Neutral Citation Number: 2013 EWHC 2721 (Admin)

Case No: CO/13845/2012

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

Thursday, 5 September 2013

Before :

His Honour Judge Raynor QC sitting as a judge of the High Court

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Between :

THE QUEEN (on the application of AR)	**Claimant**
- and -	
(1) THE CHIEF CONSTABLE OF THE GREATER MANCHESTER POLICE	
(2) SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendants**
-and-	
DISCLOSURE AND BARRING SERVICE	**Interested Party**

- - - - - - - - - - - - - - - - - - - -
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Mr Hugh Southey QC (instructed by **Stephensons Solicitors LLP**) for the Claimant
Ms Jennie Powsney (instructed by the **Greater Manchester Police**) for the 1st Defendant
Mr Jason Coppel QC (instructed by the **Treasury Solicitor**) for the 2nd Defendant

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APPROVED JUDGMENT

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

JUDGE RAYNOR QC

JUDGE RAYNOR QC

1. This is a claim for judicial review arising out of the issuing of an enhanced criminal record certificate (ECRC) to the claimant on 28 March 2012 in connection with his application for a licence as a private hire driver. As defined in the skeleton argument submitted by his Counsel, Mr Hugh Southey QC, the issues which arise are

   a) whether the disclosure was a breach of the presumption of innocence under article 6(2) of the European Convention on Human Rights;

   b) whether the disclosure was procedurally unfair because it was inconsistent with the claimant's acquittal and/or occurred without consultation, and

   c) whether the retention and disclosure of data regarding the acquittal is and was a breach of article 8 of ECHR.

2. On 8 March 2013 HH Judge Davies granted permission on the papers to proceed with the claim against the Chief Constable. Although he refused permission to proceed with the claim against the Secretary of State, she has appeared before me by Mr Jason Coppel QC.

3. On 21 March 2013 Judge Davies granted an Anonymity Order in favour of the claimant, providing that he should be referred to thereafter as "A R".

4. The ECRC was issued under the provisions of section 113B of the Police Act 1997, which so far as material at the relevant time provided as follows:

> (1) 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".

As will be seen, the issue in this case concerns s.113B(4)(b), not s.113B(4)(a).

5. The part of the ECRC which is complained of stated as follows:

"**Other relevant information disclosed at the Chief Police Officer(s) discretion**

Greater Manchester
GREATER MANCHESTER POLICE HOLD INFORMATION CONCERNING [AR] DOB…. THAT IN THE OPINION OF THE CHIEF OFFICER MIGHT BE RELEVANT TO THIS APPLICATION, AND OUGHT TO BE DISCLOSED UNDER PART V OF THE POLICE ACT 1997.
ON 04/11/09 POLICE WERE INFORMED OF AN ALLEGATION OF RAPE. A 17-YEAR OLD FEMALE ALLEGED THAT WHILST SHE HAD BEEN INTOXICATED AND TRAVELLING IN A TAXI, THE DRIVER HAD CONVEYED HER TO A SECLUDED LOCATION WHERE HE FORCIBLY HAD SEX WITH HER WITHOUT HER CONSENT.
AR WAS IDENTIFIED AS THE DRIVER AND WAS ARRESTED. UPON INTERVIEW HE STATED THAT THE FEMALE HAD BEEN A PASSENGER IN HIS TAXI, BUT DENIED HAVING SEX WITH HER, CLAIMING THAT SHE HAD MADE SEXUAL ADVANCES TOWARDS HIM WHICH HE HAD REJECTED. FOLLOWING CONSIDERATION BY THE CROWN PROSECUTION SERVICE, HE WAS CHARGED WITH RAPE OF FEMALE AGED 16 YEARS OR OVER, AND APPEARED BEFORE BOLTON CROWN COURT ON 21/01/11 WHERE HE WAS FOUND NOT GUILTY AND THE CASE WAS DISCHARGED."

The facts

6. As appears from the ECRC, in January 2011 the claimant (who was then nearly 33) was tried at Bolton Crown Court on a charge of rape allegedly committed shortly after 1 a.m. on 4 November 2009. The essential facts are summarised in the ECRC. I have taken the following further matters from the transcript of the evidence of Ms Sonia Marshall, a forensic scientist, and from the transcript of the judge's summing up to the jury.

a) The complainant in evidence alleged that after she had got into the taxi the claimant had on a number of occasions asked her for "a blow job", and she had refused. Afterwards he stopped the car and

got into the back with her where, after pulling down his trousers, putting on a condom and pulling down her trousers and thong, he forcibly had sex with her without her consent and in spite of her resistance. He then took her home and sped off.

b) Her mother gave evidence that on her return home the complainant was tense and agitated and said that the taxi driver had kept asking for “a blow job”. However she made no complaint of rape or of being attacked.

c) The following day the complainant went to college, and witnesses gave evidence of her distress there. She complained to a teacher (in effect) that she had been raped by a taxi driver, following which the police were called.

d) On a medical examination that morning it was found that she had a small abrasion at the entrance to her vagina consistent with recent penetration or attempted penetration by an erect penis or other hard object, but also consistent with some non-sexual cause.

e) There was no semen found on vaginal swabs taken on examination of the complainant, nor on her thong or the claimant’s underwear, but that was not unexpected if a condom had been worn. Indeed there was no semen, DNA or other forensic evidence to link the claimant and complainant, but that could be explained if a condom had been worn.

f) There were trace amounts of DNA from another man on the complainant’s thong, but the same could remain even following numerous machine washes. (The complainant’s evidence was that she had last had intercourse with another man approximately 6 weeks previously).

g) The claimant was a man of good character, who from the time of his first police interview on 5 November 2009 had consistently denied any sexual contact with the complainant and given a consistent account of events. He said that after he had stopped outside her home she jumped into the front of the vehicle and said that she wanted to give him “a blow job” and wanted company. He said he refused, stating that he was married and a professional man – he was a qualified teacher but had not been able to obtain employment as such. He said that she eventually got out of his vehicle and he left her standing in the road.

h) The case was left to the jury and, as previously stated, the claimant was acquitted on 21 January 2011.

7. On 22 March 2011 an ECRC was issued by the Criminal Records Bureau, the predecessor to the Disclosure and Barring Service, on the claimant’s application in connection with his proposed employment as a lecturer. The “other relevant information” contained in the Certificate was in identical terms to that set out in the certificate issued on 28 March 2012.

8. On 20 April 2011 the claimant complained to the Chief Constable about that disclosure stating:

> "There is no conviction. The jury rejected the complainant's evidence and the disclosure of the allegation is so prejudicial as to prevent me from being fairly considered for employment. Even if the disclosure of the allegation was possibly appropriate the disclosure fails to provide a full account of the evidence given and how the jury came to its conclusion. It is wrong, unfair and grossly prejudicial [that] I should have to defend myself every time I apply for employment after the jury have ruled I am an innocent man".

9. The police rejected that complaint.

10. The claimant then appealed against that decision and the Police Occupation Checks Unit rejected the appeal, having considered a review carried out by Susanna Wilson on 19 March 2012. At the time of her review Ms Wilson had the transcripts previously referred to but no other trial transcripts.

11. She concluded, in accordance with section 113B(4)(a), that the information was relevant to considerations of risk that the claimant might pose to children or vulnerable persons (and no complaint is made regarding this conclusion). It is thus accepted by the claimant that the Chief Constable was entitled to conclude that the first condition for disclosure, namely that set out in s. 113B(4)(a), was satisfied.

12. Ms Wilson then went on to consider whether, in accordance with s.113B(4)(b), the information ought to be included in the certificate.

13. She first set out her reasons for concluding that the information was of sufficient quality to pass the required test under the Guidance applicable at the material time, namely whether it was reasonable to believe that the information might be true. Since extensive complaint is made of this analysis, it is necessary for me to set it out in full:

> "I believe the information is of sufficient quality to pass the required test because:

- There was sufficient evidence for the CPS to authorise the applicant being charged with Rape, indicating that they believed there to be a realistic prospect of conviction. If the CPS had not believed the allegation, they would not have authorised the charge. This indicates that on the balance of probabilities the allegation was more likely to be true than false.
- Although the applicant was found not guilty by the jury, the test for criminal conviction is beyond all reasonable doubt, which is higher than that required for CRB disclosure purposes. Therefore the applicant's acquittal does not prove that he was innocent, or even that the jury though he was innocent, just that he could not be proved guilty beyond all reasonable doubt.
- In the applicant's letter to the IGU he states that another male's DNA was found on the victim's underwear. Whilst this is true, the expert forensic witness stated that this could have been there for a while, and could have been from the last time the victim stated she had sex, 6 weeks prior, dependent on the number of times the item had been washed since then. The expert was clear that the presence of another male's sperm DNA on the victim's underwear did not evidence that she had had sex with someone else on the evening of the incident.
- The forensic evidence regarding the alleged sexual intercourse between the application and the victim was inconclusive, which was to be expected as the victim alleged the applicant had used a condom, thereby making the presence of forensic evidence less likely. Therefore this does not support either the applicant or the victim, but cannot be used to cast doubt of the victim's account.
- The medical evidence revealed vaginal injuries consistent with penetration, which were up to three days old. This was consistent with the victim's account, and although not conclusive evidence, is in her favour.
- In the applicant's letter to the IGU he claims that the judge stated there were many inconsistencies in the female's account. Having read the judge's summing up, he states that "there has been legitimate criticism from the defence about some of the details of the accuracy of [the victim's] evidence", however he goes on to indicate that he believes these details are not important. "I suggest that the big picture may be what matters". The inaccuracies in the victim's evidence are not regarding the actual allegation, but regarding the circumstances leading up to the alleged incident, eg the time she got into the taxi, whose decision it was tat she was not staying at her friend's house, and the precise conversation with the applicant. As the victim was intoxicated at the time (by her own admission and that of the applicant), it is entirely plausible that she may have forgotten some of the less important aspects of the evening, and therefore this does not necessarily cast doubt on her account.
- Although the victim was also unclear as to the duration of the alleged intercourse, as she states she was in shock, and she was intoxicated, this again does not make her account implausible.

- The court heard evidence of the victim's distress after the incident from a number of witnesses, which would seem to support her account.
- Although the applicant's account was consistent which is in his favour, the judge rightly states that this does not negate the possibility of him lying as "of course a man may lie consistently".
- There is no indication of the victim having any motive to make a false allegation, and it seems unlikely that she would wish to go through the emotional trauma of medical and forensic examinations, intimate questions about her sexual activity, and the court case, to make a malicious allegation without a strong motive for doing this.
- Although the IGU review has raised that the acquittal indicates that the allegation might not be true, the legislation and guidance is clear that allegations that might not be true can be disclosed, as the test required for CRB disclosure purposes is lower than this.
- Due to the above, I believe that the information is more likely to be true than false and is not lacking in substance, and it is reasonable to believe that the information might be true, and therefore it passes the required test."

14. Finally Ms Wilson addressed the question whether she believed that disclosure was reasonable and proportionate, concluding that it was for the following reasons:

"I believe disclosure is both reasonable and proportionate because:

- In my opinion, as explained above, the information is clearly relevant and passes the required test.
- The alleged incident is relatively recent as it occurred in Nov 2009, less than 3 years ago.
- Although this is an isolated incident, it is very serious as it relates to an alleged rape using force, by a stranger. It is not a minor incident.
- If the applicant repeats this alleged behaviour in the [position applied for], vulnerable people could be caused serious emotional and physical harm.
- Although disclosure of this incident will have an impact on the applicant's human rights as he may fail to gain employment in his chosen profession, this would not prevent the applicant from gaining employment in another profession which does not require an enhanced CRB check, and therefore it would not prevent him from gaining employment to support his family. Disclosure of this allegation will not prevent the applicant from gaining all forms of employment indefinitely.
- I believe that it is important that the [potential employer/registered body] are made aware of this allegation, in order that they can

make an informed recruitment decision and act to safeguard vulnerable people.

- Due to the above, I believe the potential risk to vulnerable people outweighs the effect of disclosure on the applicant's human rights in this instance, and therefore the information ought to be disclosed."

15. The claimant did not bring any legal challenge to the decisions of the Chief Constable or the CRB in relation to the disclosure of March 2011.

16. As stated previously, a further ECRC was issued by the CRB on 28 March 2012 in connection with the application by the claimant for a licence as a private hire driver. The Chief Constable did not consult the claimant regarding the information provided for inclusion on that certificate.

17. On 28 March 2012 Ms Wilson again reviewed the proposed disclosure, stating the reasons for agreeing with the proposed disclosure in precisely the same terms as quoted in paragraphs 13 and 14 above, the police risk assessment having recognised that the claimant was applying to be a taxi driver and would come into contact with children and vulnerable adults, providing an opportunity to commit a similar offence. She concluded:

"Having reviewed this in the context of the post applied for, and having balanced the potential risks for vulnerable people against the adverse effects of disclosure on the applicant's human rights, I consider disclosure would be proportionate in this instance…"

18. Inspector Kynaston, the Chief Constable's delegate, reviewed the material provided by Ms Wilson, and stated her rationale for believing that the disclosure was factually correct, reasonable and proportionate, as follows:

"The disclosure is in relation to allegations that on 04/11/09 police were informed of an allegation of rape. A 17-year old female alleged that whilst she had been intoxicated and travelling in a taxi, the driver had conveyed her to a secluded location where he forcibly had sex with her without her consent. [AR] was identified as the driver was arrested. Following consideration by the Crown Prosecution Service, he was charged with Rape of Female Aged 16 Years or Over, I consider that this is relevant to the post applied for as the applicant may present a risk of harm to the children/vulnerable adults with whom they may come into contact whilst again working as a private hire driver.

In considering whether the information ought to be disclosed, I have taken into account the gravity of the material involved, the reliability of the information on which it is based, the relevance to the post applied for, the period of time elapsed since the event(s) occurred, together with the likely impact on the applicant of disclosing the material. I have also taken into account the details of the matters as reported to the police, together with the considerations of the Crown Prosecution Service. I believe the information contained in this disclosure to be of sufficient quality to pass the required test under MP8, and with due regard to my obligations under the CRB's Quality Assurance Framework and specifically Section 115(7)(a) and (b) of The Police Act 1997, I consider this is information that is relevant to the post applied for and ought to be disclosed to be considered by the registered body concerned. I believe this disclosure to be factually correct, reasonable and proportionate, and that the wording is fair and reflective of the information held by Greater Manchester Police. Having considered the human rights of all relevant parties and the potential risks as outlined above with which I fully agree I believe the disclosure is necessary and therefore authorise this disclosure as approved information.

19. On 22 June 2012 the claimant complained to the CRB about the March 2012 disclosure. He stated

a) That the allegation of the complainant was false and that he had been found not guilty, having protested his innocence on his arrest
b) That the Judge had stated that there were many inconsistencies in the complainant's account and that forensic evidence had shown that someone else's DNA was found on her underwear
c) That he had maintained his innocence throughout
d) That he had a first class degree in mathematics and completed the PGCE, which meant that he was qualified to teach at colleges and wanted to pursue a career of teaching. However when he applied for jobs the rape allegation was disclosed and employers would not consider him for employment, which he considered to be unjust as he knew he was innocent and had been found not guilty
e) That would adversely affect the rest of his life and his family (he having four children).

He concluded by asking for the reasons for the not guilty verdict to be reviewed and for the decision as to disclosure to be reconsidered, as he believed he was being punished for a crime he had not committed and that his "whole life has been turned upside down".

20. His complaint was rejected by the CRB on 7 August 2012.

21. Pre-action correspondence was exchanged from 10 September 2012 to 1 November 2012, with these proceedings being issued on 21 December 2012.

The issues

(A) Whether the claimant's article 8 rights were infringed by the disclosure in the March 2012 ECRC Certificate

22. Article 8 of ECHR provides as follows:

> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

23. Three issues arise, namely whether the claimant's article 8 rights are engaged in this case and, if they are, whether they have been unlawfully infringed by (a) the disclosure effected by the ECRC and/or (b) the retention by the Chief Constable of material relating to the claimant's acquittal.

(I) Engagement of Article 8

24. The law in this connection has recently been summarised by the Court of Appeal in *R (T) v Chief Constable of Greater Manchester Police. [2013] 1 Cr. App. R 344.*

25. In paragraph 31 of the judgment of the Court, the position was summarised as follows:

> 31. …. The issue of what does and what does not lie within the scope of art. 8 has been considered many times. The judgment of Lord Hope in *R. (L) at [24]-[27*] contains a useful summary of the jurisprudence. There are two separate bases on which the disclosure of information about past convictions or cautions can constitute an interference with the right to respect for private life under art.8(1). First, the disclosure of personal information that individuals wish to keep to themselves can constitute an interference. In one sense, criminal conviction information is public by

virtue of the simple fact that convictions are made and sentences are imposed in public. But as the conviction recedes into the past, it becomes part of the individual's private life. By contrast, a caution takes place in private, so that the administering of a caution is part of an individual's private life from the outset. Secondly, the disclosure of historic information about convictions or cautions can lead to a person's exclusion from employment, and can therefore adversely affect his or her ability to develop relationships with others: this too involves an interference with the right to respect for private life. Excluding a person from employment in his chosen field is liable to affect his 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 his private life: see *Sidabras v Lithuania* (2006) 42 E.H.R.R. 6 (p.105) at [48].

26. In *Wright v Secretary of State for Health [2009] AC 739, para 36,* Baroness Hale said that the fact that a person had been excluded from employment was likely to get about and, if it did, the stigma would be considerable.

27. Mr Coppel for the Secretary of State submits that the disclosure in this case did not interfere with the claimant's article 8 rights since the acquittal occurred in public as recently as early 2011 and there is no evidence that the ECRC had the effect of excluding him from any form of employment, still less that it prevented him from earning a living or developing relationships with others so as to have serious repercussions on the enjoyment of his private life.

28. I reject that submission. In my view article 8 is clearly engaged in this case. The effect of the 2012 Certificate may well be to prevent the claimant from pursuing employment as a private hire driver, which will impact on his earning a living, which in turn is liable to have serious repercussions on the enjoyment of his private life. Furthermore the disclosure will continue to be made in future teaching applications and if the claimant is excluded, as again may be the case, from that chosen employment, that is likely to have a serious effect on his livelihood and the development of his relationships with others.

29. In this regard the judgment of Lord Neuberger in *L v Commissioner of the Metropolitan Police [2010] 1 AC 410, 438* is pertinent:

> 68. As to the first issue, I am firmly of the view that article 8 is engaged in this case. An enhanced criminal record certificate (an "ECRC") which contains particulars of any convictions (potentially including spent convictions) or cautions (under section 115(6)(a)(i) and 113(5) of the 1997 Act), or any other information "which might be relevant" and which "ought to be included in the certificate" (under section 115(6)(a)(ii) and 115(7) of the 1997 Act), will often have a highly significant effect on the applicant. In the light of the wide ambit of section 115 (extending as it does to social workers and teachers, as well as to those "regularly caring for, training, supervising or being in sole charge of children), an adverse ECRC (i.e. an ECRC within section 115(6)(a), rather than section 115(6)(b)) will often effectively shut off forever all employment opportunities for the applicant in a large number of different fields, for the reasons given, in relation to other legislation, by Baroness Hale of Richmond in *R (Wright) and others v Secretary of State for Health* [2009] UKHL 3, [2009] 2 WLR 267, para 22.

(II) Infringement of article 8 rights

30. The leading authority is the decision of the Supreme Court in *R (L) v Commissioner of the Metropolitan Police [2010] 1 AC 410.*

31. In his judgment Lord Hope summarised the position as follows:

> 40. The question whether the information might be relevant is not, however, the end of the matter. An opinion must also be formed as to whether it "ought" to be included in the certificate. It is here, as the guidance that is available to the police correctly recognises, that attention must be given to the impact that disclosure may have on the private lives of the applicant and of any third party who is referred to in the information. For the reasons I have already given (see paras 22-29), I consider that the decisions which the chief officer of police is required to take by section 115(7) of the 1997 Act will fall within the scope of article 8(1) in every case. So in every case he must consider whether there is likely to be an interference with the applicant's private life, and if so whether that interference can be justified.
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> 41. This raises the question whether in *R (X) v Chief Constable of the West Midlands Police* [2005] 1 WLR 65, paras 36 and 37 and especially in para 41, Lord Woolf CJ struck the balance in the right place. Before he addressed himself to this issue, however, Lord Woolf noted in para 20 of the judgment that it had not been suggested in that case that the legislation itself contravenes article 8:
>
>> "No doubt this is because disclosure of the information contained in the certificate would be 'in accordance with the law' and 'necessary in a democratic society', in the interests of public safety and for the prevention of crime and for the protection of the rights and freedoms of others. This country must, through its legislature, be entitled to enable information to be available to prospective employers, where the nature of the employment means that particular care should be taken to ensure that those who are

> working with the appropriate categories of persons can be relied on to do so, without those in their care coming to harm if they are under the age of 18 or vulnerable adults."

I would respectfully endorse those remarks. Here too it was not suggested by Mr Cragg that the legislation itself contravened article 8, so long as it was interpreted and applied in a way that was proportionate.

42. 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. As the many additions that have been made to the list of matters in section 115(5) show, the use that is being made of the requirement to obtain an ECRC has increased substantially since the scheme was first devised. The number of disclosures of information by means of ECRCs has exceeded 200,000 for each of the last two years (215,640 for 2007/2008; 274,877 for 2008/2009). Not far short of ten per cent of these disclosures have had section 115(7) information on them (17,560 for 2007/2008; 21,045 for 2008/2009). Increasing use of this procedure, and the effects of the release of sensitive information of this kind on the applicants' opportunities for employment or engaging in unpaid work in the community and their ability to establish and develop relations with others, is a cause of very real public concern as the written intervention submitted by Liberty indicates.

45. The correct approach, as in other cases where competing Convention rights are in issue, is that neither consideration has precedence over the other: *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 AC 457, para 12, per Lord Nicholls of Birkenhead. The rating table in MP9 should be restructured so that the precedence that is given to the risk that failure to disclose would cause to the vulnerable group is removed. It should indicate that careful consideration is required in all cases where the disruption to the private life of anyone is judged to be as great, or more so, as the risk of non-disclosure to the vulnerable group. The advice that, where careful consideration is required, the rationale for disclosure should make it very clear why the human rights infringement outweighs the risk posed to the vulnerable group also needs to be reworded. It should no longer be assumed that the presumption is for disclosure unless there is a good reason for not doing so.

32. In his judgment Lord Neuberger stated as follows:

81. Having decided that information might be relevant under section 115(7)(a), the chief officer then has to decide under section 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.

82. In a nutshell, as Lord Hope has said, the issue is essentially one of proportionality. In some, indeed possibly many, cases where the chief officer is minded to include material in an ECRC on the basis that he inclines to the view that it satisfies section 115(7)(b), he would, in my view, be obliged to contact the applicant to seek her views, and take what she says into account, before reaching a final conclusion. Otherwise, in such cases, the applicant's article 8 rights will not have been properly protected. Again, it is impossible to be prescriptive as to when that would be required. However, I would have thought that, where the chief officer is not satisfied that the applicant has had a fair opportunity to answer any allegation involved in the material concerned, where he is doubtful as to its potential relevance to the post for which the applicant has applied, or where the information is historical or vague, it would often, indeed perhaps normally, be wrong to include it in an ECRC without first giving the applicant an opportunity to say why it should not be included.

33. A helpful summary of the law has recently been provided by Stuart-Smith J in *R (L) v Cumbria Constabulary [2013] EWHC 869 (Admin)*

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*

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.

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.

(III) Whether the interference with the claimant's article 8 rights effected by the disclosure in the ECRC is justified

The claimant's submissions

34. The claimant's submissions may be summarised as follows:

a) it has not been demonstrated that disclosure was necessary for the protection of the vulnerable or that a fair balance has been struck between the need to protect the public and the protection of the claimant's article 8 rights: and

b) there was a failure to adopt a fair procedure, which impacts on the claimant's article 8 rights and also was a breach of his common law rights.

35. As to the first submission,

a) it is submitted that the decision making process was flawed, in that

i) the review of the information obtained from the trial transcript proceeded on a false premise, namely that the CPS authorisation of prosecution indicated that on the balance of probabilities the allegation was more likely to be true than false. This of course was a non-sequitur. Proceeding from that, it is submitted that the transcript analysis was slanted in favour of the complainant, who was referred to as "the victim"; it is said that the reviewer was not open minded, and I note in that regard that there is no reference in the review to the claimant's good character;

ii) insufficient account was taken of the acquittal, and Mr Southey submits that where a person is acquitted following a trial, the criminal allegation should not be included in an ECRC unless the acquittal was on the grounds of a legal technicality or agreed facts indicate risks;

iii) there was an insufficient analysis of the evidence, reliance being placed on the judgment of Coulson J in *R (RK) v South Yorkshire Police [2013] EWHC 1555 (Admin),* where he stated (in paragraph 57) that if the ECRC was going to disclose information in relation to allegations that had been rejected by a jury, on the grounds that they could still be "substantiated", then at the very least that required a detailed analysis of the allegations by reference to the evidence. Mr Southey submits that a full trial transcript should have been obtained by the police and analysed, given that there was no indication of why the jury acquitted. It is pointed out, correctly, that the police only obtained a transcript of the summing up and forensic scientific evidence after the issuing of the first ECRC in March 2011;

iv) it is not sufficient to justify disclosure that the facts might be true, it being necessary to consider how likely it was that they were true. In this case it is submitted that it was impossible to come to a reasonable and reliable conclusion that the complainant's accounts was more likely to be true than false.

b) it is further submitted that the disclosure in this case is particularly damaging since it is implied that the claimant was guilty of the offence with which he was charged.

36. As to the second broad submission (paragraph 34(b)), Mr Southey, as stated, points out that article 8 has an important procedural component and requires that the decision making process must be such as to secure that the views and interests of those who will be adversely affected by the decision are known and taken into account. I was referred to the decision of the Court of Appeal in *R (H and L) v A City Council [2011] EWCA Civ 403* (paragraph 51), and the remarks of Lord Woolf MR in *R (Thorpe) v North Wales Police [1999] QB 396, 428*, that before deciding whether or not to disclose information the Police should have consulted the persons about whom disclosure was being contemplated, disclosing the gist of the relevant information to give then an opportunity to comment.

37. It is submitted by Mr Southey

a) correctly, that there was no consultation at all before the issuing of the first ECRC and that there should have been consultation with the claimant before a decision was taken because it is difficult to persuade a decision maker to change his mind afterwards;
b) that there was no consultation about the effect of the impact on the claimant and that he was not given a fair opportunity to say why there should be no disclosure;
c) that there was no disclosure of the points that the police regarded as significant, to let him respond; and
d) that there was no consultation so as to ensure that full consideration was given to matters such as the reliability of allegations.

The defendants' submissions

38. It is submitted that

a) there is no valid procedural complaint here either under article 8 or at common law because the claimant had had a full opportunity to rebut the rape allegation during the criminal trial and had made full representations in relation to the disclosure of the acquittal after the first ECRC in March 2011. It is pointed out that there is no suggestion in the Grounds of Claim or Skeleton Argument that there were any further substantive points which he would have made had he been given a further opportunity in March 2012 to make representations about the disclosure;

b) the Chief Constable was fully entitled to come to the view that the assertion of rape was not lacking in substance and that it was reasonable to believe that it might be true, notwithstanding the acquittal. It is submitted that the review contained a careful analysis of the transcripts of the summing up and forensic evidence;

c) the Chief Constable was plainly entitled to take the view that it was reasonable and proportionate to disclose the acquittal in the following circumstances:

   i) it cannot be said that the acquittal amounted to the complete exoneration of the Claimant in relation to the allegation of rape;

   ii) the allegation was both recent and obviously relevant to the purposes for which the ECRC was sought, namely that of deciding whether the Claimant was a fit and proper person to hold a private hire licence;

   iii) disclosure was to an experienced decision maker, the licensing authority, who would exercise judgment as to what to make of the acquittal;

   iv) the case is to be contrasted with that of *R (R K) v South Yorkshire Police*, where Coulson J did not regard the incidents as "particularly grave or serious" (paragraph 35) and concluded that the allegations "were inherently unreliable [and that it was] unsurprising that they failed" (paragraph 40).

My conclusions

39. For reasons which I shall state (and ignoring for the moment the issue of the retention by the police of data relating to the acquittal) I am satisfied that the interference with the claimant's article 8 rights resulting from the March 2012 ECRC was justified, and that the disclosure in that Certificate was reasonable, proportionate and no more than necessary to secure the objective of protecting young and vulnerable persons.

40. The following are my reasons:

   a) Although the review proceeded on a false premise (namely that the decision to charge indicated that on the balance of probabilities the allegation was more likely to be true than false) it is clear on my reading of the transcript of the forensic evidence and summing up that the same were carefully considered in the review, and in my judgment the comments on the forensic and medical evidence, the complainant's inconsistencies and the consistency of the claimant were fair. The complainant's evidence derived some support from

the medical evidence and her distress, and no criticism has been made of the comments regarding the lack of any indication of motive to make a false allegation and willingness to suffer emotional trauma.

In this connection I regard it helpful the comments of Stuart-Smith *in L v Cumbria Constabulary* at paragraph 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.

b) It does not seem to me in this case that the police, as part of their decision making process, were reasonably required to obtain a full trial transcript in order to reach reliable conclusions as to whether the complainant's allegations lacked substance and whether it was reasonable to believe that they might be true. For that purpose I consider that it was sufficient that they had a transcript of the summing up and note that there is no rationality challenge to these conclusions.

c) The fact of acquittal was recognised, and in my view it was right to comment that nothing could be assumed from the fact of acquittal other than that the jury was not satisfied beyond reasonable doubt of guilt.

d) Whilst I do not consider that a firm or reliable conclusion as to whether the complainant's account is more likely to be true than false can be gathered from the transcript alone, I am quite satisfied that the Chief Constable was fully entitled to conclude that it was "not lacking in substance, and that it [was] reasonable to believe that the information might be true". In my judgment that is a

sufficient basis for disclosure (subject to the issue of proportionality), given the other factors reasonably relied upon by the Chief Constable as justifying disclosure as stated in the review, such as the seriousness of the alleged offence, its relevance to the position applied for and its comparatively recent occurrence.

e) I do not accept that the March 2012 disclosure decision is invalidated or rendered unlawful by any failure of procedure, or that the claimant has in the event suffered any injustice as a result of the failure to consult before making that decision. When making that decision, account was taken of his previous complaints regarding the March 2011 disclosure, there had been no legal challenge to that disclosure and the Chief Constable in my view was entitled to proceed upon the basis that the claimant's complaints were as previously stated. In the event it is plain that the police in the March 2012 review anticipated and considered the matters that the claimant later raised in his letter of 22 June 2012 and, as submitted by the Defendants, no suggestion has been made in these proceedings of any further substantive matters that the claimant would have wished to raise.

f) Account was taken of the claimant's employment difficulties resulting from the ECRC, Inspector Kynaston having taken into account the likely impact on the claimant of disclosing the material. In my judgment, the Chief Constable was justified in concluding that the potential risk to the vulnerable if the claimant obtained a private hire driver's licence and had acted as alleged by the complainant outweighed the detriments that would be caused to him by the disclosure and the interference with his article 8 rights and that disclosure were both justified and proportionate. I am satisfied that the disclosure in the March 2012 ECRC Certificate was no more than was necessary to meet the pressing social need for children and vulnerable adults to be protected and that the balance between that need and respect for the claimant's article 8 rights was struck in the right place.

(IV) Alleged infringement of article 8 rights by retention of information relating to the claimant's acquittal

41. The challenge here is to the retention of the information for police purposes irrespective of disclosure.

42. Mr Southey's submission that the mere retention of the acquittal data in this case is an unlawful interference with the claimant's article 8 rights is based upon the decision of the European Court of Human Rights (ECtHR) in the case of *MM v UK (13 November 2012*). In that case the Court held that the retention and disclosure of the Applicant's caution data regarding the caution given to her for child abduction in November 2000 amounted to a violation of article 8 on the grounds that the cumulative effect of data protection shortcomings meant that the Court was not satisfied that there were sufficient safeguards in the system for retention and disclosure of criminal record data to ensure that data relating to the Applicant's private life had not been and would not be disclosed in violation of her right to respect for her private life.

43. In the course of its judgment the Court reiterated that both the storing of information relating to an individual's private life and the release of such information came within the scope of article 8 and that this was all the more true where the information concerned a person's distant past (paragraph 187).

44. In paragraphs 188 and 199 of its judgment the Court stated as follows:

> 188. The Court notes at the outset that the data in question constitute both "personal data" and "sensitive personal data" within the meaning of the Data Protection Act 1998 (see paragraph 67 above). They also constitute "personal data" and are identified as a special category of data under the Council of Europe's Data Protection Convention (see paragraphs 122-123 above). Further, the data form part of the applicant's criminal record (see *Rotaru*, cited above, §§ 43-46; and *Bouchacourt*, cited above, § 57). In this regard the Court, like Lord Hope in *R (L)*, emphasises that although data contained in the criminal record are, in one sense, public information, their systematic storing in central records means that they are available for disclosure long after the event when everyone other than the person concerned is likely to have forgotten about it, and all the more so where, as in the present case, the caution has occurred in private. Thus as

> the conviction or caution itself recedes into the past, it becomes a part of the person's private life which must be respected (see *Rotaru*, cited above, §§ 43-44). In the present case, the administration of the caution occurred almost twelve years ago.
>
> 199. The Court recognises that there may be a need for a comprehensive record of all cautions, conviction, warnings, reprimands, acquittals and even other information of the nature currently disclosed pursuant to section 113B(4) of the 1997 Act. However, the indiscriminate and open-ended collection of criminal record data is unlikely to comply with the requirements of Article 8 in the absence of clear and detailed statutory regulations clarifying the safeguards applicable and setting out the rules governing, *inter alia*, the circumstances in which data can be collected, the duration of their storage, the use to which they can be put and the circumstances in which they may be destroyed.

45. Mr Southey submits that there is no statutory basis for holding the acquittal information and that there are no clear and detailed statutory regulations clarifying the safeguards applicable to the retention of data or the circumstances in which they may be destroyed, rendering their retention unlawful in accordance with the judgment of the ECtHR in *MM*.

46. Mr Coppel submits that *MM* is not in accordance with authority of the English courts, which I should follow, and that it is distinguishable for reasons set out in paragraph 30 of his skeleton argument.

47. The authority to which he refers is *C v Metropolitan Police Commissioner [2012] 1 WLR 3007,* where the Divisional Court rejected an article 8 challenge to the retention of information on the police national computer regarding an allegation of rape.

48. In the present case the police have legitimate reasons to retain the information regarding the claimant's acquittal for their own purposes, not only if further matters arise involving the claimant, but also if further matters arise involving the complainant. For my part, I would distinguish *MM* on the simple basis that there the information was over 12 years old and related to a caution administered in private. Here the acquittal occurred in public approximately 2 ½ years ago. In *MM* (at paragraph 188) the Court referred to conviction or cautions receding into the past and

becoming a part of a person's private life which must be respected. In common with the view of Burnett J in the Divisional Court in *TD v Metropolitan Police Commissioner [2013] EWHC 2231 (Admin)* (relating to data in relation to the claimant's arrest and an allegation of sexual assault that occurred nine years previously) I would say that the "time has not come when it can be said that the retention of the material records relating to the Claimant…is a disproportionate interference with his Article 8 Rights".

49. Furthermore, I am satisfied that the retention at the present time of this information is justified and, if it engages Article 8 at all, the interference with the claimant's right to respect for his private life is small and plainly proportionate. A similar conclusion was reached by Richards LJ in the Divisional Court in the case of *C v Metropolitan Police Commissioner*.

(B) Whether the disclosure in the March 2012 ECRC constitutes a breach of the claimant's rights under article 6(2), which provides that "everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law"

50. At first sight it would seem surprising that disclosure in accordance with Section 113B of the Police Act 1997 could amount to a breach of this provision, but Mr Southey relies upon statements in two decisions of the ECtHR, namely *Hrdalo v Croatia (27 September 2011)* and *Allen v UK (12 July 2013*).

51. In paragraph 55 of the *Hrdalo* judgment, the Court stated:

> 54. The further issue to be determined in the present case is whether in the above administrative proceedings the domestic authorities, by their conduct, the reasons given for their decisions or the language used in their reasoning, cast doubt on the applicant's innocence and thus undermined the principle of the presumption of innocence, as guaranteed by Article 6 § 2 of the Convention (see *Vassilios Stavropoulos*, cited above, § 37). The Court reiterates that one of the functions of Article 6 § 2 is to protect an acquitted person's reputation from statements or acts that follow an acquittal which would seem to undermine it (see *Taliadorou and Stylianou v. Cyprus*, nos. 39627/05 and 39631/05, § 26, 16 October 2008).

52. In the *Allen* case, the Court stated:

94. However, in keeping with the need to ensure that the right guaranteed by Article 6 § 2 is practical and effective, the presumption of innocence also has another aspect. Its general aim, in this second aspect, is to protect individuals who have been acquitted of a criminal charge, or in respect of whom criminal proceedings have been discontinued, from being treated by public officials and authorities as though they are in fact guilty of the offence charged. In these cases, the presumption of innocence has already operated, through the application at trial of the various requirements inherent in the procedural guarantee it affords, to prevent an unfair criminal conviction being imposed. Without protection to ensure respect for the acquittal or the discontinuation decision in any other proceedings, the fair trial guarantees of Article 6 § 2 could risk becoming theoretical and illusory. What is also at stake once the criminal proceedings have concluded is the person's reputation and the way in which that person is perceived by the public. To a certain extent, the protection afforded under Article 6 § 2 in this respect may overlap with the protection afforded by Article 8 (see, for example, *Zollman v. The United Kingdom* (dec.), no. 62902/00, ECHR 2003-XII; and *Taliadorou and Stylianou v. Cyprus*, nos. 39627/05 and 39631/05, §§ 27 and 56-59, 16 October 2008).

102. More recently, the Court has expressed the view that following discontinuation of criminal proceedings the presumption of innocence requires that the lack of a person's criminal conviction be preserved in any other proceedings of whatever nature (see *Vanjak*, cited above, § 41; and *Šikić*, cited above, § 47). It has also indicated that the operative part of an acquittal judgment must be respected by any authority referring directly or indirectly to the criminal responsibility of the interested party (see *Vassilios Stavropoulos*, cited above, § 39; *Tendam*, cited above, § 37; and *Lorenzetti*, cited above, § 46).

103. The present case concerns the application of the presumption of innocence in judicial proceedings following the quashing by the CACD of the applicant's conviction, giving rise to an acquittal. Having regard to the aims of Article 6 § 2 discussed above (see paragraphs 92-94) and the approach which emerges from its case-law review, the Court would formulate the principle of the presumption of innocence in this context as follows: the presumption of innocence means that where there has been a criminal charge and criminal proceedings have ended in an acquittal, the person who was the subject of the criminal proceedings is innocent in the eyes of the law and must be treated in a manner consistent with that innocence. To this extent, therefore, the presumption of innocence will remain after the conclusion of criminal proceedings in order to ensure that, as regards any charge which was not proven, the innocence of the person in question is respected. This overriding concern lies at the root of the Court's approach to the applicability of Article 6 § 2 in these cases.

104. Whenever the question of the applicability of Article 6 § 2 arises in the context of subsequent proceedings, the applicant must demonstrate the existence of a link, as referred to above, between the concluded criminal proceedings and the subsequent proceedings. Such a link is likely to be

present, for example, where the subsequent proceedings require examination of the outcome of the prior criminal proceedings and, in particular, where they oblige the court to analyse the criminal judgment; to engage in a review or evaluation of the evidence in the criminal file; to assess the applicant's participation in some or all of the events leading to the criminal charge; or to comment on the subsisting indications of the applicant's possible guilt.

53. Mr Southey also relies upon the dictum of Lord Phillips in *R (Adams) v Secretary of State for Justice [2011] 2 WLR 1180,* that*:*

"The Strasbourg Court has stated that one of the functions of Article 6.2 is to protect an acquitted person's reputation from statements or acts that follow an acquittal which would seem to undermine it."

54. Mr Coppel for the Secretary of State submits:

a) that article 6.2 is not applicable because the Strasbourg cases show that the provision "is designed to protect the criminal acquittal in proceedings that are closely linked to the criminal process itself." (per Lord Hope in *Adams* at paragraph 109) and the issuing of an ECRC in no way constitutes proceedings; and

b) in any event the issuing of the ECRC does not constitute a breach of article 6.2.

55. It is not necessary for me to consider Mr Coppel's submission regarding "proceedings", because I am quite satisfied that his submission regarding breach is correct for the following reasons:

a) as stated in paragraph 94 of *Allen*, the aim of Article 6.2 (after acquittal) is to protect the individual who is acquitted from being treated in subsequent proceedings or by public officials as if in fact guilty of the offence charged. Contrary to Mr Southey's submission that the disclosure here "implies that [the claimant] is guilty of a serious sexual offence", in my view it does no such thing. In no way does it suggest that he should have been convicted, nor does it suggest that he in fact committed the acts complained of. What may fairly be implied is the suggestion that, notwithstanding the acquittal, he may in fact have committed the acts complained of; that does not, however, impugn the correctness

of the acquittal, and I accept Mr Coppel's submission that there is a valid distinction between a statement casting doubt on the correctness of an acquittal and a statement that suggests that, notwithstanding the acquittal, the claimant might have committed the acts alleged.

b) In my judgment, it is no breach of article 6(2) to imply, in a statement made lawfully under Section 113B(4) of the Police Act 1997, that, notwithstanding the acquittal, the claimant might in fact have committed the act complained of in a criminal charge. For such disclosure to be lawful, it must be justified under Article 8, as I have found this disclosure to be, and in my view that renders the disclosure lawful under the ECHR.

56. I derive some comfort in this regard from the fact that in previous cases involving acquittals it was not thought to argue that the disclosure constituted a breach of Article 6(2). (I refer to *R (S) v West Mercia Constabulary [2008] EWHC 2811 (Admin)* and *R (RK) v South Yorkshire Police*, the decision of Coulson J previously referred to.) In the *S* case, Wyn Williams J found that it was irrational or unreasonable in the *Wednesbury* sense for the Deputy Chief Constable to conclude that it might be true that the claimant was the offender (para 69). However, he went on to say (at para 70)

> "I stress, however, that this decision is very specific to the facts of this case. I do not suggest for one minute that allegations should not be disclosed in an ECRC simply because the alleged offender has been acquitted. The circumstances surrounding the acquittal are all important. There will be instances where an alleged offender is acquitted but only because the Magistrates (or Jury) entertain a reasonable doubt about the alleged offender's guilt. The tribunal of fact may harbour substantial doubts. In such circumstances, however, it might well be perfectly reasonable and rational for a Chief Constable to conclude that the alleged offender might have committed the alleged offence….."

Conclusion

57. It follows that this claim for judicial review fails.