Neutral Citation Number: [2017] EWCA Civ 1838

Case No: C1/2015/2662/QBACF

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE,
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
HHJ BEHRENS
[2015] EWHC 2085 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/11/2017

Before :

LORD JUSTICE LEWISON
LORD JUSTICE BEATSON
and
MR JUSTICE HILDYARD

- -

Between :

THE QUEEN ON THE APPLICATION OF SD	**Appellant**
- and -	
THE CHIEF CONSTABLE OF NORTH YORKSHIRE AND ANR	**Respondent**

- -
- -

Mr Hugh Southey QC (instructed by **Thompsons**) for the **Appellant**
Mr Ian Skelt (instructed by **Force Legal Department**) for the **Respondent**

Hearing date: 19 October 2017

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Approved Judgment

Lord Justice Beatson :

I. Overview:

1. In order to protect vulnerable groups, including children, provision is made by the Police Act 1997,[1] as amended, for the Disclosure and Barring Service ("the DBS") to issue an enhanced criminal record certificate ("ECRC") to those applying to work with such groups. The information disclosed in an ECRC is information which the Chief Constable of the relevant police force reasonably believes "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 or disciplinary proceedings, or otherwise, as well as details of any recorded convictions.

2. The appellant, SD, worked in the education sector. Until 31 October 2011, he was employed by a college of further education teaching vocational skills to students aged between 17 and 24. In August 2013 the appellant began new employment as a child workforce technician with Visions Learning Trust. He was asked by his employer to apply for an ECRC and did so. The respondent, the Chief Constable of North Yorkshire Police, invited submissions by the appellant on the disclosure he proposed to make concerning a disputed allegation that the appellant had made comments of a sexual nature while employed by the college of further education. The comments were alleged to have been made while he was supervising an overseas student trip and in the presence of students aged between 17 and 24 and other adults in July 2010. The respondent rejected the submission that no disclosure should be made but modified its terms in the light of the appellant's submissions. The ECRC issued was dated 14 February 2014.

3. The appellant brought judicial review proceedings, claiming that the disclosure disproportionately interfered with his right under Article 8 of the European Convention on Human Rights ("ECHR") to respect for his private life. His case was that the inclusion of the allegations, which he strongly denies, in the ECRC did not strike the right balance as they were: (a) not serious in nature, (b) not reliable, (c) four years old, and (d) their inclusion has the potential to severely damage his career and life prospects. His application was rejected by His Honour Judge Behrens, sitting in the Administrative Court in Leeds. This is an appeal against the judge's order dated 16 July 2015. In broad terms, the issue is whether the respondent, the Chief Constable of North Yorkshire Police, erred in the way he balanced the interests of children, a vulnerable group, against the right of the appellant, and whether the judge erred in his approach.

4. In Parts II and III of this judgment, I summarise the legal framework, as to which there is broad agreement, and set out the disclosure that is challenged. Part IV summarises the background to the disclosure and the history of these proceedings. Part V summarises the judgment below, and Part VI the procedural history of the appeal. Part VII contains my analysis, and my conclusion that the disclosure in the ECRC was a disproportionate interference with SD's Article 8 rights and should be quashed, and the reasons for so concluding. If Lewison LJ and Hildyard J agree, the appeal against the judge's order will be allowed.

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1 In this judgment, save where otherwise stated, all references to statutory provisions are to this Act.

II. The legal Framework:

5. By section 113B(4) of the Police Act 1997 as amended:

> "Before issuing an enhanced criminal record certificate, the Secretary of State must request any relevant chief officer to provide any information which –
>
> (a) the chief officer reasonably believes to be relevant for the purpose described in the statement under sub-section (2), and
>
> (b) in the chief officer's opinion, ought to be included in the certificate."

A chief officer is entitled to delegate this responsibility, and he or she or the delegate is required to issue the certificate to the individual who has applied for it.

6. Section 117 of the 1997 Act provides for a person who has applied for an ECRC and believes that the information in it is inaccurate to apply to the Secretary of State for a new certificate. Section 117A enables a person who believes that the information provided is not relevant for the purpose authorised by the Act or ought not to be included in the ECRC to apply for a review of the disclosure by the independent monitor ("IM"), an officer appointed by the Secretary of State under section 119B, who is also required to conduct a general review of a sample of ECRCs. Section 119B(9) provides that the chief officer of a police force must provide to the independent monitor such information as the monitor reasonably requires in connection with the exercise of his functions under section 117A.

7. The effect of disclosing information in an ECRC will often, in practice, severely restrict or end any opportunity for the individual in question to secure employment in an area for which an ECRC is required and for which they have been trained and have considerable experience. The risks of non-disclosure to the rights and interests of the members of vulnerable groups have to be balanced against the right of the individual concerned under Article 8. Where the allegations have not been substantiated and are strongly denied, this balancing exercise is particularly sensitive and difficult: see the decision of the Supreme Court in *R (L) v Commissioner of Police of the Metropolis* [2009] UKSC 3, [2010] 1 AC 410 and my summary in *R(A) v Chief Constable of Kent* [2013] EWCA Civ. 1706, (2014) 135 BMLR 22.

8. In *L's* case Lord Neuberger gave guidance about the balancing process and examples of the different and sometimes competing factors which have to be weighed up by the decision-maker. At [81], he stated:

> "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."

He also stated that:

"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."

9. In July 2012, the Home Office issued guidance under section 113B(4A) to assist chief officers of police making decisions as to the information to be provided in ECRCs. This largely adopted Lord Neuberger's guidance in *L's* case and the parties in this appeal did not refer to it because they agreed that it sufficed to refer to the jurisprudence, in particular, *L* and *A*.

10. As well as providing guidance as to the way the rights and interests of members of vulnerable groups have to be balanced against the right of the individual concerned under Article 8, *A's* case deals with the approach to the views of other regulators and the position of material which could not have been available to the decision maker at the time of the decision. I deal with those matters at [53] – [54] below.

II. The challenged ECRC:

11. After the appellant's application for an ECRC in August 2013, on 8 November 2013 the respondent informed him that information relating to his time at the college of further education was being considered for inclusion in it. He objected to the proposed disclosure, and the respondent revised the proposed wording in the light of his submissions but maintained his decision to make disclosure. The entry in the ECRC dated 14 February 2014 to which the appellant objects is under the heading "Other relevant information disclosed at the Chief Police Officer's discretion". It states:

"The information relates to [SD's] alleged unprofessional behaviour during a college trip.

North Yorkshire Police believe this information to be relevant to an employer's risk and suitability assessment when considering [SD's] application for technician working with children because without this information the registered body may not be able to mitigate and manage any potential risk.

The information held by police is:

[SD] underwent a police investigation in November 2011 following an allegation that he had behaved in an unprofessional manner whilst working as a lecturer supervising a college trip in July 2010. [SD] allegedly made inappropriate comments of a sexual nature in the presence of students aged between 17 - 24 and other adults present on the trip. The

findings of the investigation revealed no criminal offences committed.

[SD] made representations regarding the above information. [SD] stated that the complaints were made against him after he had made a complaint against another member of staff. He believed that this member of staff had encouraged others to make allegations about him to discredit him and they were only ever based on hearsay. [SD] further stated that the allegations were false.

After careful consideration, North Yorkshire Police believe that this information ought to be disclosed because it shows [SD's] alleged inappropriate behaviour /language in the presence of students in his care. In this particular case [SD's] right to privacy is outweighed by the need to protect the interest of children and for the Registered Body to have details of the incident in order to make a balanced decision. The potential risk to any child of being exposed to similar behaviour/language in this instance outweighs any prejudicial impact, however regrettable, to [SD]".

III. The factual and procedural background:

12. The allegations were that on the trip SD took photos of male students outdoors with their tops off and made sexually inappropriate remarks in the presence of the students and others. While on a train, he was alleged to have said "I've never been sucked off on a train before". It was also alleged that he made sexually inappropriate remarks while drinking in a bar, which at their height, included attribution of the remarks "fishy jump" and "nothing like sex with a 12 year old, right juicy fanny". SD denies that he made any sexually inappropriate remarks either whilst on a train or whilst in a bar but accepts that he took photographs of some of the male students with their shirts off with a camera the college provided him with to keep a record of the trip. This allegation is not referred to in the ECRC and it is not necessary to make any further reference to it.

13. Following the trip, the appellant was questioned and reprimanded. The college later stated that he was questioned about the sexually inappropriate remarks but his position is that the reprimand related only to other matters.

14. In August 2011, the appellant raised a formal grievance against a colleague about other matters. In the course of the college's investigation of that grievance, the investigator was informed of the allegations about the appellant's conduct on the trip. The appellant believed that the colleague against whom he had raised the grievance had encouraged others to do this to discredit him. There was an investigation into his conduct on the trip and the outcome of the investigation was a recommendation that the matter be dealt with as gross misconduct under the college's disciplinary procedure. The disputes between the appellant and the college were, however, settled by a compromise agreement dated 31 October 2011, under which he left the college

and received severance pay of £8,874, and the college agreed to give him a positive reference.

15. The college then referred the allegations about the appellant's conduct prior to his leaving its employment to the police and to the Independent Safeguarding Authority ("ISA") which at that time was responsible for maintaining the lists of those barred from working with children and vulnerable adults. The police investigated the matter in November 2011 without informing the appellant: he was unaware of the investigation. The police concluded that no crime had been committed.

16. In a letter dated 12 January 2012, the ISA informed the appellant that it was considering whether to include him in the lists. In a letter to him dated 13 March 2012, the ISA stated that it had concluded its enquiries, had "carefully considered all the information available" to it, and "on the basis of this information ... decided that it [was] not appropriate to include" the appellant in either of the barred lists. The letter also made two other points. It stated that, while the ISA's decision meant that the appellant would not be prevented from carrying on regulated activity, "there may be other restrictions placed on you by other bodies and our decision does not overrule these". It also stated that its decision had no bearing on the decision of an employer in the future not to employ the appellant. That decision would be made on the basis of "information gathered from references, criminal record checks, and other relevant sources of recruitment information".

17. I return to the challenged ECRC. I first summarise parts of the AT3 form which records the thought processes (the rationale) and decisions made when evaluating information and, if disclosure is to be made, the wording of the disclosure. The disclosure analyst recorded that the applicant would be working within the children's sector and summarised the allegation. The analyst stated that the allegation was that the inappropriate comments of a sexual nature were made and caused alarm and distress, and that there was a risk that the applicant "may" behave in a similar manner towards children if the opportunity arose within his employment.

18. In the box dealing with why it was reasonable to conclude that the information was true, the analyst stated that a police investigation was conducted into the behaviour in which SD's actions were "deemed inappropriate but not criminal" and "this resulted in no further police involvement". She also stated that there were numerous witnesses to his behaviour, and similar allegations from both staff and students suggested that allegations made were more likely to be true than false. In the box dealing with why she considered that it would be proportionate to disclose the information, she stated that "the applicant has behaved inappropriately in the presence of young males in his care" and "has applied to work within the children's sector with possible unsupervised contact." He "may have opportunity where he 'might' behave in a similar manner to which he was alleged to have done". "His employers deemed it serious enough to report to the police for assistance". The analyst stated that she had taken into account SD's rights to respect for private life but considered that the potential risk to children he may pose outweighed those rights. The analyst recorded that the disclosure contained only factual information and informed the employer of the findings of an investigation initiated by an education authority and that without this information the employer would not be able to make an adequate risk assessment of the applicant.

19. The analyst's decision was reviewed by a quality assurance officer, who summarised the allegations and the risk, and stated that she had reviewed all the evidence, including that provided by the applicant and the college. She refers to statements from others present on this trip, who are independent witnesses, which suggested that he did make inappropriate comments, and to SD's suggestion that the complaints were made after he himself had made a complaint about the college. As to the latter, it is also stated that the information suggested that not to be the case and that his behaviour had come to light prior to his complaint, although there had been no formal investigation. The officer recorded that the evidence in the investigation by the college suggested that the allegation was more likely to be true because of independent witnesses and similar accounts, and that SD left the college before a misconduct hearing could take place. It concluded:

> "This disclosure will regrettably impact on the applicant's rights to respect for private and family life. However, it is important that an employer is made aware of all the facts to make a fair, informed, balanced decision on employment and mitigate and manage any potential risk.
>
> This disclosure is not a recommendation of employment and only for the employer to have all the relevant facts. The disclosure is to help with the safe-guarding of children, protecting their rights, and is therefore justified."

20. The section of the form completed by the DBS manager stated that she believed the information to be more likely true than false because two separate investigations were performed and various witness statements had been made which lent towards the students' version of events and had been backed up by an independent witness. It is stated that it was proportionate to release the information as a proposed employment as a child workforce technician enabled SD to have access to other children and "not disclosing the information will not help the employer manage any potential risk". It also stated that "if no potential risk is found by the prospective employer this information only serves as an awareness of previous documented events". Reference is made to the impact on SD's human rights, and his statement that the allegations are false, but also that the need to protect children who may come into contact with him justified the interference in his private life.

21. The decision of DCC Tim Madgwick, the officer to whom the Chief Constable had delegated the decision, stated that he had reviewed the earlier sections of the AT3, summarised the police investigation, the allegations, and SD's representations about the information and the complaints, that is, that the member of staff against whom he had raised a complaint, had encouraged others to make allegations about him to discredit him, and the allegations were only based on hearsay and were false.

22. DCC Madgwick stated there was no presumption in favour or against providing a specific item or category of information, and that every piece of information should be assessed on its own individual merits. He continued:

> "I believe the information to be of sufficient quality to pass the required tests. A police and college investigation was made into [SD's] alleged inappropriate conduct during a trip to

> Transylvania. [SD] is alleged to have used inappropriate words and taken photographs of students who were semi-naked. Witness statements were taken from all concerned from the trip and meetings held with [SD] resulted in the decision that [SD] was to be served with an informal reprimand from [the college].
>
> I reasonably believe the information to be relevant to anyone with responsibility for considering the risk that this individual may pose, having regard to the specifics of this application. [SD] placed himself by his own choice in a situation and allegedly behaved in a manner which subsequently caused alarm and distress to students he was accompanying. It was alleged that he urinated in a public place and made comments of a sexual nature about females. The relationship between [SD] and those students may be construed as a relationship going beyond an acceptable boundary.
>
> I believe the disclosure is reasonable and proportionate because in not disclosing the information this will not enable a prospective employer [to] manage any potential risk if they feel there is one. [SD] provided a response in the form of a representations letter on three separate occasions giving his version of events. [SD's] responses appeared to conflict with each other and I believe it is reasonable to disclose information which the DBS Unit are confident on, taking into account all the information made available at the time. It would be disproportionate to disclose information if it is trivial and this has not been the case with [SD].
>
> I believe the disclosure to be accurate, balanced and fair because comprehensive investigations had been made into the allegations into [SD] via [the college], pupil statements, police held information, representation responses from [SD] and advice from ACPO rank, all of which enabled DBS to strike a fair and balanced decision from the information made available."

23. After considering the appellant's Article 8 rights and whether an interference with them was legitimate and justified, DCC Madgwick concluded:

> "I believe the information ought to be disclosed and strikes a fair balance between the applicant's rights and those the disclosure is intended to protect. The information and allegations made against [SD] are of a nature that any potential risk to any child being exposed to behaviour and language in the future by [SD] has to be considered however regrettable to [SD]. Therefore their rights and freedoms need protecting."

24. The appellant's evidence (see statement, dated 16 June 2015) is that following receipt of the ECRC his employer provisionally decided to terminate his employment but his

managers made representations on his behalf as a result of which he was retained. On 12 May 2014, he raised a dispute about the contents of the ECRC. He denied the allegations, explained why they should not be considered reliable, asserted that they at most amounted to "poor behaviour" and were therefore not relevant, and that disclosing them was not proportionate. The respondent rejected his dispute on 9 June 2014. The appellant then requested the IM to review the disclosure. However, on 12 September 2014, before the IM's response, he filed these proceedings. His evidence (see statement, dated 16 June 2015) is that he wished to be employed as a college lecturer rather than as a technician because of the higher salary, but that the entry in the ECRC had created obstacles.

25. The respondent's summary grounds of defence dated 2 October 2014 contested the claim on substantive grounds and also submitted that permission should not be granted because the appellant had not exhausted his alternative remedies. On 5 November 2014, the matter was stayed by HHJ Kaye QC until either the decision of the IM was given or 1 February 2015. The IM gave his decision in a letter dated 4 December 2014.

26. The IM stated that, having considered all the information, he was satisfied that the incidents were more likely to have occurred than not, that the information was of sufficient gravity to be disclosed and was sufficiently current, and it was relevant. The IM considered that disclosure was proportionate because the appellant was seeking "a role working within the child workforce" and that repetition of the type of incident described in the ECRC would have a significant negative impact on the children SD would be responsible for, who would be younger than those he was supervising at the time of the incident described. He was "satisfied that this outweighed the impact that disclosure may have on [SD]". Permission to seek judicial review was granted by HHJ Gosnell on 9 February 2015.

27. The respondent's detailed grounds did not contend that the claim against the Chief Constable was misconceived because it should have been brought against the IM. There is also no such suggestion in the respondent's skeleton argument below. Paragraphs 36-37 rely on the decision of the IM which, it is stated, "stands as independent support for the decision .... to disclose the information, and the terms of the disclosure". It was submitted that the decision of the IM, who is well placed to make discretionary assessments on risk, should be respected by the court, which should be reluctant to intervene in his decisions and opinions on that issue. The IM is independent of the Chief Constable and the Disclosure and Barring Service.

IV. The judgment below:

28. The judge stated that the relevant legal principles could be taken from the summary in section II of my judgment in *A's* case. As well as the passages from *L's* case set out above, he referred to what I had said in *A's* case about the role of the court and post-decision/post-disclosure material. At [36], he summarised the approach as follows:

> "I am required to make a high intensity review of the decision. I must make my own assessment of the relevant factors. However, there is no shift to a merits review. The degree of weight to be attached to the decision maker's decision depends on the extent to which he addressed the factors relevant to

> striking the balance. The fact that the decision was supported by the IM cannot in my view be irrelevant. The weight to be attached to it will also depend on the extent to which the IM has addressed the relevant factors in reaching his conclusion"

29. The Judge then (see [40] – [62]) considered the five factors identified by Lord Neuberger in *L's* case in the passage set out at [8] above; that is gravity, reliability, relevance, time elapsed since the events occurred, and the impact on SD. In the sections dealing with each of these factors he considered the respondent's assessment, the IM's assessment, and then made his own assessment. For example, on reliability, he stated (at [46]) that he agreed with the views expressed by in the AT3 by DCC Madgwick, the other officers, and the IM that the incident is more likely to have occurred than not. He stated that his reasons:

> "largely echo their reasons. There are two members of staff and 9 students who corroborate the allegations. Although the email sent by one of the members of staff after the trip has not been disclosed it is to be noted that it referred to the inappropriate comments and according to the investigation report they were specifically raised with SD at the time. Whilst it is possible that there has been a conspiracy by the members of staff and the students to discredit SD it is to my mind more likely that their statements are correct."

30. His assessment on the other factors also agreed with the other assessments. In relation to lapse of time he also stated (at [57]) that this was a value judgment and:

> "Whilst I agree with the IM and (by implication) the Chief Officer that 4 or 5 years is not sufficient for the matters to become aged I should myself have thought that (in the absence of additional information) they will soon become aged."

The judge then considered the wording of the disclosure in the ECRC. He noted that counsel for SD did not criticise the wording of the disclosure in his submissions and (at [66]) stated that he agreed with the Chief Officer and the IM that it was accurate, balanced and fair.

31. The judge stated (at [67]) that it was common ground that the disclosure interfered with the appellant's right to privacy and that there is a legitimate aim of protecting vulnerable people because the appellant would be working with children. The crucial question therefore was whether the disclosure was proportionate. The respondent believed that it was because it would enable a prospective employer to manage risk, and the IM supported that view. The judge stated (at [70]) that he agreed with the IM's conclusion that I have summarised at [26] above.

32. The judge held that the respondent took into account the relevant factors, gave the appellant the right to make representations and modified the wording in the light of them, and reached a conclusion on proportionality which was entitled to considerable weight. He stated ([at 71-72]):

> "I am conscious that I have to form my own view on proportionality in the light of the fact that this is not a merits review. In all the circumstances, I consider that the decision was proportionate and I would dismiss the application".

V. The appeal:

33. The appellant's notice was filed on 12 August 2015. The grounds identify the following four errors of law by the judge:

    (a) Neither the judge nor the police had considered that the ISA had decided that the appellant should not be barred from working with children and was fit to continue to do so.

    (b) The judge did not consider the potential for harsh or unjustified decision-making by employers.

    (c) The judge failed to give proper or adequate weight to the possibility that the allegations were false when assessing proportionality.

    (d) The judge took account of the decision of the IM despite the fact that it post-dated the decision of the Chief Constable's delegate.

34. Mr Southey submitted that, if the judge did err and the court needed to determine the proportionality of the disclosure, those grounds meant that the court should find it disproportionate. He emphasised three factors. The first was that because the police decision was flawed, for example by not considering the decision of the ISA, the court should give it little weight. The second was that the allegations were not of behaviour that was so serious that Parliament had provided that it should be criminal. The third was that there had been no complaints about the appellant's conduct since he left the college of further education. Permission to appeal was granted by Lindblom LJ on 16 November 2015.

35. In the Administrative Court, the respondent relied on the decision of the IM as independent support for the Chief Constable's delegate's decision. He did not argue that the appellant should have brought his claim against the IM rather than against the police: see the skeleton argument below, paras 36-37. In resisting the appeal, however, it was submitted that the claim should not have been against the police, but should have been against the IM. This, it was said, was because the 1997 Act provides a specific statutory framework for the determination of disputes such as those in this case. Section 117A enables a person who believes that the information in a disclosure is either not authorised by the Act or ought not to be included in the disclosure to apply to the IM for a review of the disclosure. Mr Skelt submitted that cases such as *L's* case and *A's* case predated the IM being given this role, and relied on the more recent decisions of HH Judge Blair QC in *R (MS) v Independent Monitor of the Home Office* [2016] EWHC 655 (Admin) and William Davis J in *R (LK) v Independent Monitor* [2016] EWHC 1629 (Admin).

36. Mr Skelt's amended skeleton argument for this appeal is dated 19 December 2016. It was served in anticipation of a hearing in this court in January 2017, which the court regrettably had to stand out. Unfortunately, there was no response from those advising

the appellant because they overlooked the fact that the amended skeleton contained fresh arguments. The issue was only identified when preparing for the hearing before us on 19 October 2017. In a note dated 16 October 2017, Mr Southey QC on behalf of the appellant, stated that this was a new point dealing with a matter not considered in the Administrative Court, and that contrary to CPR 52.13(2)(b), no respondent's notice had been filed. Moreover, since the right to a review by the IM only arises after disclosure it could not be said that such a review is an adequate alternative remedy to judicial review.

37. On 18 October, Mr Skelt filed a respondent's notice and, at the outset of the hearing on 19 October, sought permission to rely on it. That application was refused. Lewison LJ, giving the decision of the court, stated that this was because the point had not been raised below where the respondent had relied on the IM's decision for a very different purpose. Understandably, the judge did not deal with it. Although, as the point now raised was one of law, it was open for this court to deal with it, in the circumstances of this case it was inappropriate to do so. The IM had not been joined and there was no indication before the court of his view on the point. It would, accordingly, be unsatisfactory to consider the effect of section 117A of the Act and the recent decisions Mr Skelt relied on. It would also be unfair to the IM for the court to determine the point in his absence.

38. On the question of proportionality, the respondent submitted: (a) the judge did not err in law; (b) if he did err, it was not a material error or a significant error of principle that (see Lord Neuberger in *Re B (a child) (care order: proportionality: criteria for review)* [2013] UKSC 33, [2013] 1 WLR 1911 at [88]) enabled an appellate court to reconsider the issue of proportionality for itself; and (c) if this court did consider proportionality, the disclosure was a proportionate interference with the appellant's right to privacy.

VI. Analysis:

39. *(a) Failure to take into account the decision of the ISA:* Mr Southey submitted that the view of the ISA was relevant and important, although not conclusive. This was because the ISA was required to establish and maintain a children's barred list under section 2(1)(a) of the Safeguarding of Vulnerable Groups Act 2006 and to include a person in that list if satisfied that the person has engaged in relevant conduct, which includes conduct that puts a child at risk of harm, and it is appropriate to include him or her in the barred list: see paragraphs 3(3) and 4(1) of Schedule 3 to the 2006 Act. The ISA's decision in SD's case meant that the ISA had concluded that he was not unsuitable to work with children, either because there was no relevant conduct or because it was not appropriate to include him in the barred list despite any relevant conduct.

40. Mr Southey submitted that the primary relevance of the ISA's decision is whether to make any disclosure at all. He relied on the statements of Lord Neuberger in *L's* case and Lord Wilson in *T's* case that employers are risk averse. I make further reference to those statements below. Mr Southey submitted that where the ISA has decided not to bar a person a powerful justification is required for disclosing material that might cause an employer to make an unjustified decision to decline to employ that person. As a secondary submission, Mr Southey argued that, if some disclosure was

proportionate notwithstanding the ISA's decision, it might only be proportionate if the disclosure included a reference to the ISA's decision.

41. Mr Skelt submitted that it was not necessary for either the respondent or the judge to have had regard to the ISA. The statute does not involve the ISA in the decision-making process of either the respondent or the IM. The role of the ISA is different from their roles and that was made clear in the ISA's determination. The appellant's reliance on the ISA decision before the judge was limited to the assessment of the seriousness of the conduct. The judge specifically addressed seriousness, as did the police. Mr Skelt also submitted that the ISA's decision was "unreasoned" and that a failure to have specific regard to it is not a significant error of principle. The fact that SD was applying for the job in question showed that he was not barred and so the failure to state this explicitly in the disclosure was of no consequence. There is some force in this but there is a difference between the position of a person who is not barred because the ISA has never considered whether to bar him or her and the position of a person whose case has been considered by the ISA which made a decision not to bar him or her. Mr Skelt also relied on the fact that, as the judge noted, the appellant's counsel below did not criticise the wording of the disclosure in his submissions.

42. The judge mentioned the ISA's decision in the section of his judgment on the facts: see [15] and [19]. He did not mention it in the section entitled "Discussion and Assessment". Although the ISA has a different role to that of the respondent, it does not follow that determinations by the ISA are irrelevant to the respondent's decision making process. In *A's* case, in a judgment with which Pitchford and Gloster LJJ agreed, I stated (at [95]) that the fact that the ISA did not bar the claimant in that case is "of course, relevant" but is "in no way conclusive". At [96] I stated that:

> "... notwithstanding the different role of the ISA ... the fact that it, the body which has primary responsibility to protect vulnerable people from unsuitable professionals, has decided not to take any action at all is also relevant to the proportionality of the disclosure that was made. In this case the ISA's letter stated that it had 'carefully considered all the information available to us'."

That statement was also made in the letter the ISA sent to SD: see [16] above.

43. The respondent's submission that the appellant only sought to rely on the ISA's decision in the context of the seriousness of the allegations might have had force had the judge considered it in that context. But the judge did not refer to the ISA's decision in the section of his judgment on seriousness. Nor does it appear that the respondent took it into account before deciding on the terms of the disclosure. There is no reference to it in the AT3 document and the respondent has argued that the ISA's decision was not a relevant factor. The only reference to it in the police documents before us was the one in the response dated 19 June 2014 to SD's complaint after the ECRC was issued. That post-ECRC document does not show that the police took account of the ISA's decision in framing their disclosure.

44. In any event, it was for the judge to consider all the relevant factors when assessing proportionality. The ISA's decision was one of those factors and it should have been

considered, both in assessing whether any disclosure should be made, and in assessing whether disclosure without referring to the ISA's decision is disproportionate for that reason. It may well have been the case that a disclosure which referred to the ISA's decision but stated that the ISA was only concerned with barring and the role of the Chief Constable and the DBS was with more nuanced decision-making would have been unassailable, but that is not what was disclosed.

45. The respondent submitted that the ECRC aimed to make the employer aware of all the facts to make a fair, informed and balanced decision on employment and to mitigate and manage any potential risk. But deciding to make disclosure without referring at all to the decision of the ISA does not make an employer aware of all the facts. From an employer's perspective, not making any disclosure at all of the allegations might be regarded as not enabling the employer to make an informed, balanced decision on employment and to mitigate and manage any potential risk posed by an individual.

46. I am satisfied that this is a clear example of a failure by the police to take account of a relevant factor in making a decision. There is no reference to the ISA in the AT3 document and, as stated at [43] above, the only reference to it in the police documents is in the post ECRC response dated 19 June 2014 to SD's complaint. But for one factor, the judge's failure to take this into account would also be a clear example of a reviewable error. That factor is that before the judge there was no objection by those acting for SD to the terms of the disclosure. Mr Skelt submitted that, for this reason, the judge cannot be criticised for not referring to the ISA's decision, and I accept that the explanation for the judge's silence may have been because those representing SD were concentrating on arguing that no disclosure at all should have been made. However, given the obligation of the court to consider proportionality and the fact that the decision of the ISA was before the court, and the statements in *A's* case as to the relevance of the decisions of the ISA, I do not consider that this precludes the appellant now taking this point. Accordingly, for these reasons, I have concluded that the judge erred in this regard. In my judgment, that is sufficient to justify allowing the appeal and setting aside his order.

47. In view of my decision on this ground, it is not necessary to say much about the alternative ways in which Mr Southey put the appellant's case, but I do so briefly.

48. *(b) Failure to take account of the potential for a harsh or unjustified decision by an employer:* Mr Southey argued that it was insufficient for the police to disclose the information and let the employer choose. He relied heavily on the statement of Lord Neuberger in *L's* case at [69] that:

> "even where the ECRC records a conviction (or caution) for a relatively minor, or questionably relevant, offence, a prospective employer may well feel it safer, particularly in the present culture, which, at least in its historical context, can be said to be unusually risk-averse and judgmental, to reject the applicant"

and that of Lord Wilson in *R(T) v Chief Constable of* Greater *Manchester Police* [2014] UKSC 35, [2015] AC 49 at [45] that:

> "in these days of keen competition and defensive decision-making will the candidate with the clean record not be placed ahead of the other,

however apparently irrelevant his offence and even if otherwise evenly matched?"

49. Lord Neuberger also referred to the fact that once an adverse ECRC has been issued in relation to one application it is, in the absence of special factors, likely to be issued in the same terms in relation to all future applications for posts requiring an ECRC. That, however, has to be seen in the context of that case. It concerned a person who had been convicted of robbery rather than a person against whom allegations had been made which had not led to criminal, regulatory or disciplinary proceedings. In the case of allegations, it is more likely that the lapse of time factor referred to by Lord Neuberger at [81] will lead to changes in the terms of a disclosure. Moreover, although the comments about "an unusually risk averse and judgmental" culture have some force in relation to allegations as well as in relation to convictions and cautions, they may have less force than where the disclosure is of a conviction. It is not relevant to an assessment of the proportionality of the disclosure in this case, but I observe that SD did not lose his present job despite the disclosure, although he has not been able to obtain employment at the level he wished.

50. Mr Southey's submission that the respondent proceeded on the basis that employers would consider employing the appellant and putting safeguards in place is in part correct. But, had it been necessary to decide the point, I would have rejected his submission that a more finely calibrated approach than that taken by the respondent in this case is required. The respondent acknowledged the potential prejudicial impact on the appellant in the reports in the AT3 document. That in itself is some acknowledgment of the risk-averse and judgmental culture and the possibility of defensive decision-making. In the light of the findings as to the reliability and relevance of the allegations about SD, apart from referring to the decision of the ISA, as to which I have concluded that failure to do so is a reviewable error, what more could the respondent have done? At that time the respondent could not have known the extent of any impact on the appellant but the findings about the reliability and relevance of the allegations which he made were justifiable. In those circumstances, I do not consider that it was necessarily incumbent on the respondent explicitly to set out further specific reasons in the AT3 for making some disclosure.

51. *(c) Attributing too great a weight to the decision of the primary decision maker:* For the reasons that I gave in *A's* case at [39], the views and conclusions of a primary decision maker who "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" carry some weight. Where the primary decision maker has not addressed the relevant values and interests 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. In this case, where the respondent did not take into account the decision of the ISA, I consider that the judge was wrong to conclude at [71] that the respondent's decision was entitled to "considerable weight".

52. *(d) Failure to take into account the possibility that the allegations were untrue:* I do not consider that the judge failed to take into account the possibility that the allegations were untrue. He referred to this in his judgment and there is no reason for believing that he discounted this factor when making his decision. He found (see [46]) that the allegations were more likely than not to be true, but I do not consider that there is anything in the judgment thereafter to indicate that he then proceeded as if the allegations were established facts.

53. *(e) Error in relation to the IM's report:* I turn to the judge's consideration of the IM's report. The judge's treatment of this is set out at [27] above. In principle, and leaving aside the fact that the IM's decision post-dated the Chief Constable's, it is clearly relevant to the application: see *A's* case at [95], [96] and [100] in relation to decisions of the CPS, the ISA and other regulatory bodies which are relevant to the particular person's position.

54. But the position of a post-decision review is, as the discussion in *A's* case shows, more complicated. In that case I stated at [91] that:

> "where the primary decision maker is not under a continuing duty in relation to the matter ... the reviewing court should not consider post-decision material when conducting its assessment of whether a *prima facie* infringement of an ECHR right has been justified as proportionate."

I also stated that cases, such as those dealing with the Housing Acts 1985 and 1996, in which the administrative process involves more than one stage, may also be ones in which the proceedings as a whole may have to be considered. The respondent submitted that the decision in this case had more than one stage, first that of the Chief Constable or the delegated officer, and then that of the IM. But the difference between this case and the Housing Act cases, such as *Manchester City Council v Pinnock* [2011] 2 AC 104 is that, in those cases, until the final stage of the process, there was no decision. I consider that this question is bound up with the issue which is not before the court, whether the proper defendant in a case such as this is the IM and that judicial review proceedings should not be brought until an individual has exhausted his remedy by seeking a review by the IM. In those circumstances, it is not appropriate to express a view but to leave it to a case in which the issue is properly before the court.

55. *(f) Proportionality:* I have concluded that the judge and the respondent erred in relation to the ISA. In relation to the decision below, for the reasons I have given, I have concluded that the judge erred in according "considerable weight" to the respondent's decision, and I doubt that the judge should have had regard to the IM's decision. If my Lords agree, it therefore falls to this court to make its own assessment of proportionality. In doing so, I give only little weight to the decision of the Chief Constable's delegate because that failed to take into account the decision of the ISA.

56. There are a number of factors that strongly point to the proportionality of a disclosure of some sort. First, in the light of the evidence corroborating the allegations, they seem to be fairly reliable. Secondly, since the appellant was applying for a job working with children and the allegations concerned his behaviour in front of children, the allegations remain relevant despite the fact that the behaviour, although inappropriate, was not criminal and that the students making the allegations indicated that they found the behaviour inappropriate, strange and childish, but none indicated that they felt in danger from the appellant.

57. It is true that there were some four years between the allegations and the date of the disclosure and there were no other incidents in that time, although the appellant had been working with children for some of that time. Those factors, together with the ISA's decision and the likely consequence for the appellant of not being able to work

in his chosen field, lead me to conclude that, while some disclosure was justified, disclosing only the allegations and SD's denial of them is unbalanced and therefore disproportionate to the risk posed by him. The reaction of an employer might be "Well he would say that, wouldn't he?" In my judgment, what is of particular relevance is the fact that the disclosure was made with no reference to the ISA's decision. Including a careful and proper reference to that would have made an employer aware of all the material facts and have assisted in making a fair, informed and balanced decision on employment. It might have been appropriate also (see [44] above) to refer to the different regulatory role of the ISA and the binary nature of the decision of the ISA as compared with the more nuanced nature of decision-making as to disclosures in ECRCs by the Chief Constable and the DBS.

58. *(g) Conclusions:* For these reasons, I have concluded that the failure to take account of the decision of the ISA or to refer to it in an appropriate manner in the disclosure meant that the disclosure was unbalanced and disproportionate. If my Lords agree with me, this appeal will be allowed and the ECRC will be quashed.

Mr Justice Hildyard:

59. I agree.

Lord Justice Lewison:

60. I also agree.