inappropriately I can state that this did not happen. He was in the pub for approx 20 min with a friend and I spoke to him throughout this time. After one drink he left in a taxi with his friend." The relevant committee of the GTC was not satisfied that there was sufficient evidence in relation to the alleged incident in the pub for there to be a case for L to answer.

41. That is how things stood until about May 2011. The police had not investigated further and had decided not to prosecute; the ISA had decided that there was no basis for including L on the Children's Barred List or the Adults Barred List; and the GTC had decided that L had no case to answer. By May 2011 L was seeking further employment as a result of which a request was made for an ECRC. The documents available to the court disclose activity in relation to that ECRC commencing in late May 2011.

42. An "Intel" document dated 25 May 2011 provides a printout of intelligence held by the police in relation to L. The document included an entry relating to the allegations made by C in May 2010. It also included unsubstantiated and uninvestigated information ranging from an entry suggesting that he might have shown "peeping tom" tendencies to an entry stating that he had put a post on Facebook stating that he was moving to the Shetland Islands.

43. On 30 May 2010 a Ms Buck, who was described as CRB Disclosure Supervisor, e-mailed PC Owen stating that she was dealing with a CRB check for L who was applying to be a supply teacher. Ms Buck asked PC Owen if she could advise her why no charges were made against L and whether PC Owen knew if L left his employment as a result of their investigation.

44. PC Owen replied on 30 May 2011. She said that no charges had been brought because of the age of C. She also said that the school had investigated him and he had been asked to leave: on the information that subsequently became available this was incorrect. PC Owen then added: "He comes across as a rather nice person but if you look at other Intel on the system about him I would suggest that he should not be in a teaching post: he is a letch and in a position of trust which I believe he misuses: maybe this is not balanced and I know you can't go on gut feelings which is a shame as I think children and young adults need protecting from him." It appears that the reference to looking at Intel on the system must have been a reference to the unsubstantiated reference to the "peeping tom" allegation.

45. On 23 June 2011 PC Owen responded to a further request, this time from a Mr Hetherington, who was described as a CRB Disclosure Decision Maker. He asked for her comments upon the truthfulness of C, her views on whether L did do as C alleged and anything else she could add that may assist in the enquiry. In her reply, she expressed the opinion that C was telling the truth and that the reason she had come forward was because "she didn't want any other student going through the same thing" She stated that she believed that L "will have behaved in the way that C suggested." In support of this opinion she stated that "when interviewed [L] totally denied anything occurring but he was fidgety and stuttering and kept saying how appalled he was at the allegation. In my experience these factors can suggest that someone is lying. …of course this can also mean they are innocent- but I just got the gut feeling that he was guilty and thought he was in deep trouble so was lying to cover up what he had actually done." (I note in passing that, at the hearing and on instructions from her solicitor who had listened to the tape, Ms Ventham told the court that L had not been "fidgety and stuttering" during the interview but could possibly be described as being defensive.) PC Owen then informed Mr Hetherington that "there were rumours previously round school that L likes the girls and was horrible to the boys". She then referred to his having stated on Facebook that he was leaving to live in the Shetland Islands and concluded "I think L is a manipulative man

who will lie through his teeth to get what he wants and it is my opinion that he should not work with children of any age".

46. Shortly afterwards, on the same day, PC Owen sent what was effectively a post-script to her previous e-mail suggesting that L had possibly been guilty of theft of school property. On the information available to the Court this was entirely unsubstantiated and was in any event irrelevant to Mr Hetherington's enquiry. The source of the allegation has not been identified.

47. Mr Hetherington subsequently adopted the pro forma approach established for considering ECRC disclosures and, on 24 June 2001, signed off on proposed disclosure on the ECRC. In due course Assistant Chief Constable Skeer authorised ECRC disclosure on 5 July 2011, signing off the final disclosure text on 6 July 2011. Before she did so, Mr Hetherington made enquiries of the school on 5 July 2011 to find out whether L had resigned or been dismissed. A note on the page in handwriting says that his departure had been by "mutual agreement".

48. As a result of this process an ECRC was issued on 22 July 2011. It recorded that the position applied for was as a supply teacher with the name of the employer being a supply agency. The disclosure under the section entitled "other relevant information" disclosed at the Chief Police Officer(s) discretion" stated as follows:

> "Cumbria Constabulary holds the following information concerning L…that in the opinion of the Chief Officer delegate might be relevant to this application and ought to be disclosed under part V of the Police Act 1997.
>
> On 07.05.10 it was alleged that, whilst in licensed premises, L had inappropriately hugged an 18 year old female school pupil and had persistently asked her to go home with him offering her £200 to do so. When interviewed, L agreed that he had been present that evening but denied all allegations stating that he had not seen or spoken to the girl. L was, at that time, still one of the girl's teachers, having taught her since she was 13 years of age.
>
> The matter was referred to the General Teaching Council who, after review, took no further action. No further police action was taken against L in relation to these allegations as the girl was 18 years of age and therefore no criminal offences had been committed."

49. As a result of this ECRC disclosure the supply register refused to include L. According to L an offer of employment which he had obtained at a primary school was also withdrawn. What appears certain is that he has, since July 2011, been unable to obtain any employment as a teacher (apart from some limited holiday activity and voluntary work in a primary school where he already knew the prospective employer). On 14 September 2011 solicitors acting for L wrote to the Criminal Records Bureau submitting form AF15 and ancillary information including a detailed statement from L. In that statement he said that he had been in the pub for 20 minutes with his friend, that he had had no contact with C at all, that C was extremely drunk later on that

night, and that the disclosure was disproportionate and therefore unlawful. He relied upon six features. First while accepting that any allegation of indecent assault was grave he noted that C was 18 years of age and legally an adult at the given time. Second he said that there was no indication that C was a vulnerable adult. He made various assertions tending to undermine C's account such as she had a reputation for making false allegations. Third he pointed out that the allegations had never been tested in an open forum, that he had not been arrested and that the GTC had found no case to answer. Fourth he asserted that no crime had been committed. Fifth he asserted that a blanket or sweeping approach to disclosure had been adopted which had been overturned in *L*. And, sixth, he pointed out the highly prejudicial impact upon him of the disclosure.

50. On 5 October 2011 the CRB wrote to Cumbria Constabulary informing them that L had disputed the accuracy of the data which the CRB disclosed to him. In response to that notification there was further police activity in relation to the ECRC disclosure. On 13 October 2011 Ms Kerry Carson, the Disclosure Unit Manager for Cumbria Police, sent a memorandum to Deputy Chief Constable Stuart Hyde (who by the time of the challenged decisions in this case had become Chief Constable). Ms Carson outlined the nature of the disclosure, the rationale for the disclosure and the basis of the dispute and commented that, in her view it was more likely than not that C's allegations were true. The matter was evidently passed to Chief Constable Mackey because, on 24 October 2011, he sent a memorandum stating that he believed it to be appropriate at that stage to offer L the opportunity to comment in writing on the form and content of any proposed disclosure (which had not been done before). He also asked that an assessment be made of the appropriateness of approaching R (one of the two witnesses identified by C as having been in the pub with her) to provide "a simple and robust further corroboration". He did not suggest approaching Mr H or Mr G.

51. R was duly interviewed and gave a statement on 1 November 2011. It is apparent from the face of the statement that she was interviewed by PC Owen. She independently identified A as having been in the pub at the same time. She said that, because she was a smoker, she had been in and out of the pub. She had seen L speaking to some man and also remembered seeing L speaking to C 'at one point'. She said that they had been close but she had seen nothing unusual. She went on to say that C had told her that L had propositioned her for money, that C had appeared shocked, and that C had provided her with updates through the evening, saying that L had repeated his propositioning as before. In the course of the statement she made an innuendo against L saying that he "likes the girls" and that she always thought the he was "weird". She said that she had discussed the matter with C the next day to persuade her to tell someone.

52. On 22 November 2011 Ms Carson sent a memorandum to Chief Constable Mackey in which she highlighted the existence of other potential witnesses, referred to the existence of a statement from Mr G and confirmed that the GTC had found that there was no case to answer. She qualified this last point by stating the GTC meeting did not have the statement from C. She did not inform Chief Constable Mackey that the GTC had the two handwritten statements that C had provided to her school, which she may not have known.

53. On 28 November 2011 Chief Constable Mackey authorised further disclosure by a memorandum to Ms Carson. He stated that he had seen, read and considered R's

statement and had noted that she said she saw L talking to the complainant, something that L denied doing. He noted that there were further enquiries with witnesses that could be made but, 'as this is not a re-investigation of an allegation I do not consider it proportionate to trace more witnesses from that evening'. After setting out factors upon which he relied he reached the conclusion that disclosure was reasonable and proportionate but proposed a change in wording. As a result, after further internal correspondence, on 2 December 2011 a further form of disclosure was made. This time the name of the employer was said to be Northumberland County Council and the position applied for was stated to be supply teacher. The wording on this ECRC was in place when L challenged the decision to make disclosure in 2012, which led to the two decisions that are directly challenged in these proceedings. The disclosure was in the following terms:

> "Cumbria Constabulary holds the following information concerning L…that in the opinion of the Chief Officer Delegate might be relevant to this application and ought to be disclosed under part V of the Police Act 1997.
>
> On 07.05.10 it was alleged that, whilst in licensed premises L had inappropriately hugged an 18 year old female school pupil and had persistently asked her to go home with him offering her £200 to do so. When interviewed, L agreed that he had been present that evening but denied all allegations stating that he had seen or spoken to the girl.
>
> L was, at that time, still one of the L's teachers, having taught her since she was 13 years of age. The matter was referred by the school to the General Teaching Council *which, after consideration by their investigating committee of the information available to them at that time, decided there was no case to answer*. No further police action was taken against L in relation to these allegations as the girl was 18 years of age and therefore no criminal offences had been committed."[2]

54. L disputed this further disclosure as a consequence of which Mr Hyde, who by now was the Chief Constable of Cumbria Constabulary, was asked to and did make a decision.

55. Ms Carson completed the pro forma AT2 assessment on or about 13 March 2012. She recorded that no further police action had been taken against L because "the evidence did not constitute any offences as [C] was 18 years old." She rejected a number of elements of police intelligence including the suggestion that L had been dismissed (because the school had confirmed the true position), and the information suggesting that L might be a "peeping tom" on the basis that "this information is unsubstantiated, poorly graded and there are no further reported incidents before or since." She did not discard the information relating to C's allegations. Having considered L's representations she concluded that the complaint was more likely to be true than false. She considered L's submission that disclosure was disproportionate and unlawful but rejected it on the basis that:

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[2] The italicised passage represented an alteration to the text of the previous ECRC.

> "I am aware that this disclosure is a balance of competing rights, however, when balanced with the potential risks of sexual harassment and/or sexual touching/ activity posed to young and impressionable females with whom L would be placed in a position of trust as a teacher, I consider disclosure to be necessary and proportionate. A prospective employer of L for a post as teacher needs to be in possession of all relevant information in order to assess any risks posed by him. It is then the Judgement and decision of L's prospective employers as to what action to take."

The section of the form which is intended to record the Chief Officer's or Chief Officer Delegate's decision appears to be blank and unsigned although the name of Assistant Chief Constable Skeer appears at the foot of it.

56. On 30 March 2012, at the instigation of Chief Constable Hyde, a statement was taken by the police from Mr G. So far as material, Mr G's statement said:

> "I remember that L came to me and told me that [C] had made a complaint against him- something about indecent assault [illegible] I think I remember they had been in the pub one night but I didn't see anything happen and I certainly didn't hear about anything that night until L told me she's made a complaint."

Later in the statement he added:

> "If he has said anything to her I imagine it would be said in jest."

57. On 18 April 2012 L's solicitors sent Mr G's earlier statement to the police.

58. Chief Constable Hyde made his decision on 3 May 2012. It was recorded in a memorandum of that date. In that memorandum he contrasted the apparent certainty in Mr G's initial statement with the more circumspect language of his police statement and concluded that, having reviewed the various statements and taking into account L's lack of acceptance that any conversation took place, he believed that C, supported as she was by R, was more credible. Having reached that conclusion he continued:

> "Therefore I conclude disclosure under part 5 of the Police Act 1997 is appropriate and reasonable for the same reasons outlined by Chief Constable Craig Mackey on 28 November 2011.
>
> I have considered all the information that might be relevant for the purpose of coming to a conclusion and the content of disclosure. I have balanced this against the right of L to a private life and the potential prejudicial impact on his employment prospects as a teacher but conclude that disclosure

> is appropriate, necessary and proportionate. The potential risks outweighing L's human rights. "

59. On 15 May 2012 the defendant's senior legal advisor wrote to L's solicitors notifying them of the decision. That is the first decision directly challenged by these proceedings. On 23 July 2012 L's solicitors wrote to the defendant requesting a review of Chief Constable Hyde's decision. They enclosed two statements, one of which was from Mr H which said:

> "The allegation on L's CRB certificate refers to an evening out which took place over two years ago in the [pub]. I was with L throughout the evening and we left together in a taxi. At no time throughout the evening did I see him speaking to or acting inappropriately with the person in question."

60. The two statements were considered by Chief Constable Hyde. On 27 July 2012 the defendant's Senior Legal Advisor wrote once more to L's solicitors informing them that Chief Constable Hyde's conclusion remained "that disclosure is appropriate, necessary and proportionate. The potential risks out way [sic] L's human rights." That is the second decision directly challenged in these proceedings.

61. These proceedings were issued on 1 August 2012. The court has copies of two subsequent ECRCs. The first is dated 26 September 2012 and related to a position at a primary school. No mention is made of the incident relating to C. The second is dated 22 January 2013 and relates to the position of supply teacher, apparently in secondary education. On this occasion disclosure was made in amplified terms as follows:

> "Cumbria Constabulary hold the following information which we believe to be relevant to the application of L, ... The information relates to an allegation of inappropriate behaviour towards a female pupil of the school where L was employed as a teacher. Cumbria Constabulary believe this information to be relevant to an employer's risk and suitability assessment when considering L's application for the post of supply teacher with vision for education, working with children and vulnerable adults, because the information, which is considered likely to be true, indicates an abuse by L of the position of trust in which he was placed as a teacher.
>
> The information held by police involves an allegation by an 18-year old female that on 07.05.10, whilst in licensed premises, L had inappropriately hugged her and persistently asked her to go home with him, offering her £200 to do so, causing her to feel vulnerable and harassed. The complainant was a pupil at the school where L was employed as a teacher and he had known her since she was 12 or 13 years of age when he was her teacher.
>
> When interviewed by police, L agreed that he had been present that evening but denied all allegations stating that he had not seen or spoken to the complainant. No further police action was

> taken against L in relation to these allegations as the complainant was 18 years of age and therefore no criminal offences had been committed.
>
> After careful consideration, Cumbria Constabulary considers that this information ought to be disclosed as the alleged incident of inappropriate behaviour occurred in relation to a female pupil of the school where L was a teacher at the time. The information is materially relevant to the post of supply teacher applied for in which L will have regular and unsupervised contact with children and young adults. The risks of similar inappropriate behaviour of a sexual nature by L towards vulnerable young persons must, in this instance, outweigh the prejudicial impact that disclosure may have on L's private life and employment prospects as a teacher."

62. In support of his claim in these proceedings L's first witness statement said that he had stayed for around 20 minutes at the pub, had one drink and left. He said that he had no contact with C at all during the night. He gave evidence seeking to undermine C's version of events including that he had been told by Mr G that C had been extremely drunk later on that night. He also asserted that C had a reputation for making false allegations and that on a previous occasion he had refused to drive C home because he did not think it would be appropriate behaviour. In a second statement made on 1 January 2013 L responded to the police witness statements of C and R stating that they were "simply not true". He said that he went to the pub having played darts at another. Once at the pub he and Mr H had one drink and then ordered a taxi to take them home with him being dropped off home first and then Mr H carried on to his home. He denied having any contact with C at all.

63. Mr H made a second statement on 29 December 2012. After stating that they had been to another pub he continued:

> "It was not until about 11.30pm that we rang a taxi and decided to go to [the pub]. We were at [the pub] for no more than 30 minutes and then ordered a taxi to take us home at around 12.30am. We were not at [the pub] for a prolonged period and had only stopped off there on our way home. Whilst at [the pub] L and I were sat at the bar. I was with L at all times whilst at the bar in [the pub]. One or two other people including Mr G the landlord came and spoke to us. All the people who spoke to us were male. As stated earlier I am sure we did not stay for longer than 30 minutes."

64. The defendant, Chief Constable Hyde, made a statement for these proceedings on 4 February 2013 in which he set out the history of his involvement and decision making process. He initially considered the case in March 2012 and was made aware of the contents of the file and previous decisions. The following points of particular relevance emerge from his statement:

   a) In the course of his decision making he had a number of discussions with his Senior Legal Advisor who reminded him of his obligations

pursuant to s.113B (4) of the Act and the factors listed by Lord Neuberger in *L*. He states that he was also aware of his obligations under the ECHR, particularly article 8;

b) He was aware of his predecessor's actions but completed a full review of the case. His decisions were based on the information available to him and were his decisions alone;

c) In assessing the reliability of C's allegation he says "it was possible that it disclosed a very serious matter suggesting a propensity to pursue young girls for sex, for payment. Equally, I was mindful that it could also constitute a misunderstanding, or that it could have been a malicious allegation. I was careful not to make the assumption that there was only one explanation.";

d) He says that he ignored the information about other allegations, but "in reviewing the case I gave considerable weight to the comments of PC Owen and her assessment of the witnesses in particular of the likelihood that the allegations could have been either mistaken or vindictive. She gave an assessment of the subject C and the witness R which I found plausible and beneficial to C's account. This added considerable weight to my overall decision.";

e) He says that he reviewed the various witness statements. He appears to have discounted the weight to be attached to the July 2012 statement from Mr H on the basis that "the statement had been produced some two years after the event and contains sparse information about the evening." He did not expressly comment on the fact that R's statement, though more detailed, was itself produced some 18 months after the date in question;

f) He gives his reasons for preferring the accounts of C and R as against that of L. In summary, he decided that some form of communication had taken place and "having determined that some form of communication did take place and in the light of L's absolute denial of this I concluded that there was a far greater probability that C was more correct in her account than L." As a result, having regard to all of the evidence available to him, he was satisfied that the allegation against L was sufficiently reliable to justify disclosure in principle;

g) Turning to the balance of competing interests, Chief Constable Hyde states that he was very aware of the impact that disclosures have on all parties. He says "I explored whether a disclosure statement could be restricted to secondary schools, as there appeared to be no evidence to suggest that younger children would be at risk." (This part of his evidence is borne out by the fact that the ECRC on 26 September 2012, which was for a position in a primary school, made no reference to C's allegations.)

h) The core of his reasoning on the balancing exercise should not be paraphrased and is set out in full below:

> "[28] I considered that whilst the disclosure of any information may be prejudicial, nevertheless the qualified nature of the information provided, the fact that each disclosure would be considered on its own merit, and the fact that not all teaching posts applied for would give rise to a disclosure, would mean the Claimant would still have plenty of opportunities to work even if this disclosure were made. (To that end, I am aware that a subsequent application by the Claimant for a post within a primary school did not give rise to a disclosure on an ECRC).
>
> [29] I considered the human rights of both the Claimant and potential vulnerable people. I understood that it was my duty to weigh up the rights of those different people/groups and to ensure that any disclosure was appropriate, necessary and proportionate. Since the incident was still relatively recent I considered whether the alleged conduct, if continued, would put vulnerable people at risk. The group I considered at risk were young girls who may have been in a teacher/student relationship with the Claimant. The group would include those who were likely to meet the Claimant in licensed premises, primarily Sixth Formers. Whilst the legal age for purchasing alcohol in licensed premises is 18, many younger people attend licensed premises. As such, I concluded that it was possible that the circumstances alleged in this incident could occur again and young girls particularly those who are ex, or current, students would be at risk.
>
> [30] I balanced this risk by considering the rights of potential victims against the rights of the Claimant to respect for his private life including his employment. I also considered the amended language used in the disclosure that gave prominence to the decision of the GTC which makes it clear that they had decided that there was no case to answer and that as the alleged victim was 18 there were no criminal offences committed. I felt that the revised wording of the disclosure addressed the proportionality issue and balanced the need to protect vulnerable people against the Claimant's rights to privacy and employment opportunities. Since the disclosure was balanced, a potential employer could make its own decision about whether any risk was relevant to the future employment opportunity. I concluded that disclosure was proportionate in the circumstances. I felt that the disclosure was necessary to protect vulnerable people in particular as the relationship between a teacher and a student was at the heart of the allegation. "

65. It is immediately to be noted that the group that Chief Constable Hyde had in contemplation as needing protection "were young girls who may have been in a teacher/student relationship with the claimant". This suggests that he did not have in contemplation young girls in the course of their dealing with L while he would be carrying out his duties as a teacher. This suggestion is clarified and confirmed by the

sentence which follows, which identifies the group as including "those who are likely to meet the claimant in licensed premises, primarily 6th formers." Chief Constable Hyde appears to have recognised that the number of people whom the claimant had previously taught and would subsequently meet in licensed premises was small, as is shown by his comment that "many" people under the age of 18 attend licensed premises. Any residual doubt that this was the group he had in contemplation is dispelled by the last sentence of paragraph 29 which I have set out above.

66. To complete the factual background, when the tape of L's interview with PC Owen emerged at a late stage, both L and Mr H made further statements:

a) L says that at the time of the alleged incident he was taking medication (Prozac) and that his description of Mr H in his interview as being intoxicated was "a mistake". He says that he had subsequently asked Mr H why he had been acting strangely on the night and was informed that he had been upset as a result of personal matters. Second, he says that the indication in interview that he had been in the pub for about 1 ½ hours was again "simply a mistake". Third he says that he had overestimated the amount he had drunk when giving his interview. Finally he confirms that he had taken a taxi home with Mr H, whatever he may have said in his interview;

b) Mr H, in his further statement, states that he was not intoxicated but was going through a difficult personal time as a result of which he was feeling particularly stressed and upset. Otherwise he confirms the contents of his previous statements.

67. What I have set out above is a paraphrase and summary of the available information. Both at the time of the hearing and for the purposes of preparing this judgment I have read and re-read all of the available information and take it into account in the discussion that follows.

Discussion

68. I start by reminding myself of the nature of L's challenge, as explained above. This is not a *Wednesbury* rationality challenge but a proportionality challenge. As a result, if and to the extent that the defendant has failed to take into account matters which he should properly have taken into account, or has taken into account matters that he should not have taken into account, that may suggest that his conclusion on where the balance of proportionality should be struck has been affected. But it does not of itself indicate that his conclusion was wrong or that the Court should reach a different conclusion. That being so, while I shall highlight certain aspects of the defendant's decision-making process, my primary concern is to look at the substance of the arguments and evidence that should go into the balance on one side or another with a view to determining whether the defendant's decisions were sustainable or were wrong.

69. Second, in considering the balance to be struck, proper account should be taken of the primary decision-maker's views, but deference is neither required nor appropriate. That is established by authority, and it is appropriate on the facts of this case. Chief Constable Hyde is evidently an experienced police officer; but the exercise he was

required to undertake involved the application of a statutory test as interpreted by the Supreme Court, which is an area where the Court has at least equal competence (and greater authority) than him. Furthermore, in striking the statutory balance, Chief Constable Hyde was required to assess the gravity of C's allegation, the potential reliability of various sources of evidence, the risk that L might pose to others, and the potential impact upon L of making disclosure about C's allegations. All of these are matters that are at least equally within the competence of the Court. One of the features of this case is that the Chief Constable and his force did not undertake any form of formalised or technical risk assessment concerning L. The Court was told by Counsel that such risk assessment tools exist and that they are routinely used by the ISA, whether or not the ISA used them in its consideration of this case. Accepting that to be the case, if such tools had been used by the police in this case, the proper conclusion may have been that the Court should pay particular attention to the expertise inherent in the resulting risk assessment: but they were not used. That is a matter to which I shall return later.

70. The balancing exercise falls to be carried out by reference to all the circumstances of the case, though it is convenient and correct to adopt factors identified in *L* as sign-posts along the way.

71. Competing submissions were made on the reliability of C's allegations. For the defendant, it was submitted that there was no reason to doubt her reliability, supported as she was by the evidence of R. For L, it was submitted that he had always disputed her allegations root and branch and that he was supported by Mr H, a school governor of presumed good character, and Mr G, whose evidence was consistent and directly contradictory to that of C.

72. There are a number of features of the evidence which suggest that C's allegations are reliable. First, taken at face value and on its own, her statements appear credible, coherent, and measured. There is no internal inconsistency that demonstrates unreliability. Her police statement adds the gloss that the initial hug was mutual, rather than it simply being a case of L unilaterally hugging her, but this does not cast doubt on her overall reliability – if anything it tends in her favour. Second, she is materially supported by R's evidence, both by corroborating what was said in the pub and in evidencing that it was at R's persuasion that C eventually decided to tell someone about what had happened. It should be noted, however, that R was not approached for a statement until 18 months after the relevant date, which might affect her reliability. It is also to be noted that it is clear from the terms of her statement that she did not like L, and that the reasons she gave for this were fairly vague and ill-defined.

73. Set against that body of evidence is the evidence of L himself, Mr H and Mr G. The evidence of Mr H, in particular, bears close attention because he is a school governor and may therefore be taken to be of good character and particularly concerned for the welfare of young people. Taken together, the evidence of the three men is substantial evidence that casts doubt on the reliability of C and R, even though the attempts to undermine their evidence by suggesting that C may have borne a grudge against L, or that she was drunk or prone to making false allegations, appear to be thin. That said, however, the terms of L's police interview on 23 May 2010 raise real questions about the reliability of the accounts given by L, Mr H and Mr G since, on the most charitable reading, what L said in interview about how long he was in the pub, Mr H's

general condition, and how he and Mr H left, are inconsistent with his subsequent accounts, as he recognises when characterising his account in interview as being mistaken.

74. In my judgment, only two things can be said with any reasonable degree of certainty about the reliability of C's allegations. First, C's evidence *may* have been reliable. Second, Chief Constable Hyde was not (and the Court is not) in a position to reach a firm conclusion about whether C's evidence was reliable or not. The reasons why no reliable conclusion could or can be reached include the straight factual dispute to which I have just referred. Additional reasons are that:

    i) No full or proper investigation was carried out by the Police. This may have been because the (incorrect) view was taken at an early stage that C's allegations, if true, did not disclose the commission of a criminal offence. Whatever the reason, although C identified the pub, R and A to the Police and L in his interview identified Mr H, the Police never contacted A, did not contact R for 18 months, did not contact Mr G for 2 years, and did not contact Mr H at any stage. Readily available evidence was therefore either not obtained or not pursued for 18 months or longer. While this was an understandable allocation of scarce police resources in relation to a relatively minor allegation (of which more below), the absence of evidence remains a material consideration;

    ii) The police investigation, such as it was, has features about it which give rise to concern. It was largely left to PC Owen in 2010. She ended up antipathetic towards L, as was clearly expressed in her emails in May and June 2011. Her antipathy was at least in part due to relying on unsubstantiated intelligence including that which suggested "peeping tom" tendencies. She recognised that her approach was not balanced and based on "gut feelings", but that did not stop her expressing her views in pejorative terms. This casts doubt on the objectivity of her investigations and assessment of witnesses. Her lack of objectivity is also evidence by her unjustified reference to L in his police interview having been "fidgety and stuttering". What cannot be determined is whether or to what extent this lack of objectivity may have affected PC Owen's production of witness statements by C, R and Mr G. While Chief Constable Hyde says that he ignored the intelligence information about other allegations, he says that he gave considerable weight to PC Owen's comments, which were based upon them. This casts doubt upon the objectivity and reliability of his assessment of the witnesses whose evidence he had available. For present purposes, the quality of the investigation that was carried out is a factor to be taken into account and which makes assessing the reliability of one account or another more uncertain;

    iii) The allegations have not been established in any court of record or other forum where the opposing accounts could be challenged and subjected to informed scrutiny. This statement does not imply criticism of the police in not bringing a prosecution. It is simply an observation on the absence of certainty when assessing reliability;

    iv) Two bodies with responsibility for the maintenance of proper teaching standards and the protection of vulnerable persons considered C's allegations

and considered that there was no case for L to answer. Ms Carson deflected the significance of these determinations by pointing out that the GTC did not have C's police statement. That is correct; but both the GTC and the ISA in fact had C's hand-written statements, which contained the substance of her allegations. It is not known whether the ISA reached its decisions on the basis of an assessment of C's allegations or a conclusion that, even if true, C's allegations did not justify L being placed upon the Barred Lists. Accordingly, the weight to be applied to the ISA decision is, in relation to reliability, slight. The GTC stated that it was not satisfied that there was sufficient evidence for there to be a case to answer, which suggests that its decision was based upon an assessment of the reliability of C's evidence rather than of the consequences if her evidence were correct. I would adopt a cautious approach and say that the significance of the GTC decision is limited, firstly, because the decision making process is not fully documented and, secondly, because the GTC was at the same disadvantage as the Chief Constable and the Court: the evidence could not be and was not properly tested with a view to establishing its reliability.

75. Chief Constable Hyde determined that some form of communication took place and, in the light of L's absolute denial of any communication, concluded that there was a far greater probability that C was more correct in her account than L. In my judgment, while Chief Constable Hyde was obliged and right to carry out an assessment of reliability, he did not have materials available to him that could justify a determination that some form of communication had taken place. He was not in a position to engage on a fact finding exercise, whether on the balance of probabilities or otherwise. While it was certainly open to him to form a view on the likelihood that C was reliable, a determination that communication took place meant that he then treated it as established fact rather than something which remained uncertain. To that extent I would hold that his determination was an error. However, adopting a reasonable and fair approach to his reasoning as a whole, it is not clear that his "determination" made a substantial difference to the outcome although it may have coloured his attitude to L when carrying out the final balancing process. The reason why it is not clear that his determination made a substantial difference is that his conclusion on reliability reflected a degree of uncertainty, namely "I concluded that there was a far greater probability that C was more correct in her account than L."

76. Standing back and looking at the evidence as a whole, the reasons I have set out above lead to the conclusion that there was ample material upon which Chief Constable Hyde could have reached the conclusion that C's evidence may well have been reliable. However, in my judgment it was and is necessary at all stages in the balancing exercise to bear in mind that her evidence had not been tested and, in particular, no prosecution had been brought or other proceedings instituted which would allow a thorough assessment of the reliability of the substantially conflicting bodies of evidence. In other words, the real possibility remained that C's allegations were without foundation.

77. The gravity of L's conduct required careful consideration on the assumption that C's allegations were true. The first question is whether her allegations disclosed the commission of a criminal offence. The police view, as recorded in the contemporaneous documentation, was that no offences were disclosed because C was

aged 18. This view appears unsupportable since L's conduct in physically pressing C to his chest on 4-5 occasions was, if C's description was correct, an indecent assault. The fact that this does not appear to have occurred to the police, or that they dismissed it as a potential criminal charge, is itself a marker of the level of gravity to be attributed to what was alleged to have happened when L hugged C. Quite apart from the relatively limited nature of the physical acts that were alleged, it is easy to recognise features of C's evidence that may have made achieving a conviction problematic, namely her acceptance that the initial hug was a mutual act and that she did not protest at the time or subsequently while in the pub: but that is a different question from whether or not her version of events disclosed a criminal offence in the first place.

78. An assessment that propositioning C would not amount to a criminal offence because she was 18 is uncontroversial, although there remained the fact that her account either of the hugging or of the propositioning, if accepted, would amount to a breach of trust as between a teacher and someone who remained a pupil at his school.

79. There is little consideration in the defendant's papers of the gravity to be attributed to the facts alleged by C, other than the conclusion that no criminal offences were disclosed and that there had been a breach of trust. There were, however, a number of features of the incident which were relevant to an assessment of gravity:

i) Though, as L recognised in his submissions to the defendant, any indecent assault is a serious matter, this was at the lower end of the scale in absolute terms. The initial hug was consensual and the complaint was of 4-5 continuations of that initial hug involving pressing C to L's chest. The fact that C was L's pupil was an aggravating feature; but other common and aggravating features of indecent conduct were absent;

ii) The propositioning was an unacceptable breach of trust, which again was an aggravating feature. That said, what was alleged to have happened was at the lower end of the scale in absolute terms. C did not allege that L coerced her in any way and, fortunately, he did not persist after leaving the pub;

iii) The effect on C was, on her account, thankfully limited. Initially she "was uncomfortable but [she] knew she could handle it." Later she said that she was not sure what to do or who to go to. She amplified her account of her feelings in her police statement, evidencing a degree of anger that she had been so treated and concern that others should not be; but there is no suggestion of any adverse effects other than in the short term.

80. Assessment of gravity in the context of potential ECRC disclosure is not solely dependent upon the gravity of the facts alleged; it must also take into account the risk to others that is disclosed by the facts alleged if they are true. Here, the assessment of risk to others by Ms Carson in the document she prepared for Chief Constable Hyde differed from his assessment, as disclosed in [29] of his statement, set out above. However, the decision was the Chief Constable's and it is therefore his reasons that fall to be scrutinised. Once again there are features which show that the gravity of this case was limited:

i) This was the only allegation against L suggesting the possibility of any risk of inappropriate behaviour, since the intelligence suggesting possible "peeping tom" behaviour was rightly discarded by the defendant. While C's allegations raise the possibility of risk, it is obvious (and Miss Ventham accepted on behalf of the Defendant) that the situation would have been much more worrying if there had been more than one such allegation: put shortly, while one allegation might be said to raise the *possibility* of a propensity to pursue young girls for sex, repeated allegations would suggest that the possibility was a reality;

ii) Chief Constable Hyde identified as the group at risk "young girls who may have been in a teacher/student relationship with L", clarifying that his concern related to those who he might meet away from school in licensed premises. This assessment was realistic because there was no evidence to suggest inappropriate behaviour at school, and the consumption of alcohol might reasonably be anticipated to contribute to disinhibition. However, this realistic assessment also meant that the class of persons at risk and the opportunities for a repeat of the behaviour alleged by C was very limited: it depended upon the coincidence of L being in licensed premises at the same time as young girls with whom he was or had been in a teacher/pupil relationship, since there was no suggestion that he had enticed C to be there. Chief Constable Hyde widened the prospective class by including those who went to pubs under-age. While his assertion that some (if not "many") younger people went to pubs is both wordly and realistic, the class would remain very narrow. What is more, it could not be assumed that all of the small number within the class would be at risk if they met him in licensed premises. Some would inevitably be accompanied in such a way as to make repetition impossible; and it could not be assumed that all others would be at risk on the basis of the allegations made by C, who L had clearly known particularly well by reason of the two years' employment. A realistic appraisal of the risk of repetition would therefore conclude that it would be slight.

81. At this point it is reasonable to bring into the balance the conclusion of the ISA that L should not be placed on either Barred List and the absence of any technical risk assessment suggesting that, on the basis of the facts alleged by C, L would pose a significant risk to young girls (as opposed to the intuitive concern that there was the possibility that he might do so). The former provides some support for a conclusion that this was, in absolute terms, not a grave case. The latter highlights the fact that the assessment made by the Chief Constable (and the assessment now being made by the Court) lacks any scientifically based evidence or precision.

82. For these reasons, I would accept that the evidence raised the possibility, if C's evidence was reliable, that L might repeat conduct such as alleged by C if the opportunity arose. But I would also hold that the Chief Constable was right in concluding that any risk posed by L was to a very limited class of persons in tightly defined circumstances. Given those restrictions, the real (as opposed to theoretical) risk of repetition was slight.

83. The Chief Constable's conclusions on the group potentially at risk also bears on the question of the relevance of the conduct to the particular job application. His conclusions (which I would endorse) did not include that there was any direct risk

arising in the course of his employment as a teacher. That not only limited the potential risk posed by L overall but also placed any risk that existed away from his employment as a teacher. His employment and any risk were not unconnected, but the absence of a perception of risk of inappropriate behaviour in the course of his employment was a factor to be borne in mind when considering whether or not disclosure to the potential employer was necessary and proportionate. Had the Chief Constable concluded that there was an established and real risk of inappropriate behaviour directly in the course of his employment, I would on the information available to the Chief Constable and the Court have disagreed.

84. The impact of the period that had elapsed between May 2010 and when the Chief Constable made his decision is not straightforward. There had been no further allegations in the intervening period. It is not a complete answer to say that he had not been employed in secondary education during that period because the potential risk identified by the Chief Constable was to young girls who were *or had been* his students, which class continued to exist after 2010, although his lack of employment would or might create some distance between them and L. The lack of allegations is, however, of some advantage to L: had he been a serious risk, there is no reason to suppose that he could not have found the opportunity to misbehave in the period from May 2010. There is no evidence that he did so. As a result, C's allegation was and remains the only allegation of any substance of inappropriate behaviour during the entirety of an experienced teacher's career.

85. For completeness I note that, by the time that Chief Constable Hyde took his decisions, L had been given ample opportunity to make representations and had done so. Nothing arises on that point.

86. I turn therefore to consider the impact of disclosure on L. It was entirely foreseeable that disclosure in the terms made would be a killer blow to L's prospects of employment, and so it has proved to be. The effect is likely to continue into the future because, even if future prospects of employment become available, he is likely to be asked why there is a gap (now approaching three years) in his teaching career. He will then have no honest alternative but to disclose the history of this case. The shadow will therefore linger. L says that the episode has had an adverse effect on his health; if that is so, it would not come as a surprise.

87. Having reviewed all of the available evidence and bearing in mind the considerations that I have outlined above, I return to the question whether the disclosure that was made by the July 2011 ECRC amounted to a disproportionate and unjustifiable interference with L's Article 8 rights.

88. For the reasons I have attempted to set out, even if C's allegations were true the risk disclosed by the one episode of which she complained was not shown to be anything other than slight and was a risk to a very limited class of persons in tightly defined circumstances. The incident alleged by C was itself relatively minor in the overall scheme of sexually inappropriate behaviour, and it was an isolated incident in a long career that was otherwise unblemished by any substantiated or substantial allegation suggesting such behaviour. The incident was not properly or fully investigated. I repeat that this is not to imply criticism of the deployment of scarce police resources at the time, but it has major implications for the decision whether or not to disclose. First, the absence of a full investigation makes assessment of the competing versions

of events more difficult. Second, because the police did not consider that L's alleged conduct constituted a criminal offence (itself a marker of the level of seriousness to be attributed to it), the reliability of C's account has never been tested or established. Third, as a result, any assessment of reliability is bound to be uncertain. The disclosure was made in circumstances where both the GTC and the ISA had considered the case, with the benefit of C's handwritten statements, and had respectively concluded that there was no case to answer and that there was no need for L to be placed on the Adults or Children's Barred Lists. Yet, despite the features that I have summarised in this judgment, the entirely foreseeable result of the disclosure has been as severe for L's employment prospects as if he had been convicted of a serious offence of sexual misconduct and placed on the Sex Offenders' Register: it is a killer blow and its effects are likely to be long lasting.

89. In my judgment, any proper balancing exercise comes down in favour of the conclusion that this interference with L's Article 8 rights is disproportionate and unjustifiable, particularly in a jurisdiction where people are generally to be presumed innocent until proved guilty. Adopting the other criteria identified above, the defendant has not shown a pressing need for the disclosure, because of the limited circumstances in which a possible risk of repetition might arise and the relative lack of gravity of the alleged conduct. Nor has the Defendant shown that the means used to impair L's rights are no more than necessary to accomplish a legitimate objective.

90. It may be argued that the terms of the July 2011 ECRC disclosure were true and accurate. Even if this were correct, it would not provide the answer to L's challenge. That is because the mere fact of including information in the "other relevant information" section of the ECRC automatically provides the Chief Constable's endorsement that he considers the reliability and gravity of the information to be such that it justifies what is foreseeably (particularly in the case of allegations of sexual impropriety by a teacher) a killer blow for the applicant's employment prospects. Furthermore, in this case the July 2011 ECRC did not provide a full and accurate picture of the true position. I have already stated that it is no part of the Court's purpose to direct the provider of the ECRC precisely how he might edit or adjust the information so as to act lawfully: see [6] above. However, certain features of the ECRC emerge which contributed to a lack of balance in the disclosure that was given. It did not disclose that the incident had not been fully investigated by the police. As a result, its implied statement that, if C had not been 18, criminal offences would have been committed carried a degree of certainty that was not justified. The statement that the GTC decided that there was no case to answer "after consideration by their investigating committee of the information available to them at that time" was inserted because the GTC did not have R's police statement; but this was not explained, and the implication that the GTC did not have adequate material upon which to make a decision is, in my judgment not justified. The disclosure did not mention that the ISA had considered the case and had ruled that L should not be added to either the Adults Barred List or the Children's Barred list. The lack of reference to the ISA implies no necessary personal criticism of the Chief Constable since it is not apparent from the papers that he was aware of the ISA's involvement. But the lack of full disclosure about the decisions of two bodies charged with regulation of the profession and protection of children and vulnerable adults contributed to a material imbalance in the disclosure that was made.

91. After the decisions that are subject to challenge in these proceedings the terms of ECRC disclosure relating to L were changed by the 22 January 2013 ECRC. In addition to the features identified above, the new disclosure added the words "... which is considered likely to be true ...", which added to the endorsement of the reliability of the allegations and to the material imbalance in the disclosure.

Conclusion

92. For the reasons set out above, the decisions under challenge constituted disproportionate and unjustifiable infringements of L's Article 8 rights.