Neutral Citation Number: [2016] EWCA Civ 490

Case No: C1/2014/0060

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

HIS HONOUR JUDGE RAYNOR QC
(SITTING AS JUDGE OF THE HIGH COURT)
CO/13845/2012

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/06/2016

Before:

LORD DYSON, MASTER OF THE ROLLS
LORD JUSTICE McCOMBE
and
LORD JUSTICE DAVID RICHARDS

- -

Between:

THE QUEEN (on the application of AR)	**Appellant**
- and -	
(1) THE CHIEF CONSTABLE OF GREATER MANCHESTER POLICE	
(2) SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondents**

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- -

Hugh Southey QC (instructed by Stephensons) for the Appellant
Jenni Richards QC (instructed by Solicitor to the Greater Manchester Police) for the First Respondent
Jonathan Moffett (instructed by the Government Legal Department) for the Second Respondent

Hearing dates: 7 & 8 April 2016

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Approved Judgment

Lord Justice McCombe:

1. On 21 January 2011 in the Crown Court at Bolton, after a trial before HH Judge Rumbelow QC and a jury, the appellant was acquitted of a charge of rape, which it was alleged had been committed by him on 4 November 2009 on a 17 year old young woman. Notwithstanding that acquittal, in two Enhanced Criminal Record Certificates ("ECRCs"), issued by the Criminal Records Bureau on behalf of the Second Respondent on 21 March 2011 and 28 March 2012 respectively (in respect of the appellant's intended employment, first for a teaching post and secondly as a taxi driver) summary details of the allegation and of the acquittal were set out on the basis of information supplied by the First Respondent. The details were as follows:

> "5. **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 GUITLY AND THE CASE WAS DISCHARGED."

2. Under relevant legislation, the Police Act 1997, ECRCs give details of convictions and cautions (with certain limitations not relevant here). Section 113B(4) of the Act provides further that:

> "(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."

It was pursuant to this provision that material relating to the rape charge and the acquittal was provided by the First Respondent and was included in the ECRC.

3. In judicial review proceedings issued on 21 December 2012 the appellant challenged the lawfulness of the reference to the allegation and to the acquittal in the second certificate. The appellant argues that the issue of an ECRC in this form infringed his rights under Articles 6.2 (presumption of innocence) and 8 (right to respect for private life) of the European Convention on Human Rights and Fundamental Freedoms ("the Convention"). His claim was dismissed by an order of 5 September 2013 made by HH Judge Raynor QC, sitting a Judge of the High Court at Manchester. After hearing the appellant in person, Lady Justice Gloster granted him permission to appeal to this court on 30 July 2014.

Background Facts

4. The appellant is a qualified teacher who, at the material time giving rise to the criminal charge, was working as a taxi driver. It was alleged by the complainant, who made the rape allegation, that at about 1 a.m. on the morning of 4 November 2009 she was a passenger in a taxi driven by the appellant. That fact was not disputed by the appellant; he accepted that he had driven the complainant as a fare paying passenger on the occasion in question. She alleged that he had driven her to a secluded place and had raped her. She said he had then driven her to her home and had "sped off". The appellant denied the allegation of rape. It is not necessary to say more about the details of the evidence at the Crown Court, which are set out more fully in the judgment of Judge Raynor, as derived by him from Judge Rumbelow's summing-up to the jury in the Crown Court trial. It suffices to say that there was no forensic evidence either to support or to undermine the allegation made. The ultimate issue in the Crown Court was simply whether, on the opposing oral evidence of the complainant and of the appellant, the prosecution had made the jury sure of the appellant's guilt. From the jury's verdict, it is clear that they had not done so.

5. On 22 March 2011, the Second Respondent issued the first ECRC. It referred to the acquittal in the same terms as the second ECRC which became the subject of challenge in these proceedings. The appellant, then acting in person without legal representation, complained to the police about the matter. He said this in his complaint:

> "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".

6. The appellant appealed against the Chief Constable's decision to provide the information under the internal procedures of the Greater Manchester Police. The appeal was rejected after consideration of the result of a review of the case conducted by a civilian reviewing officer employed by the force.

7. The reviewing officer concluded that the disputed information was relevant and that it ought to be included in the ECRC. Her reasoning, which was the subject of much argument before the judge and before us, was as follows:

> "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 thought 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 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 [sic] 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 [sic] 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."

8. In deciding that disclosure of the material was reasonable and proportionate, the reviewing officer concluded 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."

9. There was no legal challenge to that decision.

10. As already mentioned, the appellant applied again in March 2012 for a second ECRC, this time with regard to work as a private hire driver. The first respondent did not consult with the appellant about whether the disputed information should be provided to the second respondent or not. The same civilian reviewing officer as before considered the matter and reached the same conclusion, for precisely the same stated reasons as were given in respect of the first ECRC in the previous year which I have quoted in full above. She also stated:

> "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…"

11. That review material was considered by an Inspector, acting as the First Respondent's delegate. She also considered that disclosure was reasonable and proportionate for the following reasons:

> "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 and was arrested. Following consideration by the Crown Prosecution, 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 events(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 is 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."

12. The appellant again complained. He contended that the complainant's allegation had been false; he had been acquitted and he had protested his innocence on arrest. He referred to inconsistencies in the complainant's account and to aspects of the DNA evidence. He said he had a first class degree and was qualified to teach in colleges, which he wished to do. However, on application for posts, the disclosure of the allegation meant that he would not be considered; this was unjust as he was innocent and had been found not guilty. The decision would adversely affect the rest of his life and the lives of his family (including his four children). The complaint was rejected on 7 August 2012.

The Convention Provisions

13. The relevant provisions of the Convention are Articles 6.2 and 8 which provide as follows:

> "Article 6
>
> *Right to a fair trial…*
>
> 2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law…."
>
> "Article 8
>
> *Right to respect for private and family life*
>
> 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."

14. Mr Southey for the appellant argued before the judge and in this court that the appellant's rights under both these provisions were infringed by the inclusion of the disputed information in the second ECRC. The judge rejected these arguments.

The Judge's Decision

15. The judge's decision on the Article 6 argument can be summarised in one passage of his judgment (in paragraph 55). He said this, after referring to *Allen v United Kingdom* (2013) Application 25424/09; (2013) 36 BHRC 1 in the Grand Chamber of

the European Court of Human Rights ("ECtHR") and accepting the submission of counsel then appearing for the Second Respondent,

> "a) 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."

16. With regard to Article 8, in rejecting the appellant's arguments, he had accepted that the police reviews proceeded on a false basis in regarding the decision to charge the appellant as indicating that on a balance of probabilities the allegation was more likely to be true than false. However, he considered the forensic evidence and the summing-up had been carefully considered and that the comments by the reviewing officer on that evidence overall, including on the complainant's inconsistencies, were fair. There was some support for the complainant in the medical evidence and in her distress. The judge commented on the absence of any criticism (at least before him) of reference to the absence of motive on the part of the complainant to make a false allegation.

17. The judge rejected criticism of the police's failure to obtain a full transcript of the criminal trial. He said that the fact of acquittal was recognised and it was right for the reviewer to comment that nothing could be assumed from the verdict other than that the jury was not satisfied of guilt beyond reasonable doubt. The judge went on to say in paragraph 40(d):

> "(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 seriousness of the alleged offence, its relevance to the position applied for and its comparatively recent occurrence."

18. The judge considered that proper account had been taken of the appellant's previous complaints and that no injustice had been suffered by him by reason of the absence of any further consultation. The judge said that account had been taken of the appellant's employment difficulties, but then concluded as follows:

> "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."

The Appeal

19. On the appeal, to take the salient points of the submissions, Mr Southey for the appellant argued that the judge erred in reaching the conclusions that he did on both articles of the Convention.

20. As a precursor to his arguments on the law, Mr Southey submitted that the police review was unbalanced and weighted against the appellant in the following respects: (a) the complainant was referred to throughout as "the victim"; (b) the decision to prosecute was taken as a starting point and as a demonstration of a likelihood of the rape allegation being true; (c) every point in favour of the appellant's innocence was discounted in the reasoning of the reviewing officer; (d) the inference seems to have been that there was a burden on the appellant to displace the starting point derived from the inference that the reviewing officer drew from the decision to prosecute.

21. Turning to the law, Mr Southey accepted that, for the purposes of section 113B(4)(a) of the 1997 Act, the police reasonably believed the information in issue to be "relevant" for the applicable purpose of the ECRC. However, he argued that such relevance only derived from the police's belief in the appellant's guilt, as demonstrated by the reasons for the decision taken. Therefore, consistently with the appellant's rights under Article 6.2 of the Convention, the police should have reached the decision under section 113B(4)(b) that the information ought not to be disclosed.

22. Mr Southey relied primarily upon the decision of the ECtHR in *Allen v UK* (supra) and in particular upon the theme to be derived from paragraph 94 of the judgment as follows:

> "Its general aim [i.e. of article 6.2]…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 officials 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…"

23. It was submitted that the certificate issued amounted to a treatment of the appellant by officials as if he were guilty of the rape offence of which he had been acquitted. Mr Southey accepted that, consistently with other ECtHR authority, Article 6 would not be infringed by the court entertaining, for example, a civil claim for damages by a complainant in a case such as this or by a finding by the court of civil liability in her favour, provided that the nature of the court's decision did not assert the acquitted person's guilt of the offence: see paragraph 123 of the judgment in *Allen*. He said that the acquittal would not feature in such civil proceedings, because (in this jurisdiction at least) the civil court would hear the evidence afresh and would decide the case on the balance of probabilities on its own assessment of the evidence, without the acquittal or the criminal proceedings playing any significant part.

24. In contrast, it was argued, in the process of issuing an ECRC the acquittal of the person concerned and the assessment of the verdict in the criminal court played a central part in evaluating whether or not material in relation to the underlying allegations should or should not be disclosed. There was a clear link with the criminal trial which is not present in civil proceedings in respect of an alleged rape.

25. In his argument on Article 8 of the Convention Mr Southey submitted that the Article was infringed in this case both as regards its procedural and substantive application. There had been no consultation prior to the issue of the second certificate. So far as procedure was concerned there had been no attempt to assess the impact of the disclosure on the appellant's attempts to find jobs. On the substantive aspect, Mr Southey submitted that an examination of the police reasoning underlying the disclosure of the information and their failure to examine critically the reliability of the allegations demonstrated that disclosure was disproportionate. There was no proper consideration of the appellant's good character in the decision making process.

26. Mr Moffett for the Second Respondent, who advanced the main argument for both respondents on the Article 6 issue, made a number of core submissions.

27. First, he pointed out that Lord Phillips of Worth Matravers in *R (Adams) v Secretary of State for Justice* [2012] 1 AC 48, at [58] described the application of Article 6.2 in contexts such as the present as "the expansion of what would seem to be a rule intended to be part of the guarantee of a fair trial into something coming close to a principle of the law of defamation" and as "one of the more remarkable examples of the fact that the Convention is a living instrument". Mr Moffett argued, therefore, that the court should be cautious in expanding the application of Article 6.2 into areas to which Strasbourg jurisprudence had not applied it. There was, he said, no example of the application of this provision to a case even proximate in nature to the present: see the list of decided cases set out by the court in *Allen* in paragraph 98 of the judgment.

28. Secondly, said Mr Moffett, the appellant's arguments came close to saying that facts underlying an acquittal could never feature in an ECRC.

29. Thirdly, it was submitted that the application of Article 6.2, post the criminal trial, was specific to the context of the case and the court took a more flexible approach to its application to a case where the rights of others might be affected, e.g. in a case of the present type where the interests of vulnerable people were engaged, than in cases affecting only the acquitted person and the state.

30. Fourthly, Mr Moffett argued, that in considering the application of Article 6.2, it was the language used by the decision maker upon which focus was to be directed. What was objectionable were statements that the subject was guilty of the offence rather than statements that he might have done the underlying acts: see paragraph 126 of the judgment in *Allen*. That had not happened in this case.

31. Presenting the argument on Article 8 for the Respondents, Miss Richards QC argued that the procedural requirements were satisfied by the police knowing from his reaction to the first certificate what the appellant's response was to the substance of the allegation and that he had had fair opportunity to make that well known. There was no need to go back to the appellant prior to the issue of the second certificate. The relevance of the information was clear with regard to the prospective employment as a taxi driver. The information was not historic or vague. No further points had been suggested by the appellant which he contended would have been revealed, by further consultation with him in 2012, which had not emerged in 2011. Further, the police expressly took into account the potential impact of disclosure on the appellant's ability to gain employment.

32. On the substantive application of Article 8 in this case and the issue of the proportionality of disclosure, Miss Richards submitted that Mr Southey's argument went too far in saying (in paragraph 3.32 of the skeleton) that "criminal allegations against a person who was acquitted at trial should not be included…or, at the very least, there should be a fair procedure to enable the person acquitted to demonstrate why an acquittal should not be included in an ECRC". She submitted that authorities, to which I shall return in the next section of this judgment (especially *R (L) v Commissioner of Police for the Metropolis* [2010] 1 AC 410 and *R (A) v Chief Constable of Kent* [2013] EWCA Civ 1706 (135 BMLR 22)), did not justify such a position. Miss Richards argued that the question for the police was whether the allegations were reliable enough to warrant disclosure and it was not necessary for the police to answer the question whether the matters were proved to their own

satisfaction. The cases did not establish (she argued) that acquittal was a bar to disclosure.

33. Miss Richards argued that the allegations were recent, very serious and had been thought by the police to be reliable; these points had to be balanced by them with the fact of the jury acquittal. In carrying out the proportionality exercise, therefore, the police had to take into account that they were acting under a statute designed for the protection of the vulnerable; an evaluative judgment was required; it was highly relevant that the information related to an allegation made against the appellant as a taxi driver and he was seeking to take up that very same employment; risk to the vulnerable was acute; in deciding upon disclosure no single factor could dominate; it was not incumbent on the police to conduct a "mini-trial" or to decide for themselves the question of whether the acts had been committed or not – that was not feasible; the acquittal was but one factor in the necessary evaluation.

Discussion

(1) *Article 6.2*

34. I have already set out above the core of the judge's decision on this aspect of the case in paragraph 55 of his judgment. Mr Southey submitted that this decision is in conflict with the judgment of the ECtHR in *Allen*. All the parties concentrated their submissions on that case and I will turn to it in more detail. However, bearing in mind the primacy in our law of decisions of the Supreme Court, I feel it wise to begin with my understanding of where the decisions in that court have taken us up to the Strasbourg decision in *Allen*.

35. I have already referred to the judgment of Lord Phillips in *Adams* in which he described the expansion of the ambit of Article 6.2 as a remarkable example of the Convention as a living instrument. It will be recalled that *Adams* was a case in which the claimants contended that the refusal of their claims to compensation under section 133 of the Criminal Justice Act 1988, following the quashing on appeal of their convictions for murder, infringed Article 6.2. At paragraph 58 of his judgment Lord Phillips expressed his agreement with the analysis of the Strasbourg case law conducted by Lord Hope of Craighead in the same case. Lord Hope addressed the subject in paragraphs 108 to 111 in which he considered the submission that a narrow reading of article 14.6 of the International Covenant on Civil and Political Rights ("ICCPR"), to which section 133 was designed to give effect, would conflict with Article 6.2 of the Convention. His conclusion, at paragraph 111, was as follows:

> "The principle that is applied is that it is not open to the state to undermine the effect of the acquittal. What article 14.6 does not do is forbid comments on the underlying facts of the case in subsequent proceedings of a different kind, such as a civil claim of damages, when it is necessary to find out what happened. The system that article 14.6 of the ICCPR provides does not cross the forbidden boundary. The procedure laid down in section 133 provides for a decision to be taken by the executive on the question of entitlement to compensation which is entirely separate from the proceedings in the criminal courts…A refusal of compensation under section 133 on the

> basis that the innocence of the convicted person has not been clearly demonstrated, or that it has not been shown that the proceedings should not have been brought at all, does not have the effect of undermining the acquittal."

36. On the question of the applicability of Article 6.2 to the operation of section 133 of the 1988 Act, the court found that it was not applicable to claims under the section: see the full discussion of the *Adams* judgments undertaken by the Master of the Rolls in the very recent case of *Hallam & anor. v Secretary of State for Justice* [2016] EWCA Civ 355. We invited the comments of counsel on this case, but it seemed common ground between them that it did not directly affect any issue arising in the present case.

37. In *Serious Organised Crime Agency v Gale* [2011] 1 WLR 2760 (a case which, although referred to counsel by the court in the course of argument, was not cited to us by them) the Supreme Court was concerned with an appeal by Mr and Mrs Gale from an asset recovery order made against them in civil proceedings in the High Court under the Proceeds of Crime Act 2002. Mr Gale had been acquitted in Portugal of unlawful drug trafficking. On the Agency's application in the civil proceedings for the recovery order, the trial judge found on the balance of probabilities that the assets identified were derived from unlawful conduct in drug trafficking, money laundering and tax evasion. Mr and Mrs Gale appealed on the basis that the orders contravened Article 6.2 of the Convention. The appeal was dismissed by this court and by the Supreme Court.

38. Lord Phillips again considered the Strasbourg cases, most of which were later to be reviewed by the ECtHR in *Allen*. He began the analysis by reference to the decision of the ECtHR in *Engel v The Netherlands (No. 1)* (1976) 1 EHRR 647 in this passage at paragraph 16:

> "Charged with a criminal offence" has an autonomous meaning: see *Engel v The Netherlands (No I)* (1976) I EHRR 647. Thus the fact that POCA unequivocally designates recovery proceedings as "civil recovery" does not establish conclusively that they do not involve the charge of a criminal offence. None the less, the classification of proceedings under national law is one of three relevant considerations ("the three factors") to which the European Court of Human Rights always has regard when deciding whether or not article 6.2 is engaged. The second is the essential nature of the proceedings and the third is the type and severity of the consequence that may flow from the proceedings, usually described by the European Court of Human Rights as 'the penalty that the applicant risked incurring'."

39. Lord Phillips said that some of the Strasbourg decisions were mutually inconsistent and that it was not easy to identify the principle underlying others (paragraph 19). He continued:

> "19. Many signatories to the Convention require guilt in criminal proceedings to be established according to an

> enhanced standard of proof in comparison to civil or disciplinary proceedings. In this jurisdiction the standard is proof beyond reasonable doubt. In such circumstances it is perfectly obvious that failure to establish guilt according to the required standard does not demonstrate that the defendant did not commit the criminal act. It demonstrates simply that the evidence adduced against him was insufficient to discharge the enhanced burden of proof. After acquittal, the possibility exists that claims for relief by, or against, the defendant may be brought that are based upon, or involve consideration of, the evidence that was inadequate to establish the defendant's criminal guilt. The resolution of those claims may turn on lesser standards of proof, or different criteria, from those which governed the criminal proceedings. Examples are a claim by the defendant in respect of his legal costs, a claim by the defendant for compensation for time spent remanded in custody, disciplinary proceedings brought against the defendant in respect of the alleged conduct that formed the subject of the criminal charge, or a claim for damages by an alleged victim of that conduct.
>
> 20. The Strasbourg Court has never suggested that it is unlawful to require a defendant who has been acquitted to satisfy some additional criterion in order to qualify for reimbursement of his costs, or for compensation for time spent on remand."

At paragraph 21, he said this:

> "Most of the cases to which I have just referred involved discrete proceedings after the defendant's acquittal in the criminal trial. There are a number of cases, however, where the Strasbourg court has held that the presumption of innocence in article 6.2 was infringed by findings in subsequent proceedings that cast doubt on the validity of a prior acquittal in criminal proceedings. The common factor in these cases has been a procedural connection between the criminal trial and the subsequent proceedings - the mantra oft repeated has been that the latter proceedings were "a consequence and the concomitant" of the criminal proceedings. The Court has also condemned as infringing article 6.2 statements by public authorities suggesting that a person acquitted might none the less have been guilty."

His Lordship then referred to *Sekania v Austria* (1993) 17 EHRR 221 and *Rushiti v Austria* (2000) 33 EHRR 1351, both of which were relied upon by Mr Southey for the appellant. Of these cases, at paragraph 25, Lord Phillips said:

> "Taken at face value these decisions seem to convert a presumption of innocence prior to conviction which is rebuttable into an irrebuttable presumption of innocence after

> acquittal. Two matters demonstrate that this is not the case. The first is the relief granted, or more significantly denied, to the applicants. Each of the applicants sought damages by way of compensation for his detention on remand – i e the relief he had sought in the domestic proceedings, to which he was entitled under domestic law if suspicion of his guilt had been dispelled. This was denied on the ground that there was no connection between the violation of article 6.2 and the damage in question. If, however, the acquittals had been conclusive of the applicant's innocence his right to compensation would logically have followed. The other matter is the reasoning of the European Court of Human Rights in a number of subsequent applications against Norway, which were heard together."

The Norwegian cases largely concerned claims to compensation, following acquittals, either by the acquitted defendant or by his alleged victim. In paragraphs 26 to 31 of the judgement, Lord Phillips comprehensively reviewed those cases and concluded at 32 as follows:

> "With respect, I find unconvincing the attempts of the Strasbourg court to distinguish between claims for compensation by an acquitted defendant and claims for compensation by a third party against an acquitted defendant. As the cases to which I have just referred show, the link between the criminal proceedings and the subsequent proceedings can be close in either case. The evidence may be common to both proceedings, as may the judges who have to consider it. In each case the compensation proceedings can put in issue the facts that were alleged as the foundation of the criminal charges. In each case facts were held proved according to the civil standard of proof which had not been established according to the criminal standard in the earlier proceedings. How can it credibly be said that the claim for compensation by the defendant is "consequential and concomitant" to the criminal proceedings but not the claim by a third party? May it not be that the Strasbourg court took a wrong turn in *Sekanina* and *Rushiti*? It might be thought that the judges who sat on the criminal proceedings will be well placed to determine the outcome of issues that depend upon the application of a lesser standard of proof to the same factual evidence; the Norwegian procedure, illustrated in *Y*, proceeded on that basis. Yet this is something that the Strasbourg jurisprudence appears to discourage. This confusing area of Strasbourg law would benefit from consideration by the Grand Chamber."

Lord Phillips presented two alternative views of the Strasbourg compensation cases and said that his favoured view was the following:

> "…Article 6.2 prohibits a public authority from suggesting that an acquitted defendant should have been convicted *on the application of the criminal standard of proof* and that to

> infringe article 6.2 in this way entitles an applicant to compensation for damage to reputation or injury to feelings. I am inclined to this view, albeit that it involves a remarkable extension of a provision that on its face is concerned with the fairness of the criminal trial: see my comment on *Taliadorou and Stylianou v Cyprus* (Application Nos 39627/05 and 39631/05) (unreported) 16 October 2008) in *R (Adams) v Secretary of State for Justice* [2011] 2 WLR 1180."

40. Finally, this led to a consideration of the position with regard to confiscation cases. This involved consideration of the inter-play between three decisions of the ECtHR (*Phillips v UK* (2001) 11 BHRC 280; *Van Offeren v The Netherlands* (Application No.19581/04) and *Geerings v The Netherlands* (2007) 46 EHRR 1212) and one case in the House of Lords *R v Briggs-Price* [2009] AC 1026. I do not, however, consider it to be necessary to bring that element of the case into the discussion on this appeal.

41. Importantly, for the state of domestic law, however, Lord Clarke of Stone-cum-Ebony, in a judgment attracting the concurrence of five of the seven justices, including Lord Phillips) in succinct terms endorsed (albeit obiter) the statement of the law on article 6.2 given by Lord Hope in the *Adams* case at paragraph 111 which I have already quoted. Lord Clarke said this:

> "58. Lord Dyson JSC concludes, at paras 141 and 142 that the judge did not impute criminal liability to the appellants and that the judge's approach to the evidence was correct. I agree.
>
> 59. For these reasons I too would dismiss the appeal on the first issue. This conclusion does not involve a detailed consideration of the issues raised by the Strasbourg jurisprudence or a resolution of the issues or potential issue identified by Lord Phillips PSC and Lord Dyson JSC. I would prefer to defer reaching definitive conclusions on them until they require a decision on specific facts. I would only add two points.
>
> 60. I agree with Lord Brown JSC that it is highly desirable that these issues should be considered by the Grand Chamber in Strasbourg in order to clarify and rationalise what he aptly calls this whole confusing area. Secondly, I note that in the recent case of *R (Adams) v Secretary of State for Justice (JUSTICE intervening)* [2011] 2 WLR 1180, where some of these issues were touched on, Lord Hope of Craighead DPSC, said at para 111 that the principle that is applied in Strasbourg is that it is not open to a state to undermine the effect of an acquittal. It appears to me that that is indeed the underlying principle and that if, as here and indeed in *Adams*, the effect of the acquittal is not undermined there should be no question of holding that there is any conflict with the presumption of innocence enshrined in article 6.2 of the European Convention on Human Rights."

42. There followed an element of disagreement between Lord Brown of Eaton-under-Heywood and my Lord, the Master of the Rolls (then sitting as a Justice of the Supreme Court) as to whether Lord Phillips's concerns as to the logic underlying some of the decisions of the Strasbourg court, concerns to which I have already referred above, were justified. Lord Dyson began his consideration of the principles by reference to the three criteria deriving from *Engel v The Netherlands* (supra).

43. Lord Dyson's conclusion on the authorities was expressed in these terms (at paragraph 132):

> "In the view of the European Court of Human Rights, the crucial question is whether the subject matter of the civil proceedings is so closely connected with some criminal proceedings that the Convention protections available in the criminal proceedings should also be available in the civil proceedings. If the outcome of the criminal proceedings is decisive for the "civil" proceedings, then there is a sufficiently close connection for article 6.2 to apply. This will occur, for example, where an acquitted defendant claims compensation for his detention on remand and the costs he incurred in the criminal proceedings. The defendant would not have been detained or incurred the costs which he claims in the civil proceedings but for the criminal proceedings. The position of the person who claims damages as the victim of the defendant is different. As was said in *Ringvold*, the victim of the alleged crime has a right to claim damages regardless of whether the defendant has been convicted or acquitted. The victim's claim is not even dependent on the defendant being prosecuted at all. There is, therefore, no link between the civil proceedings and any criminal proceedings that may have been instituted. The court held that the fact that an act may give rise to a civil claim in damages and also constitute a crime is not sufficient. There is also the point that, as was pointed out by the court in *Ringvold*, if the position were otherwise, article 6.2 would have
>
> > "the undesirable effect of pre-empting the victim's possibilities of claiming compensation under the civil law of tort, entailing an arbitrary and disproportionate limitation on his or her right of access to a court under article 6(I) of the Convention."
>
> This is a further indication that there is a real distinction between claims for compensation by an acquitted defendant and claims by an alleged victim of an acquitted defendant."

I have to add, however, that Lord Brown said that he considered that the second sentence in the paragraph quoted above begged the question that it purported to answer: paragraph 114 (p.2797H).

44. Paragraphs 134 and following of Lord Dyson's judgment chime in precisely with Mr Moffett's fourth submission summarised above as to the importance of the language

used in subsequent decisions following an acquittal in a criminal court. At paragraph 134, my Lord said this:

> "But the Strasbourg jurisprudence shows that there may be a yet further route by which article 6.2 may apply to proceedings which (i) are not civil on an application of the *Engel* criteria and (ii) do not objectively have the necessary close link with criminal proceedings. There is a principle that, if in the civil proceedings, the court's decision "contains a statement imputing the criminal liability of the [applicant]", that *of itself* will be sufficient to *create* the necessary link for article 6.2 to apply in those proceedings. The clearest statement of this principle is to be found in *Y v Norway* (2003) 41 EHRR 87."

After analysing the cases in which the language used by the domestic court or authority had given rise to the potential application of Article 6.2, Lord Dyson said (at paragraph 138):

> "It seems, therefore, that the necessary link can be created by this route only if the court in the civil proceedings bases its decision adverse to the defendant using language which casts doubt on the correctness of an acquittal. The rationale must be that in such a case the court has chosen to reach its decision by explicitly finding that a criminal charge has been committed. If it chooses to reach its decision in that way, then the protections afforded by article 6.2 should be available as if the civil proceedings were criminal proceedings. But if the decision in the civil proceedings is based on reasoning and language which goes no further than is necessary for the purpose of determining the issue before that court and without making imputations of criminal liability, then the necessary link will not have been created…The fact that the findings of fact in the compensation proceedings may implicitly cast doubt on the acquittal is not enough to import article 6.2. What is required is that the decision in the compensation proceedings contains a "*statement* imputing criminal liability" (emphasis added) (*Y v Norway* para 42) for article 6.2 to be imported."

45. The judgments in *Gale* were delivered on 26 October 2011. On 12 July 2013 the Grand Chamber of the ECtHR delivered its judgment in *Allen*. It was another compensation case. The applicant's claim to compensation under section 133 of the 1988 Act, following the quashing of her conviction for the manslaughter of her four year old son, had been rejected by the Secretary of State, whose decision had survived challenge in the English courts. The ECtHR also found that there had been no violation of Article 6.2. However, it is clear that the court had rejected the contention of the United Kingdom government (following the decision in *Adams*) that Article 6.2 had no bearing at all upon section 133 of the 1988 Act: see again the judgment of the Master of the Rolls in *Hallam* at paragraph 28. On that issue this court was bound to dismiss the appeal because in *Adams* the Supreme Court had held that article 6.2 is not applicable to the operation of section 133: see paragraphs 21-23 of the judgment. Nonetheless, the court went on to consider the application of Article 6.2 to section

133, coming to the conclusion on the basis of the Strasbourg cases that, if that Article applied, section 133 was not incompatible with it.

46. The *Allen* case did not address the factual situation arising in the present case. It did, however, refer to and comment upon the cases in the ECtHR that had given rise to the Supreme Court's expression of desire for the principles to be re-considered by the Grand Chamber.

47. I have already quoted the passage from paragraph 94 of the judgment in *Allen* introducing the analysis of the previous cases and which was heavily relied upon by Mr Southey. At paragraphs 95 and 96, the Court said that the "test" based upon the three criteria set out in *Engel's* case (supra) was "inappropriate" in cases following the termination of the criminal proceedings (c.f. the judgments of Lord Phillips and Lord Dyson in *Gale*). The court said this:

> "95. As expressly stated in the terms of the Article itself, Article 6 § 2 applies where a person is "charged with a criminal offence". The Court has repeatedly emphasised that this is an autonomous concept and must be interpreted according to the three criteria set out in its case-law, namely the classification of the proceedings in domestic law, their essential nature, and the degree of severity of the potential penalty (see, among many other authorities on the concept of a "criminal charge", *Engel and Others v. the Netherlands*, 8 June 1976, § 82, Series A no. 22, and *Phillips v. the United Kingdom*, no. 41087/98, § 31, ECHR 2001-VII). To evaluate any complaint under Article 6 § 2 arising in the context of judicial proceedings, it is first of all necessary to ascertain whether the impugned proceedings involved the determination of a criminal charge, within the meaning of the Court's case-law.
>
> 96. However, in cases involving the second aspect of the protection afforded by Article 6 § 2, which arises when criminal proceedings have terminated, it is clear that the application of the foregoing test is inappropriate. In these cases, the criminal proceedings have, by necessity, been concluded and unless the subsequent judicial proceedings give rise to a new criminal charge within the Convention's autonomous meaning, if Article 6 § 2 is engaged, it must be engaged on different grounds."

There then followed an extensive list in paragraphs 98 (a) to (i) of cases in which "The Court has been called upon to consider the application of Article 6.2 to judicial decisions taken following the conclusion of criminal proceedings, either by way of discontinuation or after an acquittal…".

48. After listing these cases under the nine categories in paragraph 98, the court noted the results in those cases in which compensation (following an acquittal or discontinuance of criminal proceedings) had been adjudicated upon in judicial proceedings. The *Allen* case did not, of course, involve a direct adjudication in judicial proceedings of entitlement to compensation, but rather a challenge in judicial proceedings to the

administrative decision of the Secretary of State to refuse compensation. However, in paragraph 102 of the judgment, it is stated that at least for the purposes of compensation claims by acquitted defendants and alleged victims alike, the principles of Article 6.2 had to be respected. The court said this:

> "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)."

49. In its conclusions under the heading "General Principles" the court expressed itself as follows in paragraphs 103 and 104:

> "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."

50. The court proceeded to examine whether the necessary "link" existed between the concluded criminal proceedings and what it called "the compensation proceedings" (paragraph 107). It concluded as follows:

> "107. In this respect, the Court observes that proceedings under section 133 of the 1988 Act require that there has been a reversal of a prior conviction. It is the subsequent reversal of the conviction which triggers the right to apply for compensation for a miscarriage of justice. Further, in order to examine whether the cumulative criteria in section 133 are met, the Secretary of State and the courts in judicial review proceedings are required to have regard to the judgment handed down by the CACD. It is only by examining this judgment that they can identify whether the reversal of the conviction, which resulted in an acquittal in the present applicant's case, was based on new evidence and whether it gave rise to a miscarriage of justice.
>
> 108. The Court is therefore satisfied that the applicant has demonstrated the existence of the necessary link between the criminal proceedings and the subsequent compensation proceedings. As a result, Article 6 § 2 applied in the context of the proceedings under section 133 of the 1988 Act to ensure that the applicant was treated in the latter proceedings in a manner consistent with her innocence."

51. The court recited some of the complaints made by the applicant as to the language used by the English courts in the judicial review proceedings as casting doubts upon her acquittal:

> "110. She highlighted, in particular, the High Court's finding that there was still "powerful evidence against" her (see paragraph 31 above); the reference by the Court of Appeal to the fact that the new evidence "*might*, if it had been heard by the jury, have led to a different result" (see paragraph 33 above); the comment that the Court of Appeal had "no doubt that the [judgment] of the CACD does not begin to carry the implication that there was no case … to answer" (see paragraph 38 above); and the finding of the Court of Appeal that "there was no basis for saying that, on the new evidence, there was no case to go to a jury" (see paragraph 39 above). These comments had to be viewed in the light of the general position as regards eligibility for compensation. The Court of Appeal's judgment clearly implied that she could potentially have been convicted had she been retried."

52. The court again reviewed its own previous decisions in cases concerning applications for compensation and defence costs, civil compensation claims by victims and disciplinary proceedings and, in a passage upon which Mr Moffett particularly relied concluded:

> "125. It emerges from the above examination of the Court's case-law under Article 6 § 2 that there is no single approach to ascertaining the circumstances in which that Article will be violated in the context of proceedings which follow the conclusion of criminal proceedings. As illustrated by the Court's existing case-law, much will depend on the nature and context of the proceedings in which the impugned decision was adopted.
>
> 126. In all cases and no matter what the approach applied, the language used by the decision-maker will be of critical importance in assessing the compatibility of the decision and its reasoning with Article 6 § 2 (see, for example, *Y v. Norway*, cited above, §§ 43-46; *O. v. Norway*, cited above, §§ 39-40; *Hammern*, cited above, §§ 47-48, *Baars*, cited above, §§ 29-31; *Reeves*, cited above; *Panteleyenko*, cited above § 70; *Grabchuk*, cited above, § 45; and *Konstas v. Greece*, no. 53466/07, § 34, 24 May 2011). Thus, in a case where the domestic court held that it was "clearly probable" that the applicant had "committed the offences … with which he was charged", the Court found that it had overstepped the bounds of the civil forum and had thereby case doubt on the correctness of the acquittal (see *Y. Norway*, cited above, § 46; see also *Orr*, cited above, § 51; and *Diacenco*, cited above, § 64). Similarly, where the domestic court indicated that the criminal file contained enough evidence to establish that a criminal offence had been committed, the language used was found to have violated the presumption of innocence (see *Panteleyenko*, cited above § 70). In cases where the Court's judgment expressly referred to the failure to dispel the suspicion of criminal guilt, a violation of Article 6 § 2 was established (see, for example, *Sekanina*, cited above, §§ 29-30, and *Rushiti*, cited above, §§ 30-31). However, when regard is had to the nature and context of the particular proceedings, even the use of some unfortunate language may not be decisive (see paragraph 125 above). The Court's case-law provides some examples of instances where no violation of Article 6 § 2 has been found even though the language used by domestic authorities and courts was criticised (see *Reeves*, cited above and *A.L. v. Germany*, cited above, §§ 38-39)."

53. I think that it is a sufficient summary of the court's findings on the facts of the *Allen* case to record the following:

> "134. The Court does not consider that the language used by the domestic courts, when considered in the context of the

> exercise which they were required to undertake, can be said to have undermined the applicant's acquittal or to have treated her in a manner inconsistent with her innocence. The courts directed themselves, as they were required to do under section 133 of the 1998 Act, to the need to establish whether there was a "miscarriage of justice". In assessing whether a "miscarriage of justice" had arisen, the courts did not comment on whether on the basis of the evidence as it stood at the appeal, the applicant should be, or would likely be, acquitted or convicted. Equally, they did not comment on whether the evidence was indicative of the applicant's guilt or innocence…They did not question the CACD's conclusion that the conviction was unsafe; nor did they suggest that the CACD had erred in its assessment of the evidence before it. They accepted at face value the findings of the CACD and drew on them, without any modification or re-evaluation, in order to decide on them, without any modification or re-evaluation, in order to decide whether the section 133 criteria were satisfied."

54. I have taken some time to summarise what seem to me to be the salient principles emerging from the Supreme Court cases and the decisions of the ECtHR. While none of these cases exactly answers the problem facing this court, it does at least appear to me that there is nothing materially inconsistent for our present purposes in the approaches of the two courts, once it is accepted that the Article 6.2 *is* engaged on the facts of the particular case. I think that we can safely conclude that Lord Hope's short summary of the principles in *Adams* represents in broad terms how English law is to decide problems of the present type: viz. "it is not open to the state to undermine the effect of an acquittal": paragraph 111 in *Adams*, as endorsed by the majority of the justices in *Gale*, paragraph 60.

55. From the *Allen* decision, we can see that it is important to have in mind the principles set out in paragraphs 103 and 104, certainly in judicial proceedings, and public officials must not treat acquitted persons as if they were guilty of the very criminal charge of which they have been acquitted (paragraph 94). However, there is to be no single approach to ascertaining whether or not there has been a violation in proceedings post acquittal. Much depends upon the context of the decision to be taken. The language used in that context is of importance: paragraphs 134-135. This accords with the assessment of the earlier Strasbourg cases which had already been made by Lord Dyson in *Gale* (at paragraphs 134 and following).

56. In my judgment, seeking to apply these principles, I consider that what occurred here did not amount to a violation of article 6.2. The statement for onward transmission in the ECRC was extremely limited. There was no aspersion cast at all upon the correctness of the acquittal in the criminal court. Nowhere was it suggested in the certificate that the appellant was guilty of the offence of which he had been acquitted.

57. To a qualified extent, therefore, I accept Mr Moffett's submissions on this part of the case. I agree with Mr Moffett that Mr Southey's submissions came close to suggesting that the fact of an acquittal could never feature in a certificate of the present type. That clearly goes too far, in my opinion, in the face of the authorities, domestic and European. The context is all important. This is not a case, like some of those in the

Strasbourg jurisprudence, where there has been an acquittal in a criminal court, followed by a linked consideration of whether the facts that underlay the allegations might or might not be true. Here the issue was whether to disclose the information as a measure of public protection; there was no procedural link at all to the criminal proceedings themselves. There was no suggestion that the jury had been wrong to acquit on the evidence and on the standard of proof which they had to apply. There was, therefore, no "undermining" of the acquittal.

58. There was, in the terminology of the ECtHR (paragraph 126), clearly "some unfortunate language" in the *reasoning* behind the reviewing officer's conclusion that the information should be included in the certificate. I have in mind here in particular the suggestion that the decision to prosecute indicated that on a balance of probabilities the allegations were more likely to be true than false and the statement of the officer's own conclusion at the end that the "information might be true". Nonetheless, a statement that the allegations were more likely to be true on the balance of probabilities does not cast doubt on an acquittal in view of the different, and more exacting, standard of proof in criminal proceedings. Further, that was not the only consideration brought to bear in the decision. I also bear in mind here, by way of comparison with the statements made in this case, the language in the judgments in our courts which were criticised by the claimant in the *Allen* case and were considered by the Grand Chamber: see again paragraph 110, quoted above. However, as I see it, up to the present the ECtHR has only applied Article 6.2, in a "post criminal proceedings" context to the *public* statements of state organs and not to documents, such as the reviewing officer's reasons in this case, which are not in the general public domain.

59. I also accept Mr Moffett's submission that the Strasbourg court has never (so far as shown to us) found a violation of Article 6.2 in a situation such as the present. Therefore, this seems to be another case in which we should not go beyond the limits of the previous cases decided in the ECtHR. As Lord Bingham of Cornhill said in *R (Ullah) v Special Adjudicator* [2004] 2 AC 323 at [20]: the "duty of the national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more and certainly no less". This approach was applied in this court in *Secretary of State for the Home Department v JJ* [2006] EWCA Civ 1141; [2007] QB 446 at [20] and in *R (Countryside Alliance) v A.-G.* [2006] EWCA Civ 817; [2007] QB 305 at [80].

60. Taken as a whole, it seems to me that the issue of the certificate did not undermine the appellant's acquittal. Nowhere is it said that he was in truth guilty of the offence. The purport of the certificate is to state the fact of the allegation and of the acquittal. It is no doubt implicit that this is an alert to the potential employer of those facts as to a possible risk to the vulnerable. However, that does not, to my mind, undermine the effect of the acquittal. The effect of the acquittal is that the jury was not satisfied, so that they were sure, that the appellant was guilty. The effect of indicating facts from which others may perceive a risk from a particular individual does not contradict the effect of that verdict.

61. I would, therefore, reject the appellant's first ground of appeal.

(2) *Article 8*

62. Turning to the appellant's case on Article 8 of the Convention, it has been common ground throughout that this article is engaged by the decision in issue in this case. There are two aspects to the appellant's challenge to the decision taken by the First Respondent and to the decision of the judge. The appellant argued that the decision failed to comply either procedurally or substantively with Article 8.

63. On the first limb of the challenge, it is clear that in a number of situations of the present type a duty to consult the applicant for the certificate will arise. As the principal authority indicates, not surprisingly, the need to do so will turn on the particular facts of the case in question and no hard and fast rules can be stated: see *R (L) v Commissioner of Police for the Metropolis* [2010] 1 AC 410.

64. In *L's* case, Lord Hope said this (at paragraph 46):

> "In cases of doubt, especially where it is unclear whether the position for which the applicant is applying really does require the disclosure of sensitive information, where there is room for doubt as to whether an allegation of a sensitive kind could be substantiated or where the information may indicate a state of affairs that is out of date or no longer true, chief constables should offer the applicant an opportunity of making representations before the information is released…But it will not be necessary for this procedure to be undertaken in every case. It should only be resorted to where there is room for doubt as to whether there should be disclosure of information that is considered to be relevant. The risks in such cases of causing disproportionate harm to the applicant outweigh the inconvenience to the chief constable."

Lord Saville of Newdigate agreed and Lord Brown also said expressly that the requirement for consultation would arise "in any borderline case". On this issue, Lord Neuberger of Abbotsbury said this (at paragraph 82):

> "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."

65. Mr Southey's complaint for the appellant is that the First Respondent made no attempt to consult with the appellant before the decision to provide the disputed information for inclusion in the second certificate was taken. The only indication of the appellant's attitude that the police had was after the information had been supplied for the first certificate and a complaint was lodged. Mr Southey submitted that there should have been direct consultation with the appellant before the information was provided for inclusion in the ECRC on the second occasion. Moreover, the impact of disclosure in cases such as the present, he argued, will inevitably change over time and the police were in no position in this case to know the extent of the impact of the disclosure on the appellant in the time since the issue of the first certificate.

66. I do not consider that overall what occurred in this case resulted in a breach of the procedural requirements of Article 8, bearing in mind the principles emerging from the *L* case. This was not a borderline case of relevance so far as the nature of the information was concerned. Indeed, no such argument was presented on the appellant's behalf. Further, the appellant had lodged his complaint in relation to the first certificate, raising points with regard to what he argued to be the manifest unreliability of the allegations having regard to his acquittal, and, in general terms, as to the employment difficulties caused by the disclosures. However, there had been no legal challenge to the first certificate. The second certificate was applied for with a view to a post in the very occupation in which the incident giving rise to the allegation had arisen. No specific new considerations appear to have been raised by the appellant at the time when the certificate was applied for and the appellant has not, in the course of these proceedings, alluded to any matter that he would have raised if he had been consulted in March 2012. The points raised in his initial complaint about the first certificate were considered again. It is to be recalled further that an application for an ECRC is made in relation to a specific post and no points were raised that would indicate that disclosure on this certificate would impact upon the appellant's employment in posts for which such a certificate was not required.

67. I turn to the substantive aspect of the appellant's complaint based upon Article 8. The broad principles are easy to state by reference to two passages in the judgments in the *L* case. First, at paragraphs 41- 42, Lord Hope, considering the question whether the information "ought" to be included in a certificate, said,

> "41. This raises the question whether in *R (X) v Chief Constable of the West Midlands Police* [2005] I WLR 65, paras 36 and 37 especially in para 41, Lord Woolf CJ struck the balance in the right place. Before he addressed himself to this issue, however, Lord Woolf CJ 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."

Secondly, Lord Neuberger said,

> "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."

68. The difficulty for the decision-maker in circumstances such as the present were, I think, well summarised by Beatson LJ in paragraph 1 of his judgment in *A v Chief Constable of Kent* (supra) as follows:

> "The information disclosed in an ECRC is information the relevant chief constable considers 'might be relevant' and 'ought to be included'. It can include allegations about criminal or other behaviour which have not been substantiated whether in the courts, in regulatory proceedings, or otherwise, as well as details of any recorded convictions. The effect of disclosing

> such information is often, in practice, the end of any opportunity for the individual to be employed in an area for which an ECRC is required. Balancing the risks of non-disclosure to the interests of the members of the vulnerable group against the right of the individual concerned to respect for his or her private life is a particularly sensitive and difficult exercise where the allegations have not been substantiated and are strongly denied."

69. I have set out above the judge's conclusions on this question. The judge also provided a very helpful reminder of a quotation from the speech of Lord Bingham in the House of Lords in *Huang v Home Secretary* [2007] 2 AC 167 at paragraph 19, as follows:

> "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."

70. The nature of the court's exercise in proceedings relating to the "proportionality" of a measure or a decision, in the context of Article 8, was considered again in *A v Chief Constable of Kent*. Beatson LJ summarised the position thus (at paragraphs 36-37) :

> "[36] It was common ground between the parties that, 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 relative weight accorded to the interests and considerations by the decision-make. The scope of review thus goes further than the traditional grounds of judicial review: see e g *R v Secretary of State for the Home Dept, ex p Daly* [2001] UKHL 26, [2003] 3 All ER 433 at [27], [2001] 2 AC 532 at [27].
>
> [37] There are also clear statements that it is the function of the court to determine whether or not a decision of a public authority is incompatible with ECHR rights. In *SB's* case [2006] 2 All ER 487 at [30], [2007] 1 AC 100 at [30], Lord Bingham stated that '[p]roportionality must be judged objectively, by the court'. See also Lord Hoffman at [68], Lord Neuberger MR in *L's* case [2009] UKSC 3, [2010] 1 All ER 113, [2010] 1 AC 410 at [74], and *Miss Behavin Ltd v Belfast City Council* [2007] 3 All ER 1007, [2007] 1 WLR 1420. In the last of these decisions Baroness Hale stated (at [31]) that it is the court which must decide whether ECHR rights have been infringed. In *Huang v Secretary of State for the Home Dept*; *Kasmiri v Secretary of State for the Home Dept* [2007] 4 All ER 15, [2007] 2 AC 167 Lord Bingham also stated that the court must 'make a value judgment, an evaluation'. But he made it quite clear (at [13]) that, 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. In *Axa General Insurance Ltd v Lord Advocate* [2011] UKSC 46, 122 BMLR 149, [2012] 1 AC 868, Lord Reed (at [131]) stated that, 'although the courts must decide whether, in their judgment, the requirement of proportionality is satisfied, there is at the same time nothing in the Convention rights, which requires the courts to substitute their own views for those of other public authorities on all matters of policy, judgment and discretion'."

71. As to the weight to be afforded by the court to the judgment of the primary decision-maker (the First Respondent in our case), Beatson LJ said (at paragraph 39):

> "Much consideration has also been given to the weight it is 'appropriate' for the court to give to the judgment of the person who has been given primary responsibility for the decision. That person has, in the words of Lord Bingham in *Huang's* case [2007] 4 All ER 15 at [16], [2007] 2 AC 167 at [16], been

> given 'responsibility for a subject-matter' and 'access to special sources of knowledge and advice'. If that person has 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: see *Miss Behavin' Ltd v Belfast City Council* [2007] 3 All ER 1007, [2007] 1 WLR 1420 per Baroness Hale at [37] and Lord Mance at [47]."

72. Errors in the reasoning process do not necessarily render the decision reached as a result a disproportionate one: see paragraphs 45 – 46 of the same judgment, and the *Miss Behavin'* case at paragraph 31, per Baroness Hale of Richmond, and *DS v HM Advocate* [2007] UKPC D1, paragraph 82 per Lord Rodger of Earlsferry, as cited by Beatson LJ in those paragraphs.

73. So far as the role of this court is concerned, when an appeal is brought from an Article 8 "proportionality" decision of a judge at first instance, Beatson LJ (in paragraph 87 of his judgment) helpfully summarised the majority judgments on this point in the Supreme Court in *Re B (a child) (care order proportionality: criterion for review)* [2013] 1 WLR 1911 as follows:

> "The majority judgments stated that the correct approach for an appellate court is to treat the exercise as an appellate exercise and not as a fresh determination of necessity or proportionality. Their reasoning was based on the requirement for a fair hearing before an independent tribunal under ECHR art 6. They considered that, because there is no obligation under art 6 to provide a right of appeal at all, it is open to domestic law to fashion the scope of any right given. In England and Wales CPR Pt 52 limits this to a review of the decision of the lower court: see Lord Wilson at [36], Lord Neuberger at [83] and [85], and Lord Clarke at [136]. It was recognised (see Lord Neuberger at [88]) that if, after such a review, the appellate court considered that the judge had made a significant error of principle the appellate court is able to reconsider the issue for itself 'if it can properly do so' because 'remitting the issue results in expense and delay, and is often pointless'."

74. In summary, the role of the courts, therefore, is this. The judge at first instance must carry out a "high intensity" review of the original decision and must make his or her own assessment of the factors considered by the decision-maker, but this is not by way of a "merits review"; the judge is not the primary decision-maker. The role includes deciding whether the decision under challenge breaches the Convention rights of the applicant, and specifically whether the decision reaches a proportionate result in compliance with the relevant provisions of the Convention. The court will pay close regard to the balance struck by the decision-maker, if he has addressed his mind to the considerations which are relevant to striking the balance between the

competing rights, particularly if he or she has an expertise in the matter. However, in the end, the decision is for the court, rather than a review in the ordinary sense. When the judge's decision is challenged on appeal, the appellate court will only consider the issue of proportionality for itself if it finds that the judge has made "a significant error of principle".

75. I do not find that Judge Raynor made any error of principle in his judgment in this case, let alone any significant error. He had sufficient of the relevant authorities well in mind, as his citations in paragraphs 31 to 33 of the judgment demonstrate. He proceeded to consider for himself the various factors material to the proportionality of the decision to disclose the information, recognising as he did the flaw in the reviewing officer's reasoning in placing some significant weight on the initial decision to prosecute. The judge recognised that a balance had to be struck between the potential risk to the vulnerable if the appellant obtained the post for which he was applying and the interference with his rights under Article 8 caused by the detriment that he would suffer by the disclosure. The judge saw that the balance was a difficult one to strike and correctly directed himself to the material considerations.

76. The points made by Miss Richards for the First Respondent, which I have summarised in paragraph 33 above, were to my mind valid elements of the decision which the First Respondent had to take, but I must not be drawn into re-making that decision. However, it seems to me that those points were in essence the same as the ones that persuaded Judge Raynor that the First Respondent's decision was proportionate on the facts of this case. I can see no significant error of principle in that and can see no reason to disagree with the assessment of proportionality that he made.

77. I, therefore, reject the second basis of the appeal.

Conclusion

78. In the result, I would dismiss the appeal.

Lord Justice Richards:

79. I agree.

The Master of the Rolls:

80. I also agree.