

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

JR 54's Application [2011] NIQB 77

IN THE MATTER OF AN APPLICATION BY
JR 54 FOR JUDICIAL REVIEW

TREACY J

Introduction

1. The applicant has brought a judicial review challenge against the PSNI and North West Regional College ("the College") the grounds of challenge being set out in an amended Order 53 Statement dated 6 June 2011. The case arises out of a decision by the College upholding its own decision refusing a work placement on the applicant's dental nursing course on 2 February 2011 because of concerns prompted by the disclosure of a caution on an Enhanced Disclosure Certificate ("EDC"). At the conclusion of the oral hearing I indicated my intention to quash the decision of the College and to give my written reasons for so concluding.
2. At the hearing counsel for the PSNI, Mr McGleenan, correctly acknowledged that disclosure of the caution on the EDC engaged Art 8(1) ECHR, that the disclosure of the caution was not in accordance with law and accordingly breached the applicant's Art 8 rights.
3. This concession arose because further investigation had persuaded the PSNI that Access NI were right to state in their letter dated 12 April 2011 that the EDC should not have contained reference to the applicant's 2006 caution. This was because of the combined effect of Section 113B(3) of the Police Act 1997 and Regulation 7(2)(a)¹ of the Police Act 1997 (Criminal Records) (Disclosure)

¹ "Central records: prescribed details

7. (1) Information in any form relating to convictions-

(a) held in the criminal history database of the Causeway System; and

(b) on a names index held by the National Police Improvement Authority for the use of police forces generally,

is hereby prescribed as "central records" for the purposes of section 112(3) of the Act.

Regulations (NI) 2008 (“the Regulations”) which only permits information concerning convictions, not cautions, sourced from the Causeway system to be obtained in this way.

4. In light of the way in which the matter developed the Court, by agreement, makes the following declaration:

“The Court makes a Declaration that the disclosure of a restorative caution administered to the Applicant by the Police Service of Northern Ireland on 19 July 2006 in an enhanced criminal record certificate issued by Access NI on 12 November 2010 was not in accordance with law and was, thereby, in breach of Article 8 of the European Convention on Human Rights and Section 6(1) of the Human Rights Act 1998”.

5. The PSNI at an early stage had acknowledged that the disclosure in the original EDC was made in error. The basis of that acknowledgment was itself in error. It had been asserted that pursuant to a direction from the Chief Constables’ Forum that the caution was spent. The letter dated 31 March 2011 from the Crown Solicitor’s Office on behalf of the PSNI to the applicant’s solicitors in material part stated as follows:

“ ...

The PSNI issued your client with a youth restorative caution on 19 July 2006. The PSNI retain all such information for policing purposes on Central Records. Access NI may view the information held on Central Records. In accordance with Section 113(b) of Part V of the Police Act 1997 Access NI discloses the details of every relevant matter relating to an individual recorded on Central Records. This led to the issue of the enhanced disclosure certificate to the North West Regional College on 12 November 2010 by Access NI. On 13 January 2011 you wrote to Access NI asking that the caution should be removed from the certificate. Access NI referred this matter to the PSNI and a new certificate was issued by Access NI

(2) Information in any form relating to-

(a) convictions held in the criminal history database of the Causeway System; and

(b) convictions and cautions on a names index held by the National Police Improvement Authority for the use of police forces generally,

is hereby prescribed as “central records” for the purposes of section 113A(6) of the Act (including that provision as applied by sections 113B(3)(a), 114(3) and 116(3)).

on 25 January 2011 with reference to the caution removed.

The Chief Constables' Forum directed on 16 September 2010 that youth cautions should be removed from records viewed by Access NI following specified periods of rehabilitation. In other words, since then, Access NI should not have sight of this information upon the expiry of a 12 month period from the date of issue of informed warnings and a 30 month period from the date of issue of restorative cautions. Unfortunately, your client's caution had not yet been removed from Central Records when the first enhanced disclosure certificate was issued. This was an error and my client apologises for any distress and inconvenience this has caused your client."

6. As a result of the confusion and uncertainty regarding the precise legal position the applicant's solicitors wrote to Access NI and on 12 April 2011 they confirmed that the EDC should not have contained the reference to the caution since this was not authorised under the relevant regulation namely Reg 7(2)(a) which only permits information concerning convictions held on the Causeway System to be obtained in this way.
7. It is now clear and is accepted by the PSNI that this caution should not have been disclosed irrespective of the time which had elapsed since it was issued – it was simply not authorised by Reg 7(2)(a), hence the agreement to the Declaration.
8. The question of whether the Court should, in addition, make an award in damages will, if necessary, be addressed at a further hearing.
9. The College, likewise, accepts that the disclosure and use of the original EDC engaged Art 8(1) and, accordingly, its use must be justified. This acceptance is hardly surprising in view of the decision of the Supreme Court in *R (L) v Metropolitan Police Commissioner [2010] 1 All ER 113* [see, in particular paras 24, 29, 40-46, 71 and 82] which was also concerned with the disclosure and use of an EDC under the equivalent English legislation. Notwithstanding the approach of the PSNI the College nevertheless contend that the use by them of the information wrongly contained in the original EDC was justified.
10. In light of the way the matter developed I believe I can express my reasons briefly. It is common case, so far as Art 8 is concerned, that the court must make its own assessment.

11. I had asked for a copy of the caution which was issued to the applicant in this case and had hoped that I would have received a copy before delivery of the judgment. So far as I am aware a copy of the caution has not been located and/or furnished to the Court and therefore I will proceed in its absence.
12. The respondent College's position is that irrespective of the unauthorised disclosure in breach of Art 8 they are not precluded from relying upon it. The existence of the caution and the applicant's explanation when taxed with it were matters, it was submitted, the College was not only entitled but obliged to take into account in making the risk assessment on placement suitability.
13. In my view the use of this information to deny the applicant the placement was disproportionate and unjustified.
14. The applicant has no criminal convictions. She was the subject of a caution in 2006 in respect of an incident which occurred when she was 17 years old whilst under the influence of alcohol. The incident occurred on 25 December 2005 and some five years prior to the impugned decision. By the caution she accepted that she was guilty of assault occasioning actual bodily harm.
15. When she applied for the course her application form stated:

"Protection of Children and Vulnerable Adults Legislation

Have you ever been investigated for allegations relating to adult or child abuse? Yes No ✓

If YES you are required by law to send information giving details of dates, details and outcomes of all incidents to the 'Designated Child Protection Officer' at the College. Please mark the envelope 'Confidential'.

Have you ever been convicted of:

*a criminal offence of a violent or sexual nature? Yes No ✓

*an offence relating to the distribution and/or sale of illegal drugs? Yes No ✓"

The application form did not ask for any details about cautions. Unsurprisingly she, like most people seeking a job or placement, consented to the obtaining of an EDC (see *R (on the application of L) v Metropolitan Police Commissioner* [2010] 1 All ER 113 at para 43).

16. Of course the applicant's consent was limited to the College obtaining information which did not violate her Art 8 rights (see para [43] of *L*). She did not therefore consent to the unauthorised provision of information about the caution (which the Court has, by agreement, declared was provided in breach of Art 8). Had the College received the correct EDC the applicant would have got the placement since the applicant's form did not require caution details nor would they have otherwise been requested. She would have been placed

and given the opportunity to successfully complete her course. This much was acknowledged by the College.

17. However, the College was, in breach of Art 8, furnished with an EDC which simply said:

**“Date of Caution: 19/07/2006
Assault Occasioning Actual Bodily Harm
25/12/2005”**

(Despite the reference in the notes of the appeal meeting on 2 February 2011 to “Police Evidence” the Court was told that the *only* information disclosed to the College was the entry in the first EDC simply referring to the caution).

18. This EDC prompted an interview (which otherwise would not have taken place) during which the applicant was wrongly accused of failing to disclose the caution in her application form. I say wrongly because it is clear from the contents of the application form quoted above that there is no reference whatsoever to cautions. When questioned about the incident giving rise to the caution she gave an account following which Ms Laverty, the Head of School, Health and Care, indicated (without stating what it was) that she would be making a recommendation regarding the placement.
19. After the meeting Ms Laverty recommended that the College do not proceed with the placement on the basis that her “conviction” was deemed particularly significant for the area of work and referred to the lack of openness and understanding of seriousness on the applicant’s part.
20. Unknown to the applicant a risk assessment was prepared which is dated 2 December 2010 and which appears at pp137-140 of the papers. The assessment however was based on the caution and the contents of her interview. She was not told that such an assessment was being completed, was unaware of it and was not invited to participate. Nor, prior to the judicial review proceedings, was she ever shown a copy. She was not however informed until January 2011 that a recommendation had been made that she would not be placed. In the meantime, she continued working at the College, submitting coursework, attending classes etc.
21. Why she was not told of the assessment or involved in the process has not been explained. Nor has any explanation been put forward for the delay in informing her until January 2011 that a recommendation had been made that she should not be placed.
22. The PSNI apologised for the error in issuing an EDC containing the reference to the caution. PSNI correspondence confirms that the error was communicated to the College who were furnished with another EDC omitting any reference to the caution. The PSNI thus attempted to rectify the error and,

for all I know, may have hoped that the respondent College would see sense and make sure that this young girl's education, reputation and future employment would not be needlessly damaged by the inadvertent disclosure of information which the PSNI plainly regarded as legally irrelevant – to be inferred from their non-exercise of other powers entitling them to disclose non conviction information. This was the position by the time of the appeal to which I now turn.

23. The College agreed to an appeal at which Ms Lavery was present and actively participated. The appeal appears to have proceeded on the basis that there was a requirement in the application form to disclose the caution albeit she appears to have accepted that the failure to disclose was unintentional. Why such a comment was ever necessary when the application form makes absolutely no mention (much less a requirement) to disclose cautions is difficult to comprehend.
24. Despite the fact that the College knew the EDC had been sent in error, that the error had been corrected by the provision of a fresh EDC without any reference to the caution the College nonetheless proceeded on the basis of the original erroneous certificate and her explanation thereof. Even if it may be justifiable in some circumstances to rely on material disclosed in breach of Art 8 and domestic law I am satisfied that continued reliance upon it in the circumstances of this case was disproportionate, unreasonable and unfair.
25. It is striking that there is absolutely no reference whatsoever to the correct EDC or to the acknowledgement by the police of their error in the minutes of the appeal hearing.
26. The choice of a restorative caution for a young person has many advantages for the police, the PPS and the individuals concerned. It saves time, expense and the trauma of the criminal process for offenders and offended alike. The advantage of such a caution for the young person – the knowledge that they won't have a record and that it won't generally be disclosed to third parties – was conspicuously removed as a result of the most unfortunate and extremely grave error. It is also a matter of deep concern that the PSNI were not aware that the caution was not disclosable at all. As they erroneously believed in this case that it could be disclosed there must exist the distinct possibility that such information has been disclosed in other cases. Since any such unauthorised disclosure inevitably involves a breach of a person's Art 8 rights, the PSNI will, I believe, be pro-actively obliged to investigate, notify and rectify any other Art 8 breaches.
27. In fairness to the PSNI they sought to correct their error (albeit on an erroneous basis itself) by writing to the College. The error was significantly compounded by the College's use of the unauthorised disclosure and in an unfair manner - information which the PSNI plainly considered was not relevant to risk. In all the circumstances I consider that its use has not been

justified and that it was disproportionate, unreasonable and unfair. This young lady has needlessly lost a year at College blighting, albeit temporarily, her education and employment prospects and impugning her reputation by, in a very public manner, bringing embarrassing private information into the public domain and using it without any lawful justification for doing so.

28. Accordingly, as I have already explained, the decision of the College is quashed and I have made a Declaration against the PSNI in the terms set out above. I will hear the parties at a separate hearing in relation to the question of damages unless this matter is resolved by agreement before that date.