CO/3513/2015

Neutral Citation Number: [2015] EWHC 4095 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2A 2LL

Tuesday, 17 November 2015

Before:

THE HONOURABLE MR JUSTICE EDIS

Between:
THE QUEEN ON THE APPLICATION OF R (BW)

Claimant

v

INDEPENDENT MONITOR

Defendant

THE CHIEF CONSTABLE OF CAMBRIDGESHIRE

Interested Party

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Gemma Hobcraft (instructed by Hickman Rose) appeared on behalf of the **Claimant**
Jonathan Moffett (instructed by GLD) appeared on behalf of the **Defendant**
George Thomas (instructed by Weightmans LLP) appeared on behalf of the **Interested Party**

JUDGMENT
(Approved)

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1. MR JUSTICE EDIS: An anonymity order is in place for this case under CPR39(2)(4) which restrains anyone from identifying the claimant. This an extemporary judgment which will be revised and corrected as to its phrasing at a later stage, although not of course as to its result or fundamental reasoning. It has been possible to dispose of this case in that way because of the careful work of all three counsel who have appeared before me who have each set out their respective cases with clarity and balance and which enabled me to undertake a significant amount of pre-reading.

2. This is a claim for judicial review of a decision ("the decision") by the defendant to uphold an earlier decision by the interested party that "other relevant information" set out in the Enhanced Criminal Record Certificate "ECRC" dated 12 September 2014 is relevant and ought to be disclosed. The decision of the defendant, the Independent Monitor, was taken on 15 May 2015. Permission to seek relief against the interested party was sought but refused on the papers. Permission to seek relief against the defendant was granted by Collins J.

3. The claimant seeks a declaration that the decision was unlawful in that it irrationally concluded that the information which it concerns was relevant and that the decision was a disproportionate and unlawful breach of the claimant's article 8 rights. He therefore seeks an order quashing it and damages by way of just satisfaction for the breach of those rights.

4. The claimant is now 19 years old and the information in respect of which he seeks to prevent disclosure relates to his acquittal on charges of common assault and sexual assault in the Youth Court when he was 15 years old "The Information." He currently hopes to pursue a degree course in education. His university place is now being held open until January 2016, subject to a clear certificate being obtained by the end of 2015. These proceedings have been expedited so that their outcome will be known in time to meet that condition if they succeed. This is another reason why I have decided not to reserve judgment in a complex matter.

5. It is unnecessary to set out the Information in detail. It records that a complaint was received by the interested party from a 13-year-old female who alleged that she had been subjected to a sexual assault by the claimant. They were at the same school and met at the end of the school day. She had previously invited him to become a Facebook friend of hers and he, having established who she was, used the opportunity to persuade her to meet him after school at a quiet part of the school grounds and she agreed.

6. In the Facebook exchange by which this arrangement was made, he told her that he would tell her when they met about "everyone woman's weakness" and asked her whether she was "flexible" and whether she could "bend." There is an issue about how well they knew each other before that time. It appears that they had been involved in the production and performance of two plays together at school and they served together on a school student board. It appears to me that the fact that he did not immediately recognise her by name when she asked him to be his Facebook friend, is perhaps the best measure of the depth of their friendship before that time. This is issue

was explored at some length in his interviews under caution after he was arrested in 2011 and he accepts there that they had never been alone together before and that they did not talk to each other during the school day. It appears therefore, that they were each aware of the others presence, that they knew each other up to a point but that the meeting which they agreed would take place was a departure in that relationship which was suggested by him.

7. He suggested that they should go to a place under some trees at the end of the school field where they would be alone. She agreed. He accepts that he there tied her wrists together and her angles together and then passed a rope so that the wrists and angles were tied together while she lay face down on the ground. He accepts that he placed a cloth by way of a gag over her mouth. He says that she came to be on the ground as a result of some self-defence manoeuvres and that it was those manoeuvres that he was referring to when he mentioned weakness in his Facebook messages before the meeting. It appears from a note of the decision of the district judge when acquitting the claimant of the charges brought as a result of this incident that the district judge had some difficulty accepting that piece of his evidence. The complainant also said that he tickled her and in particular that he tickled her bottom but he denied and denies that. She said that he had tied her ponytail to the rope which was also denied. There were some further factual disputes between the two of them about her behaviour during and after the incident. In the end it appears to be accepted, however, that there came a time when she spat out the cloth and screamed whereupon he untied her. She told him that she would tell the police which she ultimately did. He was arrested and, as I have said, interviewed. He said he tied her up as a joke and denied touching her bottom. He said that she thought she was consenting because she was laughing and giggling. He agreed that he had used the cloth as a gag and he also admitted that he had searched on Youtube for "women tied up" more than once. He said that he had done that because he thought it was funny that people let themselves be tied up and he denied that his Youtube searching was for any sexual purpose. He did say that he realised that what he had done was wrong in that he had gone too far.

8. The case was heard by a district judge who heard the evidence and dismissed the charges at the end of the trial. The information in the disclosure includes the following: "In response to an offer to make representations about this text, BW has advised that he did not suggest that they went to the bottom of the school field. There were a number of places they went to within the school premises first before taking refuge from rain under a tree in the school field. After careful consideration [the interested party] believes that this information ought to be disclosed because the incident occurred three years ago and the complaint was of a sexual and violent nature. In his view, it had an importance which outweighs BW's right to a private life.

9. The statement of facts for these proceedings sets out BW's version of the incident which led to his arrest, trial and acquittal. Afterwards, BW and his father successfully asked the police to remove his PNC record, fingerprints, photographs and DNA sample. That request was acceded to by Chief Inspector Dales on 21 May 2013 after an investigation into the investigation which led her to believe that it was defective in certain respects. She identifies four particular difficulties with it as follows:

10. (1) that the crime report records a police officer as saying that the claimant had made a full and frank admission when interviewed. In fact, it was a partial admission as explained above. It is not clear to me why Chief Inspector Dales thought that this was important. The officer who made this mistake was covering the file while the officer in charge was on leave. When the officer in charge returned, he wrote up a full summary of the interviews which was accurate and no harm of any kind resulted from the error.

11. (2) The CCTV was not properly investigated according to the records. In fact, it appears that it was but that this was not appreciated by the officer who reviewed the case for Chief Inspector Dales because he did not then speak to the officer in charge. By the time the issue was before the defendant for decision, this issue had been resolved and the information before the defendant was that the CCTV at the leisure centre had been investigated and found to be of no evidential value.

12. (3) The advice of the CPS to obtain a statement from a drama teacher had not been followed properly. The relevant drama teacher seems to have left school before a statement could be taken from her. This evidence was potentially relevant to the issue of whether the episode, including tying the girl up, was pre-planned. The claimant said that he had the ropes with him when he met the complainant because they had been used in a play a little while before. If that were the true, the drama teacher would have been able to say that it was true. He said that he did not therefore have them because he planned to use them. The truth or falsity of this explanation would reflect on his credibility and on the evidence of planning. It would not of course substantially impact upon what actually happened at the end of the school field when the incident took place.

13. (4) The investigation was delayed because it was done during the summer months when the school was closed and people were away. It is not clear that any harm resulted from this either except for delay which was not relevant to whether the PNC record should be deleted and the DNA samples disposed of.

14. Having identified those four criticisms of the investigation, Chief Inspector Dales noted in her email informing the claimant of the outcome of her investigation that the case was a dispute about whether the claimant's conduct was malicious and whether there was a sexual motive. She referred to the fact that complainant had tried to telephone the claimant after the incident but before she reported it to the police and to evidence which she had received that the complainant had been behaving confrontationally at school towards the claimant. She said this

15. "*Given the actions of the female since the alleged offence, the age of the two parties involved, the issues from court where the female has been identified as not having provided a completely truthful account and the management of the investigation, I am satisfied that in this case BW's PNC record and so on are expunged.*"

16. The position of the police as expressed in their document which was before the defendant, is that this was wrong and not in accordance with the policy for such decisions. As I have pointed out above, the criticisms of the investigation which Chief Inspector Dales made appeared to me to be largely irrelevant to the question which she

had to decide. Nevertheless, the claimant is entitled to say, as he does, that the same police force has taken decisions in relation to the same material which appear to be inconsistent. The interested party contends that they are not necessarily inconsistent and that it is perfectly conceivable that different decisions under the different regimes may be taken where both decisions are right. It is, I think unnecessary for me to consider that submission further because as I have indicated, the position of the police in this case is that the DNA decision was wrong. The issue for me is whether the defendant treated this information in a rational way when deciding that it had no bearing on his decision on the issue to which it would be relevant, namely the credibility or reliability of the information. Another similar point arises in relation to the fact that the Disclosure and Barring Service, "DBS", has not barred the claimant from working with children. That is a point which the claimant is entitled to rely upon and which the defendant could reasonably consider along with other material before him in deciding the outcome of the review which he was undertaking.

17. By way of background explanation, I record that two certificates were for BW, one relating to his activity as a football referee and the other to his university place. On each occasion the claimant was invited to make representations about the disclosure of the information. On each occasion the claimant made representations and on each occasion the decision was that the information would be disclosed. BW then instructed a company to challenge that and the defendant responded on 19 January 2015 concluding "I am satisfied that the disclosure was accurate, relevant and proportionate and that it ought to be disclosed." The response of the defendant gave the date of the referee certificate and not the university certificate and the claimant was invited to submit representations again which he did. This resulted in the defendant's second decision on 15 May 2015, which is the subject of these proceedings. This reached the same conclusion as had the first.

18. The Legal Framework

19. Section 113B of the Police Act 1997, as in force at the date of the decision, provides for the duties of the DBS and for input by chief officer of police and for statutory guidance to be given by the Secretary of State. It provides so far as relevant:

20. 113B Enhanced Criminal Record Certificates

21. (1) DBS must issue an enhanced Criminal Record Certificate to any individual who (a) makes an application....

22. (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.

23. (4) Before issuing an Enhance Criminal Certificate, DBS must request any relevant chief officer force to provide any information which (a) the chief officer reasonably believes to be relevant for the purpose described in the statement under subsection 2 and (b) in the chief officer's opinion ought to be in concluded in the certificate.

24. *(4) (a) In exercising functions under subsection 4, a relevant chief officer must have regard to any guidance for the time being published by the Secretary of State.*

25. At the time of the certificate which was reviewed by the defendant the provision was in a different form but in substance, although not procedurally, the relevant criteria for the making of decisions are unaffected.

26. The 1997 Act provides a scheme for the disclosure of convictions and a separate scheme for disclosure of other kinds of information including information comprising allegations which did not result in a conviction or caution. These provisions cover a wide variety of information. Sometimes the allegations though unproved may be admitted. Sometimes as here, they may be admitted in part but denied in important respects.

27. The process, and the role of the defendant in it, is governed by section 117A of the 1997 Act which provides by subsection (1)

28. *"Subsection 2 applies if a person believes that information provided in accordance with section 113B(4) and included in a certificate under section 113B or 116*

29. *(a) is not relevant for the purpose described in the statement under section 113B(2) or as the case may be 116(2) or*

30. *(b) ought not to be included in the certificate."*

31. A procedure is then established by which such a person may apply in writing to the Independent Monitor and a procedure by which the Independent Monitor carries out the review. This requires the Independent Monitor to ask the chief officer of a police force where appropriate to review the information and to report on the statutory criteria which are (as above) whether the chef officer reasonably believes the information is relevant for the purpose described in the statement and whether in the chief officer's opinion, the information ought to be included in the certificate.

32. The provisions of the Act, as I have indicated, involve the issuing of guidance by the Secretary of State and require the chief officer to have regard to that guidance. This guidance has recently been replaced with a new second edition. At the time of the decision the first edition of the guidance established eight principles, against which chief officers must assess whether the disclosure of information on a certificate is lawful because it is relevant and whether disclosure would breach article 8 of the ECHR. That guidance was published in 2012 and was clearly designed to reflect the state of the law as it had been explained in, among other cases, R (L) v The commission of police for the Metropolis [2009] UKSC 3. The guidance includes the following:

33. (1) there should be no presumption either in favour of or against providing a specific item or category of information.

34. (2) Information must only be provided if the chief officer reasonably believes it to be relevant for the prescribed purpose which requires that:

35. (a) information should be reasonably believed to be relevant for the prescribed purpose for which the certificate is being sought.

36. (b) Information should be viewed as sufficiently serious,

37. (c) information should be sufficiently current.

38. (d) Information should be sufficiently credible.

39. (3) Information should only be provided if in the chief officer's opinion it ought to be included in the certificate which requires an assessment of the impact of disclosure on the private life of the applicant or a third party and of any adverse impact of disclosure on the prevention or detection of crime.

40. The guidance also says that the article 8 rights of the individual affected must be considered and that disclosure must be necessary to pursue a legitimate aim and if those tests are met, that the question becomes one of proportionality.

41. It is unnecessary in this judgment for me to review the law extensively. It is largely agreed. I will set out however one or two guiding principles. First, there is no rule of law which prevents an allegation which resulted in an acquittal from being included in a certificate; see R (AR) v Greater Manchester Police and others [2013] EWHC 2721 (Admin) as an example of a case where such information was lawfully disclosed.

42. I am invited to take the law from section 2 of the judgment of Beatson LJ in the decision of R (A) v The Chief Constable of Kent [2013] Civ 1706 and I do. There is no purpose to be served by setting out that passage in that judgment in its entirety but the following passages are of particular importance.

43. "36 ...where the question before a court concerns whether a decision interferes with a right under the ECHR and if so whether it is proportionate and therefore justified, it is necessary for the court to conduct a high intensity review of the decision. The court must make its own assessment of the factors considered by the decision maker. The need to do this involves considering the appropriate weight to give them and thus the relevant weight accorded to the interests and considerations by the decision maker. The scope of review thus goes further that the traditional grounds of judicial review....

44. 37. ...despite the fact that cases involving rights under the ECHR involve a "more exacting standard of review" there is no shift to a merits review and it remains the case that the judge is not the primary decision maker.

45. 39. If the primary decision maker has a addressed his or her mind at all to the existence of values or interests which under the ECHR are relevant to striking the balance, his or her views and conclusions carry some weight. But if the primary decision maker has not done so or has not done so properly, his or her views are bound to carry less weight and the court has to strike the balance for itself, giving due weight to the judgments made by the primary decision maker on such matters as he or she did consider."

46. Therefore, in considering whether the information is relevant for the purposes section 117A(1)(a), I am assessing a challenge based on irrationality in the way commonly encountered in public law cases. In considering whether the information ought not to be disclosed on the certificate for the purposes of section 117A(1)(b) where the article 8 rights of the claimant are engaged, I am carrying out the somewhat different form of review just described. This is a two-stage process with a different approach required of the court at each of the stages.

47. The second principle from the statutory guidance which is set out above, applies to the first stage. Thus, seriousness, currency and credibility are aspects of relevance. They are also aspects of proportionality assessment, stage 2. At that stage they are often referred to by slightly different terms, namely gravity, lapse of time and reliability. That is because of the way in which Lord Neuberger expressed himself in R (L) v Commissioner of Metropolitan Police at paragraph 79, 80 and 81. He said this in paragraph 81:

48. "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."

49. It is likely that if these three factors: seriousness/gravity, currency/lapse of time and reliability/credibility are found to be present to a sufficient degree, then the relevance test will be met without further valuation. At the second stage the extent to which they are present and their cogency will be a relevant factor in deciding what weight to give them in balancing the impact of disclosure on the individual's private life, against the rights and freedoms of those whom the disclosure regime is designed to protect. Generally a decision maker will make findings of fact about these three factors and then apply those findings in these different ways to the decision at each of the two stages. The first decision is a threshold decision and the second is an evaluative one.

50. The Decision.

51. The decision is a lengthy and reasoned document. The defendant first set out the facts and the representations which had been made on behalf of the claimant and then addressed himself to the two-stage process. The first issue was relevance to a role in a wide workforce which has individual responsibility for the vulnerable, in particular, children. A critical issue for the defendant to resolve and one which has been

extensively canvassed before me is credibility or reliability. The defendant said this in the decision about that.

52. *"The disclosure text reflects the information from the complainant and also yours. You argue that the credibility of the complainant is severely questionable as she admitted lying in court about contacting Childline. It is accepted that this in itself is not a key element to the case but it is argued that the fact that she lied in this way then brings into question the credibility of the remainder of her allegation. I note this point and it is well made but I am left to consider the remaining evidence. There is also doubt cast as to why the complainant would stay with you for some time after the matter and I note this but do accept that people can react in different ways to traumatic incidents. You and the complainant agree some of the facts but differ in key areas as one might expect and we are left with one person's word against another. Unfortunately as the matter was heard at Youth Court there is no transcript and there were apparently no police officers present at the time the case concluded. The prosecutor recalls that there were doubts on both parties' evidence. I therefore asked the police to attempt to obtain more information as this would be a key point to consider. I have now been informed that the case went to full trial and that both the complainant and your evidence were heard along with others. In this sense, I note that the trial was not halted following the complainant's evidence and any legal argument as to credibility. Rather the matter progressed through prosecution and defence cases and a decision was made based on the criminal standard. I therefore do not feel that this casts sufficient doubt on the credibility of the complainant.*

53. *"I note that there is also an allegation that the complainant attempted to make contact with you via Facebook and had apparently tried to call you prior to reporting the matter. The reasons for this attempted contact are not clear but if correct, they could add the doubt which is cast on the credibility of the witness account.*

54. *"Having regard to the protection of the vulnerable, there are a number of factors worthy of consideration. It is not challenged that you met the girl, you both went somewhere quiet and dry voluntarily. Whilst there, it is agreed that you tied the girl's hands and feet behind her back and also that you gagged her. In the workforce applied for and also the specific role you can reasonably expected to have responsibility for the vulnerable. Having considered the matter, I am satisfied that the events did take place and it concerns me that a 15-year-old boy would want to tie a 13-year-old girl up in that way. There are elements of both parties' evidence which have been challenged and on balance I am satisfied with the credibility of the information being disclosed.*

55. *"I am satisfied that the information is of sufficient gravity to be disclosed. It is sufficiently credible and current and that reference to it in the disclosure is relevant to a role in the children's workforce which you would be working with the vulnerable."*

56. Immediately before that passage the defendant had said this in apparent reference to the claimant's reliance on Chief Inspector Dales' decision.

57. *"In respect of credibility, your representations present an extensive challenge to the way in which the police considered the evidence. In performing my review, it is not my*

role to take a view on whether the police properly considered all the evidence but to make my own judgment on the basis of all the available information as to whether the information was relevant and ought to be disclosed. I have therefore come to my own views on credibility."

58. I shall turn to the criticisms of that decision and the other decisions on relevance in a moment.

59. The second issue was whether the disclosure was a violation of the article 8 rights of the claimant. Correctly the defendant addressed this on the basis that article 8 was engaged and therefore applied the two-stage test: one, necessity and legitimate aim and two, proportionality. The defendant identified the legitimate aim, namely the protection of the rights and freedoms of boys and girls with whom the claimant might be expected to come into contact in the course of his university degree. The defendant considered whether the proposed disclosure was the most appropriate means of bringing the information to the attention of those who needed to have it and decided that it was. In that context, the defendant was considering employers other than the university which, of course, is already aware of the information. No doubt that consideration arose in the context of having to decide how children with whom the claimant might come into contact during work placements should be protected. Having decided that the information was relevant, the defendant decided that such employers in the relevant sector ought to know of it.

60. As to proportionality, the defendant accepted that it appeared that the claimant would be excluded from his degree course if the disclosure was made and that this could have a damaging effect on his career. He took into account the fact that the claimant was not barred from working with children. He took into account that prior to the incident the claimant was of good character and also that there were no subsequent adverse incidents. That is an important finding in the context of one of the complaints which I must address. He concluded:

61. "That being said, I also have to consider the rights of the children you would be responsible for as they enjoy equal rights. You are seeking a role within the child workforce and would reasonably be expected to have responsibility for young children in that workforce and also in the specific role applied for.

62. "Whilst no one group should have greater rights than the other, having considered all the facts in this case, the admission that you, as a 15 year old, tied up gagged a 13-year-old girl in what happens to me to have been a planned course of action, the discussion the night before in respect of you asking the complainant about being flexible and did she bend, the possession of a rope in your bag and then using it on the girl, the admission that you went too far by gagging her all suggest to me that there is a continuing risk to those people that you would be responsible for in the workforce applied for. I am satisfied that if there were to be a repeat of this type of incident described in the disclosure certificate, this could have a significant negative impact on the children you would responsible for in terms of their physical and psychological well-being, such as to outweigh the impact that disclosure may have on you."

63. In earlier passages of the decision, the defendant had explained how he came to his factual conclusions which are briefly summarised in that passage. He rejected the explanation which the claimant had given to the police that the incident arose out of an unplanned prank which went too far. He found that there was some planning. It follows from that finding that he rejected the suggested motive of the claimant but did not make any finding as to what the motive actually was. In those circumstances, the defendant said that the behaviour of the claimant, which was substantially admitted, was not normal for a 15-year-old boy. Those are the reasons which ultimately led to the conclusion which I have just given.

64. The Grounds of Challenge

65. BW contends that the decision was unlawful because it was irrational to decide that the information was relevant and it ought not to have been included in the disclosure certificate because its inclusion was, in all the circumstances, disproportionate and contrary to his article 8 rights. The point is made that its inclusion represents a "killer blow" to BW's chances of a career in education which is plainly highly relevant to the proportionality issue.

66. As to relevance, it is submitted that the decision failed to have regard to the purpose for wish the disclosure is sought, working with children, and to consider whether it is sufficiently serious, current and credible. The claimant relies on various matters as showing that the information was not credible. The defendant found in certain respects that it was not only credible but accurate. Where the claimant had admitted his behaviour, that finding plainly follows. In the two respects which I have identified, namely as to planning and whether or not it was a prank, this involved rejecting the explanation given by the claimant and indeed the evidence which he had given to the district judge. As I have already recorded, the district judge himself expressed doubts about whether some of that evidence was right.

67. The finding on credibility is said to be irrational in the circumstances. First, it is said that the complainant was the source of the information and that she was tainted because of the Childline lie referred to in the extract from the decision I have quoted above. However, the source of the information was not simply the complainant. Much of what she said was admitted by the claimant. He denied what she said in respects I have identified above. The defendant did not attempt to resolve those issues in detail. He did not make a finding as to what the claimant's motive actually was, only that it was not that which he had asserted.

68. The honesty or otherwise of complainant was therefore not of direct significance to the findings which the defendant actually made. The claimant's motivation could not directly be spoken of by the claimant. His state of mind had to be determined by inference from the facts as found or admitted. It is plain from the decision of the defendant that he rejected the claimant's explanation for the Facebook messages. Secondly, the claimant relies on the fact that the interested party which made the disclosure decision in the first place had previously accepted that the PNC record should be expunged. The defendant knew about this and had extensive documentation concerning it before him when he took his decision. He dealt with it in the way that I

have indicated above by saying that he was not considering the adequacy of the investigation and would make his own credibility assessment. In my judgment that was a rational way of approaching that decision. That was in fact the defendant's function in reviewing the decision of the interested party.

69. The decision to which he came was that the act was planned and that it was something other than horseplay or a prank. In view of the Facebook communication, it is in my judgment hard to imagine any other conclusion about those issues being reached, and it is not possible to say that the defendant's conclusion was irrational. Those exchanges speak for themselves and the explanations advanced by the claimant are not compelling. Equally, the defendant effectively ignored the decision of Chief Inspector Dales saying that it irrelevant because he was going to address credibility himself. I am satisfied that that was not an irrational approach.

70. The seriousness finding for the purposes of relevance is really attacked on the basis of a part of the decision where the defendant said that even if the claimant had tickled the girl's bottom, it would still be "at the lower end of the scale but it is aggravated by the fact that she was tied up at the time." It is said that having come to that conclusion and having made no finding that the claimant had tickled the girl's bottom, the defendant should have been driven to conclude that this information did not satisfy the seriousness test for the purposes of relevance.

71. In my judgment that is a somewhat strained criticism which depends upon the way in which the defendant has chosen to express himself rather than the substance of the decision that he reached. The incident was at the lower end of the scale of sexual crime but sexual crime is not at the lower end of the scale of material which might be disclosed under this regime. In other words, a relatively less serious sexual offence would be serious enough to be disclosable and would not lose that character simply because there are other more serious sexual offences which are committed from time to time. Accordingly, that the decision was not irrational in my judgment.

72. As to currency, the defendant noted that the matter was almost four years old and, whilst as recorded in the passage I have identified and highlighted above, an isolated incident. There was nothing relevant before or since. In my judgment this is highly relevant to the proportionality assessment but it is not irrational to regard the incident as being sufficiently recent to retain its relevance. I shall deal further with currency below.

73. Accordingly, I reject the irrationality challenge to the relevance decision.

74. Proportionality

75. In my judgment the decision is rather brief on this issue. It carries forward the findings of fact on relevance but does not explain what weight the various factors should receive. In reality the determinative part of decisions of this kind will often be the second stage. The first stage merely involves passing a threshold. It is a yes or no decision. The second stage involves a much more nuanced case-specific evaluation of the detailed circumstances. That is a criticism of the way in which the decision is structured. However, the decision does contain a great deal of information and findings

about facts to which I have already referred. It is in my judgment a sufficient basis on which the heightened form of review can be conducted by me. I do so by reference to the factors identified by Lord Newberger in R v L at paragraph 81 set out above and one additional factor not mentioned by Lord Newberger there, namely the youth of the claimant at the time of the incident.

76. **Youth**

77. R (T) v The Chief Constable of Greater Manchester [2015] AC 49 per Lord Reid contains an analysis of relevant materials which identify for the purposes of the law the relevance of youth in criminal offending. That is no less relevant where the conduct did not result in any criminal conviction. Rehabilitation, immaturity and the private nature of proceedings in youth courts are all relevant. A person at the age of 15 is not the same as a person at the age of 25, in the way in which they take decisions as to how to behave, perhaps in particular in sexual matters. None of this is dealt with at all in the decision except by references to the age of the claimant, usually to contrast his age with that of the age of the complainant who was two years younger.

78. The defendant does not say what impact the youth of the claimant at the material had on the decision. This is, however, a feature which I am well able to assess myself on the material which I have in the way described by Beatson LJ in passage that I have set out above. So far as gravity is concerned, I have already said for the purposes of relevance that the conduct was sufficiently serious to be relevant and in my judgment it was of sufficient gravity to be disclosable. Whether it should be disclosed is the result of the evaluative exercise taking gravity into account as well as the other factors. In that context, the observation quoted above by the defendant about the level of sexual or physical conduct which the information disclosed is relevant.

79. **Lapse of Time**

80. This is closely connected in its relevance with the youth of the claimant at the time of the incident and with the impact on him of disclosure. Four years, which is the time which has passed since the incident, is a long time in a person's life when the period begins when they are 15 years old. This clearly a significant feature and I shall return to it below when I come to deal with the impact of disclosure on the claimant. In this case reliability is not in my judgment at this stage a significant issue. Here the findings on credibility for the purposes of the relevance decision are determinative of the existence of a sufficient degree of reliability to justify disclosure provided other factors relevant to proportionality are weighed in the balance. I have indicated that the finding of premeditation and the rejection of the explanation that this was all a prank is a sound finding arrived at by proper reasoning and not irrational. It was therefore a finding which the defendant was entitled to carry forward into the proportionality exercise. A finding of unexplained conduct of this kind is a worrying matter. I have already referred to the defendant's credibility assessment for the relevance test above and set it out. It was nuanced and took all relevant factors into account.

81. Next, has the claimant had a chance to rebut or respond to the allegation? The answer to that is plainly yes. He was interviewed by the police. He gave evidence at the trial.

He has made representations to Chief Inspector Dales. He has made a series of representations first to the interested party and thereafter to the defendant and now makes representations to me.

82. The relevance of the material to a particular job application is a matter which required thought. The point is well made that the claimant was not in a position of trust at school when this incident took place. If he is ever employed as a teacher, he will be in a completely different situation from being a friend of a younger girl at a time when they are both attending the same school as pupils. That is a consideration which undermines the extent of the relevance and at this stage the existence of relevance is not the only thing to be considered. Its extent is also to be considered.

83. Finally, I turn to deal with the issue of the impact of disclosure on the claimant. It is said that it will be a "killer blow" to his prospects of a career in education. The defendant accepted as I have indicated that there will be an adverse impact on the claimant if there is disclosure. He did not explore fully what that adverse impact will be. He had obviously concluded that the incident had not lost relevance despite the lapse of time, but he does not say why this is so. The police decision does address the issue of when it might be possible to issue a clear certificate to this claimant. I say nothing about the reasoning it contains and its validity. I merely observe that it did raise the question for consideration. The decision of the defendant does not do that. That is not in itself a criticism of the decision. Crystal ball gazing is not part of the function of the defendant on a review of this kind. What he did have to decide, however, was whether the incident retained its significance despite the lapse of time which was obviously a significant feature in this case.

84. It appears to me that youth, lapse of time and impact on the claimant's private life is not fully reasoned in this decision and the way in which the balance has been struck, including proper regard to those factors, is not clear. Therefore, I must address, without placing a great deal of weight upon the views of the defendant, what the significance of those features is. This incident occurred four years ago. It is plain to me and not only because the police accept it in their document explaining their decision on disclosure, that there will come a time if there are no further relevant incidents when it will be possible, indeed necessary, to issue a clear certificate. The question is whether it is so clear that that time has already come that the decision to disclose the information is disproportionate.

85. In my judgment this not an easy issue and it would have been far better if the defendant had grappled with it in terms. My own conclusion about it is that the claimant is still young at the age of 19. I conclude that the incident which is the subject of the information on the findings which I have upheld of the defendant was a worrying and unusual incident. I also conclude that the claimant has never satisfactorily explained it or acknowledged it. Those are features which mean that it does, in my judgment, continue to have a relevance and its relevance is that having behaved in this unusual way once, he is perhaps more likely than others to behave in a similar way in the future. That proposition will ultimately be refuted by the passage of time during which he does no such thing. In my judgment, however, a period of four years, long as it is, is not enough to enable the court to conclude that the lapse of time has addressed the risk

which on the findings of the defendant inevitably existed at an earlier stage. In those circumstances I hold that the disclosure decision made by the interested party and upheld on review by the defendant, was not disproportionate. The risk presented by behaviour of this kind to vulnerable people is sufficient to justify measures which result from disclosure.

86. What impact this will have on the claimant is not sufficiently established in my judgment. It is clear that he would not be able to return to his university course in January as he had hoped to do. What steps he may be able to take thereafter to pursue a career in education when the time has come when he can and must receive a clear certificate will be determined then. It is, in my judgment, also relevant that he is a student rather than an experienced professional. This does not decide the matter because he has article 8 rights just as anyone else does. The fact that he is still 19 years old and able to make alternative career choices if he chooses to do so into jobs which he can do without needing a certificate is relevant in assessing the impact on him of the disclosure decision. For these reasons I have concluded that the disclosure decision of the defendant was in its result, although not in its reasoning, appropriate and his conclusion was justifiable. I therefore dismiss this application for judicial review.

87. MR MOFFETT: My Lord very grateful for that. No further applications from me.

88. MR JUSTICE EDIS: Thank you very much. Not as part of the judgment but I hope things turn out well. I realise this has not helped and it is a disappointment.

89. MISS HOBCRAFT: My Lord can I seek permission to appeal in relation to an important point of principle and practice which is how the assessment of proportionality is conducted when an individual is a minor at the time of the relevant allegation?

90. MR JUSTICE EDIS: No. I will refuse permission to appeal but of course you may take your application elsewhere. Thank you very much.